Trinity Term
[2024] UKSC 22
On appeal from: [2022] EWCA Civ 852

JUDGMENT

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

before

Lord Reed, President
Lord Hodge, Deputy President
Lord Lloyd-Jones
Lord Burrows
Lord Stephens
Lady Rose
Lord Richards

JUDGMENT GIVEN ON
2 July 2024

Heard on 6 and 7 March 2023

Appellant
Thomas de la Mare KC
Charles Morgan
Nicholas Ostrowski
George Molyneaux
(Instructed by BDB Pitmans LLP (London))

Respondent
Jonathan Karas KC
James Maurici KC
Richard Moules KC
James McCreath
(Instructed by Pinsent Masons LLP (Manchester))

Environmental Law Foundation (Intervening)
Stephen Hockman KC
Tom Cleaver
(Instructed by Hausfeld & Co LLP)

LORD REED AND LORD HODGE (with whom Lord Lloyd-Jones, Lord Burrows, Lord Stephens, Lady Rose and Lord Richards agree):

1. Introduction

1. This appeal raises the question whether the owners of watercourses (an expression we shall use to describe all channels through which water flows, whether natural or artificial) or bodies of water can bring actions in nuisance or trespass in the event that the water is polluted by discharges of foul water from the infrastructure of statutory sewerage undertakers, in the absence of negligence or deliberate misconduct. The court is not asked at this stage to decide whether such proceedings would be well-founded on the facts of the case: the question is whether such actions are barred on the ground that they would be inconsistent with the legislative scheme established by the Water Industry Act 1991 ("the 1991 Act").

2. The appeal arises in the context of long-running litigation about the Manchester Ship Canal ("the canal"), which runs from Manchester to the Mersey Estuary. In its upper reaches it is a canalisation of the rivers Irwell and Mersey. It was constructed pursuant to the Manchester Ship Canal Act 1885. The appellant, the Manchester Ship Canal Company Ltd ("the Canal Company"), was originally incorporated under that Act, and is the owner of the beds and banks of the canal. The respondent, United Utilities Water Ltd ("United Utilities"), was appointed under the Water Act 1989 ("the 1989 Act") as the sewerage undertaker for the North West of England. It owns a network of sewers, sewage treatment works and associated infrastructure, mostly constructed by its statutory predecessors, which it acquired on the privatisation of the water industry under that Act.

3. United Utilities' sewerage network includes around 100 outfalls from which material emanating from sewers, sewage treatment works and pumping stations is discharged into the canal. At times when the sewerage system is operating within its hydraulic capacity, the discharges are of surface water or treated effluent. At times when the hydraulic capacity of the system is exceeded, at least some of the discharges are of foul water. That is how the system has been designed to operate. When its hydraulic capacity is exceeded, either because the inflow of sewage and surface water is greater than it can accommodate, or because it is unable to dispose of the inflow because of some mechanical failure or loss of power, the problem is resolved by discharging foul water into the canal through the outfalls. Discharges of foul water from the outfalls could be avoided if United Utilities invested in improved infrastructure and treatment processes.

4. The background to the proceedings is a dispute between the parties over whether United Utilities requires the consent of the Canal Company in order to discharge foul

water into the canal, and must therefore pay the Canal Company for a licence, or can pollute the canal without the consent of the Canal Company and free of charge, because the Canal Company is barred by the 1991 Act from bringing actions in nuisance or trespass. However, the appeal has a wider importance. The implication of the judgments in the courts below is that, absent an allegation of negligence or deliberate wrongdoing, no owner of any watercourse or body of water can bring any claim based on nuisance or trespass against any sewerage undertaker in respect of polluting discharges into the water, however frequent and voluminous the discharges may be, and however damaging they may be to the owner's commercial or other interests or to the owner's ability to use or enjoy its property. In view of that wider importance, the court has permitted the Environmental Law Foundation to make submissions as intervener.

5. The appeal turns on the effect on the common law of the provisions of the 1991 Act. As will appear, many of the Act's provisions have a long history, and most of the judicial decisions which we will have to examine have concerned their statutory predecessors. In order to understand those decisions, and the principles which they establish, it will be necessary to set them in their statutory context. However, we will begin by explaining some general principles which it will be necessary to have clearly in mind in the later discussion, as they are central to our analysis. We will start with some relevant principles of the tort of private nuisance, with which almost all the relevant cases have been concerned. Although the tort of trespass was also mentioned in the parties' submissions, it was not considered in any detail, and our treatment of it will be correspondingly brief. We will then explain some basic principles governing the tortious liability of bodies exercising statutory powers.

2. General principles

(1) The tort of private nuisance

6. In general terms, the tort of private nuisance is committed where the defendant's activity, or a state of affairs for which the defendant is responsible, unduly interferes with the use and enjoyment of the claimant's land: *Jalla v Shell International Trading and Shipping Co Ltd* [2023] UKSC 16; [2023] 2 WLR 1085 ("*Jalla*"), para 2. In most cases the undue interference with the use and enjoyment of the claimant's land will be caused by an activity or a state of affairs on the defendant's land. "The ground of responsibility is the possession and control of the land from which the nuisance proceeds": *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, 903 per Lord Wright ("*Sedleigh-Denfield*"). "Deliberate act or negligence is not an essential ingredient but some degree of personal responsibility is required": *Sedleigh-Denfield,* p 897 per Lord Atkin.

7. Nuisances may be, and often are, of a continuing nature. As was explained in *Jalla,* para 26, in general terms a continuing nuisance is one where there is repeated activity by the defendant, or an ongoing state of affairs for which the defendant is responsible, which causes continuing undue interference with the use and enjoyment of the claimant's land. For example, noise and smells are continuing nuisances where they occur on a regular basis. So is the repeated discharge of sewage into a watercourse which runs through the claimant's land: *Hole v Chard Union* [1894] 1 Ch 293. In such cases there is a continuing cause of action, which accrues afresh from day to day. It is because nuisances are often of a continuing nature that an injunction prohibiting the continuation of the relevant activity or state of affairs is a standard remedy. Damages are also an available remedy, but can be awarded at common law only in respect of causes of action that have already accrued, and not in respect of future causes of action which have not yet accrued. The result, at common law, is that the claimant must periodically bring further claims. In contrast, damages for future causes of action can be awarded in equity in lieu of an injunction, under section 50 of the Senior Courts Act 1981 (the successor to the Chancery Amendment Act 1858, commonly known as Lord Cairns' Act).

8. It is important not to confuse the concept of a continuing nuisance with the concept of continuing a nuisance. The latter concept refers to the situation where defendants are responsible (and therefore liable) for a nuisance not because they created it but because they failed, with actual or constructive knowledge of the state of affairs which resulted in the nuisance, to take reasonable steps to prevent it.

9. The difference between the two concepts is illustrated by *Sedleigh-Denfield*. In that case, a local authority had laid a pipe in a ditch on the defendants' land in order to carry away rain water. When laying it, they omitted to place a protective grating close to the mouth of the pipe, so as to prevent it from becoming choked with leaves. The pipe was laid without the defendants' knowledge or consent, but they became aware of its presence and used it as a land drain for their fields. During a heavy rainstorm the pipe became choked with leaves, so that the water overflowed and flooded a neighbour's land. This was not a continuing nuisance: the flooding was an isolated incident. The defendants were held responsible for the nuisance, although they had not created it: the state of affairs which brought about the flooding had been created by the local authority, trespassing on the defendants' land. The defendants were responsible because, knowing (actually or constructively) of a state of affairs which created a risk of flooding of their neighbour's land, they allowed that state of affairs to continue without taking reasonable steps to prevent such flooding by fitting a grating close to the pipe. This was described, following the language used in earlier authorities, as "continuing" the nuisance, although there was not any nuisance in existence until the flooding occurred.

10. The cause of action for continuance of a private nuisance depends on the claimant's establishing not only that the nuisance has occurred, but also that the defendants knew of its possible cause, actually or constructively, and failed to take

reasonable means to bring it to an end. As Viscount Maugham put it in *Sedleigh-Denfield*, discussing the earlier case of *Job Edwards Ltd v Birmingham Navigations Proprietors* [1924] 1 KB 341, if "there was no evidence that the [alleged wrongdoers] either caused or continued the nuisance or were guilty of any negligence in relation to it", then they were properly held not liable (p 893; see also, in relation to the burden of proof on the plaintiff, p 887). In his opinion, the defendants in *Sedleigh-Denfield* were also responsible because they had "adopted" the nuisance by using the pipe to drain their property without taking the proper means to render it safe. He stated (p 894):

> "In my opinion an occupier of land 'continues' a nuisance if with knowledge or presumed knowledge of its existence he fails to take any reasonable means to bring it to an end though with ample time to do so. He 'adopts' it if he makes any use of the erection, building, bank or artificial contrivance which constitutes the nuisance. In these sentences I am not attempting exclusive definitions."

11. Lord Atkin explained that a person who made active use of the source of a nuisance was himself causing the nuisance, even if he was not responsible for the presence of the source of the nuisance on his land (p 897):

> "If a man uses on premises something which he found there, and which itself causes a nuisance by noise, vibration, smell or fumes, he is himself in continuing to bring into existence the noise, vibration, etc, causing a nuisance. Continuing in this sense and causing are the same thing."

This situation, which seems to correspond to what Viscount Maugham described as "adopting" a nuisance, was to be contrasted with passively "continuing" a nuisance (ibid):

> "It seems to me clear that if a man permits an offensive thing on his premises to continue to offend, that is, if he knows that it is operating offensively, is able to prevent it, and omits to prevent it, he is permitting the nuisance to continue; in other words he is continuing it."

On the facts of *Sedleigh-Denfield,* there was "sufficient proof of the knowledge of the defendants both of the cause and its probable effect" (p 899).

12. Lord Wright distinguished between, on the one hand, the situation where the defendant has himself created the source of a nuisance, and on the other hand, the situation where he has taken it over when he acquired the property or where it is due to the act of a trespasser or stranger. In the latter situation, there was an additional ingredient of liability (pp 904-905):

> "If he is to be liable a further condition is necessary, namely, that he had knowledge or means of knowledge, that he knew or should have known of the nuisance in time to correct it and obviate its mischievous effects … Then he is not liable unless he continued or adopted the nuisance, or, more accurately, did not without undue delay remedy it when he became aware of it, or with ordinary and reasonable care should have become aware of it."

The onus of proving these elements of liability rested on the plaintiff (p 908). Lord Romer agreed with Viscount Maugham's formulation (p 913).

13. The principle laid down in *Sedleigh-Denfield* in the context of a hazard created by a trespasser was applied to a natural hazard in the Australian case of *Goldman v Hargrave* [1967] 1 AC 645, which concerned a fire caused by lightning. That decision was followed by the Court of Appeal in *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485 ("*Leakey*"), which concerned the movement of an unstable hillside. The judgments in those cases are consistent with the view that the relevant cause of action depends on more than proof of the existence of the nuisance. In *Goldman v Hargrave* it was said by Lord Wilberforce that "the existence of a duty must be based upon knowledge of the hazard, ability to foresee the consequences of not checking or removing it, and the ability to abate it" (p 663), and similar dicta in other cases were cited approvingly in *Leakey* (eg at p 522; see also *Smith v Littlewoods Organisation Ltd* [1987] AC 241, 274).

14. Finally, in relation to general aspects of the law of private nuisance, two further points should be made. First, it is not a defence to a claim for private nuisance that the activity carried on by the defendant is of public benefit, although this may be relevant in determining the appropriate remedy, as this court explained in *Lawrence v Fen Tigers Ltd* [2014] UKSC 13; [2014] AC 822 ("*Lawrence*") and *Fearn v Board of Trustees of the Tate Gallery* [2023] UKSC 4; [2024] AC 1 ("*Fearn*"). Secondly, statutory controls over pollution have never been treated as a reason for cutting down the rights arising under the law of private nuisance. In *Barr v Biffa Waste Services Ltd* [2012] EWCA Civ 312; [2013] QB 455, Carnwath LJ stated (para 46(ii)):

> "The common law of nuisance has co-existed with statutory controls, albeit less sophisticated, since the 19th century. There is no principle that the common law should 'march with' a statutory scheme covering similar subject matter. Short of express or implied statutory authority to commit a nuisance … there is no basis, in principle or authority, for using such a statutory scheme to cut down private law rights."

That dictum was cited with approval, in connection with the relationship between the law of private nuisance and planning law, in *Lawrence*, para 92, and *Fearn*, para 110.

(2) Tortious liability and statutory powers

15. Bodies exercising statutory powers enjoy no dispensation from the ordinary law of tort, except in so far as statute gives it to them. Unless acting within their statutory powers, or granted some statutory immunity from suit, they are liable like any other person for trespass, nuisance, negligence and so forth: see, for example, *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180; 143 ER 414.

16. What is duly done under statutory authority is lawful action of which no-one is entitled to complain. Even if it would otherwise have been a tort, the authority conferred by Parliament renders it lawful. It is therefore necessary to distinguish between interferences with private rights which Parliament can be taken to have authorised, which are lawful, and interferences which Parliament is not to be taken to have authorised, which are unlawful. In doing so, two important and related principles have to be borne in mind.

17. First, an individual's right to the peaceful enjoyment of his or her property is a fundamental right, long recognised by the common law and now also protected by the Human Rights Act 1998. The right of access to a court in the event that such enjoyment is threatened is another fundamental right, also long recognised by the common law and statute, and also protected by the Human Rights Act. It follows that the process of interpreting a statute which is said to authorise what would otherwise be an unlawful interference with rights of property, or to deprive individuals of rights of action which would otherwise be available to them to protect their property against such interference, brings into play the principle of legality, which Lord Hoffmann summarised in these terms in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131:

> "Fundamental rights cannot be overridden by general or ambiguous words ... In the absence of express language or necessary implication to the contrary, the courts therefore

> presume that even the most general words were intended to be subject to the basic rights of the individual."

The requirement of express language or necessary implication imposes a high hurdle.

18. Secondly, Parliament will not be taken to have intended that powers should be exercised, or duties performed, in a way which causes an interference with private rights where such an interference could have been avoided. Where, on the other hand, private rights must inevitably suffer, no cause of action will arise. Accordingly, as Viscount Dunedin stated in *Manchester Corpn v Farnworth* [1930] AC 171, 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."

19. The leading modern authority on this point is *Allen v Gulf Oil Refining Ltd* [1981] AC 1001, which concerned a claim in private nuisance arising from the operation of an oil refinery. The statutory authority to construct and operate a refinery was held to confer immunity from proceedings for any nuisance which might be the inevitable result of constructing a refinery on the land. Lord Wilberforce stated (pp 1013-1014):

> "It is … for the appellants to show, if they can, that it was impossible to construct and operate a refinery upon the site, conforming with Parliament's intention, without creating the nuisance alleged, or at least a nuisance … [T]he statutory authority … confers immunity against proceedings for any nuisance which can be shown (the burden of so showing being upon the appellants) to be the inevitable result of erecting a refinery upon the site – not, I repeat, the existing refinery, but any refinery – however carefully and with however great a regard for the interest of adjoining occupiers it is sited, constructed and operated."

20. This test of inevitability reflects the wider principle that legislation is not construed as depriving individuals of their rights unless it does so expressly or by necessary implication. As Lord Blackburn said in *Metropolitan Asylum District v Hill* (1881) 6 App Cas 193, p 208, "the burthen lies on those who seek to establish that the Legislature intended to take away the private rights of individuals, to shew that by express words, or by necessary implication, such an intention appears". As Lord Blackburn made clear at p 203, the absence of provision for compensation is an important (but not conclusive) indication that the legislation in question was not intended to authorise interference with private rights: see also *Allen v Gulf Oil Refining Ltd* at p 1016.

21. Many of the cases in which these principles were developed and applied concerned the operation of sewerage systems under statutory powers. At common law, the discharge of foul water on to private land, or into a private watercourse or body of water, may be a trespass or a private nuisance, depending on the circumstances. If so, then the owner has legal remedies available at common law and in equity, in the form of an action for damages and an application for an injunction or for damages in lieu. Applying the general principles which we have explained, the question has therefore arisen in such cases whether there was any provision of the relevant legislation which expressly or impliedly authorised such a trespass or private nuisance, or which expressly or impliedly deprived the owner of the remedies otherwise available. Those are also the questions which arise in the present case. As we have explained, they arise in the context of provisions in the 1991 Act whose roots, in many instances, stretch far into the past, and which cannot be understood without reference to the earlier law. We therefore turn next to consider how the law stood prior to the privatisation of the water and sewerage industry under the 1989 Act.

3. The law prior to privatisation

(1) Legislation

22. Sewage disposal and drainage have been the subject of statutory regulation since at least the reign of Henry VIII. But the systematic construction of extensive networks of public sewers dates largely from the middle of the nineteenth century. From the institution of public health legislation in the 1840s until the privatisation of the water and sewerage industry in 1989, sewerage services in England and Wales were generally provided by local authorities of various kinds in the exercise of statutory powers. The relevant statutes followed a similar pattern, which has been reiterated in more recent legislation. In broad terms, they established the relevant authorities, vested in them the existing public sewers and sewage works in their area and those made in future, conferred on them the power to construct sewers and sewage works (subject, under some provisions, to the approval of a third party, such as the Local Government Board or the Minister of Health), placed them under a duty to ensure that their area was

effectually drained, required them to maintain their sewers, permitted premises in the area to connect their drains to the public sewers, and enabled the authority to recover their costs from their customers. Parliament also sought to strike a balance between, on the one hand, the imperative of providing drainage and sewerage facilities for the developing industries and fast-expanding towns and cities of the United Kingdom and, on the other hand, the protection of the private law rights of those affected by such provision.

23. It did so in the first place by restricting the acts which it authorised so as to exclude the creation of a nuisance. For example, the Towns Improvement Clauses Act 1847 ("the 1847 Act"), which set out standard clauses for use in the local Acts of Parliament under which sewerage was at one time provided, conferred on the commissioners established under those Acts the power to cause the public sewers in their area to be emptied into the sea or any public river, "but so that the same shall in no case become a nuisance" (section 24). Section 107 also provided that "[n]othing in this Act contained shall be construed to render lawful any act or omission on the part of any person which is, or but for this Act would be, deemed to be a nuisance at common law". The Public Health Act 1848 ("the 1848 Act"), which made general provision for areas of England and Wales outside London, authorised local boards of health to cause the sewers vested in them to be emptied, "but so as not to create a Nuisance" (section 46). Similar provision was made by section 30 of the Local Government Act 1858 ("the 1858 Act"). The Metropolis Management Act 1855 ("the 1855 Act"), which addressed the provision of sewerage in London, similarly provided for the sewers and works to be constructed and kept, and the sewage disposed of, "so as not to create a Nuisance" (section 135).

24. Specific provision was also made for the protection of private interests in watercourses. Section 145 of the 1848 Act provided:

> "That nothing in this Act shall be construed to authorize the Local Board of Health … to use, injure, or interfere with any Watercourse, Stream, River, Dock, Basin, Wharf, Quay, or Towing Path in which the Owner or Occupier of any Lands, Mills, Mines, or Machinery, or the Proprietors or Undertakers of any Canal or Navigation, shall or may be interested, without Consent in Writing first had and obtained".

The 1858 Act repealed section 145 of the 1848 Act but replaced it, in section 73, with a more elaborate provision to similar effect:

> "Nothing in this Act or any Act incorporated therewith shall be construed to authorise any Local Board to injuriously affect

> any Reservoir, River, or Stream, or the Feeders of any Reservoir, River, or Stream, or the Supply, Quality, or Fall of Water contained in any Reservoir, River, Stream, or Feeders of any Reservoir, River, or Stream, in Cases where any Company or Individuals would, if this Act had not passed, have been entitled by law to prevent or be relieved against the injuriously affecting such Reservoir, River, Stream, Feeders, Supply, Quality, or Fall of Water, unless such Board shall have first obtained the Consent in Writing of such Company or Individuals so entitled as aforesaid."

Section 74 gave the complainant the option to refer to arbitration the question whether such injurious affection had occurred. The fact that arbitration was "at the Option of the Party complaining" reflected the availability of legal and equitable remedies as an alternative.

25. Parliament further protected private rights by making provision for the payment of compensation to persons who suffered harm as a result of the exercise of the powers conferred on the relevant authorities. For example, section 21 of the 1847 Act provided for the payment of compensation to persons who suffered loss as a result of the exercise of the commissioners' powers. Section 144 of the 1848 Act provided for the payment of compensation to persons sustaining damage by reason of the exercise of the powers conferred by the Act, the amount to be settled by arbitration. Similar provision was made by sections 135 and 225 of the 1855 Act.

26. The Public Health Act 1875 ("the 1875 Act") consolidated the previous legislation with amendments. It has to be considered in greater detail, as it was the subject of several of the cases which we will discuss. Local authorities were placed under a duty to keep sewers in repair, and to cause to be made such sewers as might be necessary for effectually draining their district (section 15). Section 17 made it clear that the Act did not authorise the discharge of untreated sewage into watercourses. It provided:

> "Nothing in this Act shall authorise any local authority to make or use any sewer drain or outfall for the purpose of conveying sewage or filthy water into any natural stream or watercourse, or into any canal pond or lake until such sewage or filthy water is freed from all excrementitious or other foul or noxious matter such as would affect or deteriorate the purity and quality of the water in such stream or watercourse or in such canal pond or lake".

Section 19 required local authorities to cause the sewers belonging to them to be constructed, covered, ventilated and kept so as not to be a nuisance or injurious to health, and to be properly cleansed and emptied. Section 27 authorised local authorities to construct sewage works and to acquire land for the purpose of disinfecting and disposing of sewage, "provided that no nuisance be created". Section 299 enabled the Local Government Board to investigate complaints that a local authority had failed to provide their district with sufficient sewers or to maintain their sewers, as required by section 15. If the complaint was upheld, the Board was required to order the authority to perform their duty. If the authority failed to comply with the order, it could be enforced by mandamus, or the Board could appoint a third party to perform the duty. Section 308 required local authorities to pay compensation for damage sustained "by reason of the exercise of any of the powers of this Act", the amount to be settled by arbitration. Section 332 re-enacted section 73 of the 1858 Act with amendments. Section 333 re-enacted the provision as to optional arbitration previously contained in section 74 of the 1858 Act.

27. The provisions of the 1875 Act were re-enacted with some amendments in the Public Health Act 1936 ("the 1936 Act"), the provisions of which largely remained in force until the 1991 Act came into operation. Section 14 required every local authority to provide such public sewers as might be necessary for effectually draining their district, and to make such provision, by means of sewage disposal works or otherwise, as might be necessary for effectually dealing with the contents of their sewers. Section 30 provided that local authorities were not authorised to convey foul water into watercourses. Section 31 required local authorities to discharge their functions in relation to sewerage so as not to create a nuisance. Section 278 required compensation to be paid for damage sustained "by reason of the exercise by the authority of any of their powers under this Act". Section 322 corresponded to section 299 of the 1875 Act, and provided for complaints to be made to the Minister of Health that a local authority had failed to discharge its functions under the Act. The Minister could hold a local inquiry and, if the complaint was upheld, direct the authority to discharge its functions. Section 331 corresponded to section 332 of the 1875 Act, and provided:

> "Nothing in this Act shall authorise a local authority injuriously to affect any reservoir, canal, watercourse, river or stream, or any feeder thereof, or 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, if this Act had not been passed, 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."

Section 332 provided for arbitration of the question whether injurious affection had occurred, at the option of the party complaining.

28. The sewerage and water supply functions of local authorities, together with the ownership of public sewers and sewage disposal works and any associated liabilities, were transferred to regional water authorities by the Water Act 1973. Section 14(1) of that Act placed regional water authorities under the same duty as had previously been imposed on local authorities by section 14 of the 1936 Act. Section 14(2) applied to them the material provisions of the 1936 Act.

(2) Case law

29. The establishment of statutory sewerage authorities was soon followed by litigation concerned with the discharge of sewage into watercourses. An early example is *Oldaker v Hunt* (1854) 19 Beav 485; 52 ER 439, which concerned a proposal by a board of health established under the 1848 Act to construct a sewer which would discharge sewage through an outfall into the river Avon, above a location where the plaintiffs owned the adjoining fields and watered their cattle. The board relied on the width of the powers conferred on them by the 1848 Act, but the plaintiffs obtained an injunction. Romilly MR held that the effect of section 145, cited at para 24 above, was that the board had no authority to discharge the sewage into the river without the plaintiffs' consent. In the absence of statutory authority, the consequent nuisance was an interference with the plaintiffs' rights. That decision was upheld on appeal: (1855) 6 De G M & G 376; 43 ER 1279.

30. Similar decisions were reached in numerous later cases. For example, in *Attorney General v Birmingham Borough Council* (1858) 4 Kay & J 528; 70 ER 220 the council, acting under a local Act which incorporated clauses from the 1847 Act, constructed sewers which discharged into the river Tame, causing a nuisance to the plaintiff and other riparian proprietors. The defendants sought without success to distinguish earlier cases on the basis that the local Act for Birmingham contained no provision equivalent to section 145 of the 1848 Act. Page Wood V-C also rejected a plea that individuals must accept the inconvenience caused by the increase of population, holding that the plaintiff's rights "must be measured precisely as they have been left by the Legislature" (p 539; ER p 225). Section 107 of the 1847 Act, cited at para 23 above, made it clear that the council had no authority to produce the nuisance which was the subject of the complaint. Recognising that the council would require time to remedy the nuisance, the Vice-Chancellor granted an interim injunction restraining the council from opening any additional sewers into the main sewer and giving the plaintiff liberty to extend the injunction if the council did not proceed forthwith to take steps to prevent the continuance of the nuisance.

31. In these cases the court was unmoved by arguments that the defendants were bound to provide drainage, since it was clear from the legislation that they were required to do so without creating a nuisance. The court was equally unmoved by submissions that it was impossible to provide drainage without creating a nuisance. In

Attorney General v Leeds Corpn (1870) LR 5 Ch App 583, Lord Hatherley LC's response to that argument was that the court was required by the legislation to assume that it was possible to provide drainage without creating a nuisance, and that it would be inconsistent with the legislation to hold that the defendants were not to be restrained from creating a nuisance (p 593).

32. The case of *R v Darlington Local Board of Health* (1864) 5 B & S 515; 122 ER 924 established another point which is relevant to the present proceedings. The problem in that case was not the pollution of a stream by sewage but the diversion of water from the stream into sewers, which interfered with a miller's operation of his water-powered mill; but the principles applied were the same. The board had used powers under the 1848 and 1858 Acts to make the sewers and had diverted the water from the stream without the plaintiff's consent. The plaintiff sought statutory compensation for his loss. The claim was rejected because compensation was payable for loss suffered as a result of acts which Parliament had authorised. Where the acts were unauthorised, as in that case, the plaintiff retained a right of action at common law.

33. Blackburn J stated (p 526; ER p 928):

> "The rule is well established, that for any act done which is injurious to property, but which an Act of Parliament has authorised to be done, though the consequence of the act is damnum to the owner, it ceases to be injuria; and the loss would fall upon him, as no damages could be recovered in an action. To prevent that injustice the Legislature have said that instead of the action the party affected shall have compensation in the manner provided by the Act. Where, however, the Act of Parliament does not authorise the wrong, and consequently the action is not taken away, the case is not one for compensation, but the remedy is by action."

Blackburn J then referred to section 73 of the 1858 Act (para 24 above), stating that the consent in writing of the persons specified was a condition precedent and that "[i]f not obtained the Board have no authority at law to do the act, and therefore an action would lie for injury sustained in consequence of it" (p 527; ER p 929). Since the board had injuriously affected the stream without obtaining the required consent, they were not authorised to do so, and the plaintiff's remedy was a common law action. That judgment was affirmed on appeal: (1865) 6 B & S 562; 122 ER 1303.

34. Other cases established that the discharge of sewage into watercourses was actionable even if the nuisance had only arisen after an interval of time, as a result of an increase in the volume of sewage as new houses were connected to the sewer. Examples

include *Goldsmid v Tunbridge Wells Improvement Comrs* (1866) LR 1 Ch App 349 and *Attorney General v Hackney Local Board* (1875) LR 20 Eq 626. As in earlier cases such as *Attorney General v Leeds Corpn*, the court granted an injunction but suspended its operation to allow time for remedial works to be undertaken.

35. Following the enactment of the 1875 Act, a question arose as to the effect of section 299 of that Act, discussed in para 26 above. The issue was considered in *Glossop v Heston and Isleworth Local Board* (1879) 12 Ch D 102 ("*Glossop*"), where the plaintiff complained about untreated sewage which had for many years polluted a river which flowed through his land. The remedy which the plaintiff sought, when the case came to be heard by the Court of Appeal, was a mandatory injunction to compel the defendant board to perform their statutory duty to cause to be made such sewers as might be necessary for effectually draining their district, under section 15 of the 1875 Act (para 26 above). The question therefore arose whether the duty under section 15 was enforceable by the grant of an injunction. The court held that it was not. The earlier cases were distinguished as being cases in which what was done was a private wrong: a nuisance, which was not authorised by the relevant legislation. The duty imposed by section 15, on the other hand, was one created by statute and owed in respect of the entire district. As James LJ explained (p 113), it could not be performed without entering on and acquiring private property, if necessary by exercising powers of compulsory acquisition. As the statutory duty was not owed to individuals, the only legal remedy for its non-performance would be the prerogative writ of mandamus, rather than the grant of an injunction; but it was noted that section 299 would be highly material in deciding whether mandamus should be granted. The view was also expressed that section 299 did not oust the court's jurisdiction to grant an injunction or damages if the plaintiff suffered a legal wrong (pp 116 and 129). James LJ gave as an example the situation where the defendant was using a sewer to convey sewage or filthy water into a watercourse (p 116).

36. The decision in *Glossop* was followed by the Court of Appeal in a number of later cases, including *Attorney General v Dorking Union Guardians* (1882) 20 Ch D 595 ("*Dorking*") and *Robinson v Workington Corpn* [1897] 1 QB 619 ("*Robinson*"). The former case concerned the discharge of increasing quantities of untreated sewage into a stream. The plaintiff relied on the defendants' statutory duties under the 1875 Act and other legislation. The court held that *Glossop* could not be distinguished.

37. In *Robinson*, the plaintiff complained about damage to houses which occurred when sewage backed up in the sewer to which they were connected. The sewer had been of adequate capacity until new houses were built. The claim for damages was based on the defendants' breach of their duty under section 15 of the 1875 Act to provide an effectual sewerage system for the district. The Court of Appeal held that section 299 provided the only remedy for non-performance of that duty. Lord Esher MR said at p 621 that "[i]f it were not for the statute, there would be no duty on the defendants to do anything in the matter", and that "if a duty is imposed by statute which but for the

statute would not exist, and a remedy for default or breach of that duty is provided by the statute that creates the duty, that is the only remedy". Lopes LJ similarly reasoned that "[t]here would be no duty on the part of the defendants unless it had been created by the statute, and the duty so created is to the public ... and not to an individual" (p 622). The judgments also placed some emphasis on the fact that there was no evidence of a failure to keep the sewer in repair (pp 621 and 623). That was presumably because a nuisance resulting from failure to maintain a sewer would be actionable at common law (*Humphries v Cousins* (1877) 2 CPD 239).

38. The judgments in *Robinson* did not spell out why the obligation to construct a public sewer could only arise under statute, but the reasons had been indicated by James LJ in *Glossop.* A public sewer forms part of a sewerage system provided for the relevant district. Its construction and maintenance require the exercise of a variety of statutory powers, including powers to enter on private land and lay and maintain pipes there, and powers to purchase private property where necessary consents are withheld or are not available on reasonable terms.

39. The approach taken in these cases was upheld in *Pasmore v Oswaldtwistle Urban District Council* [1898] AC 387 ("*Pasmore*"), where a manufacturer sought a writ of mandamus to compel the local authority to construct adequate sewers to drain the liquids emanating from his factory. The House of Lords rejected the claim, holding that the statutory duty of the local authority to make sewers effectually to drain its district could not be enforced by an application for mandamus. The only remedy was a complaint to the Local Government Board under section 299 of the 1875 Act. The Earl of Halsbury LC explained at p 394 that "[t]he obligation which is created by this statute is an obligation which is created by the statute and by the statute alone". He cited with approval Lord Tenterden CJ's dictum in *Doe d Murray v Bridges* (1831) 1 B & Ad 847, 859; 109 ER 1001, 1006, that "where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner". Lord Macnaghten, in a concurring speech, stated that "the obligation was never more than a statutory obligation; it did not exist at common law" (p 398).

40. It is also relevant to mention the case of *Durrant v Branksome Urban District Council* [1897] 2 Ch 291 ("*Durrant*"), where the Court of Appeal held that a local authority operating under the 1875 Act was impliedly authorised to discharge water into a watercourse provided that it was clean or adequately treated, since section 17 expressly prohibited the discharge only of "sewage or filthy water".

41. Claims in nuisance continued to be upheld in cases where the complaint was not of a failure to construct a sewer. For example, in *Baron v Portslade Urban District Council* [1900] 2 QB 588 the Court of Appeal held that the defendants were liable for nuisance resulting from their failure to cleanse a sewer. The defendants argued that,

because section 19 of the 1875 Act imposed a duty on them to cause the sewers to be properly cleansed, and section 299 applied where they had made "default … in the maintenance of existing sewers", section 299 provided an exclusive remedy. The Earl of Halsbury LC rejected this argument, observing that there was a wide difference between the duty to construct a new system of drainage and the obligation of the local authority to use sewers that were vested in them in a proper and reasonable manner. The common law duty to use proper diligence in the management of existing sewers was independent of the statutory duty imposed by section 19. Another example is *Attorney General v Lewes Corpn* [1911] 2 Ch 495, where the defendants were held liable in damages for a public nuisance caused by the flooding of the plaintiff's land with sewage as a result of their allowing a sewer to fall into disrepair. The cause of action under the common law was sustained notwithstanding that there was a statutory duty to maintain sewers which was enforceable under section 299. The court also granted an injunction but postponed its operation to allow the local authority to carry out remedial works.

42. A helpful summary of some of the principles established by these cases was provided in *Price's Patent Candle Co Ltd v London County Council* [1908] 2 Ch 526. The case concerned a nuisance which occurred at times of heavy rainfall, when a pumping station discharged storm water contaminated with sewage into a watercourse owned by the plaintiffs, in order to relieve the pressure in an overloaded sewer. The Court of Appeal upheld the grant of an injunction, and rejected the council's argument that they could be liable only if they had acted negligently. Cozens-Hardy MR referred to three general principles (pp 543-544):

> "In the first place, there is a presumption that a public body, whether a trading body or not, is not authorised to create a nuisance or otherwise to affect private rights unless compensation is provided. In the second place, this presumption must yield where the language of the statute is sufficiently clear to authorise the nuisance without compensation. In the third place, if the statute expressly confers a power but adds a proviso that no nuisance must be created, it is no defence to say that the work, in truth, cannot be done without creating a nuisance … Considerations of public welfare may justify the suspension of an injunction upon terms, but they do not justify the denial of relief to the private person whose rights have been affected."

43. We should also note the judgment of Parker J, as he then was, in *Jones v Llanrwst Urban District Council* [1911] 1 Ch 393, where a local authority acting under the 1875 Act was held liable in the tort of private nuisance for discharging sewage into the river Conway, notwithstanding their reliance on section 299 and on the statutory right of the inhabitants of the district to send their sewage into the authority's sewers. Parker J observed that the statutory right to connect new houses to sewers was only a

right to turn sewage from private drains into the sewers of the authority, and did not imply a right on the part of the authority to dispose of the sewage by letting it out on their neighbour's land (p 410):

> "If A, the owner of a cesspit, grant to B, or B acquires by prescription, a right to turn B's sewage into A's pit, I cannot myself see how A can escape liability for letting the sewage out on his neighbour's land merely because of the rights of B."

An injunction was accordingly granted to restrain the council from causing or permitting sewage to pass into the river unless it was sufficiently treated so as not to pollute the river opposite the plaintiff's land. Recognising that it would take time for the council to carry out remedial works, Parker J suspended the operation of the injunction for 18 months.

44. It is necessary to consider in detail the case of *Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd* [1953] Ch 149 ("*Pride of Derby*"). The plaintiffs were an angling club with fishing rights in the river Derwent, which was polluted with untreated sewage. They based their action on private nuisance. The defendant corporation operated sewerage works which did not cause pollution when they were constructed but had later become inadequate to deal with the current level of sewage. The defendants did not dispute that the pollution of the river constituted a nuisance, but argued that the plaintiffs were not entitled to any relief, since the nuisance resulted from circumstances beyond their control. They also argued that they could only have resolved the problem by enlarging their sewerage works, and that the only remedy for their failure to do so was a complaint to the Minister of Health under section 322 of the 1936 Act. In addition, they argued that an injunction would be inappropriate in any event, since they could not carry out any works of improvement without the grant of a licence under wartime regulations which remained in force. Furthermore, the money required to carry out the works could not be borrowed without the Minister's approval in accordance with the 1936 Act. In any event, since they provided a vital public service, they should not be prevented from doing so by the grant of an injunction, but should only be held liable (if at all) in damages. The sewage disposal arrangements were an urgent necessity for public health.

45. The Court of Appeal unanimously rejected these arguments. It held that the discharge of the sewage into the river was a nuisance, and that an injunction should be granted. Evershed MR observed (p 180) that, unlike the previous authorities relied on by the defendants, such as *Glossop*, this was not a case where the complaint was of insufficient drainage, but a case where the complaint was about the consequences of the defendants' drainage. In other words, unlike in cases such as *Glossop, Robinson* and *Pasmore,* the cause of action was not based on the defendants' failure to perform their

statutory duty: it was based on the occurrence of a nuisance for which the defendants were responsible. The defendants were causing a nuisance by discharging effluent from their sewage disposal works into the river (pp 179-180). They were therefore liable in nuisance unless they had a statutory defence. No such defence existed. The relevant local legislation permitted them to discharge the effluent from the sewage disposal works into the Derwent, but incorporated section 17 of the 1875 Act (quoted at para 26 above), and provided for the payment of compensation for damage caused by the exercise of their powers. The incorporation of section 17 made it clear that they had no power to carry untreated sewage into the Derwent, and the fact that statutory compensation was payable where they caused damage when acting *within* their powers reinforced that view.

46. Like the Master of the Rolls, Denning LJ focused on the nature of the cause of action. He distinguished earlier cases such as *Glossop, Dorking* and *Robinson* as "cases where all that could be said against the local authority was that they had failed to carry out their statutory duty to drain their district" (p 189). The plaintiffs had "a perfectly good cause of action for nuisance, if they can show that the defendants created or continued the cause of the trouble; and it must be remembered that a person may 'continue' a nuisance by adopting it, or in some circumstances by omitting to remedy it: see *Sedleigh-Denfield v O'Callaghan*" (p 190). In the circumstances of the case, the defendants were responsible for causing the nuisance (p 191):

> "When the increased sewage came into their sewage disposal works … they took it under their charge, treated it in their works, and poured the effluent into the river Derwent; but their treatment of it was not successful in rendering it harmless; it was still noxious. Their act in pouring a polluting effluent into the river makes them guilty of nuisance. Even if they did not create the nuisance, they clearly adopted it within the principles laid down in *Sedleigh-Denfield v O'Callaghan*, and they are liable for it at common law unless they can defend themselves by some statutory authority."

47. Romer LJ agreed (p 193). Once it was established that the deplorable condition of the Derwent was due in a substantial degree to the discharge of noxious material from the defendants' sewage works, they could escape liability only by showing that the nuisance was the inevitable result of the performance of that which they were authorised by statute to do. That they could not do. First, it was not inevitable that the works which they were authorised to construct and maintain would cause a nuisance. Secondly, Parliament had not authorised them to create a nuisance.

48. In relation to the arguments against the grant of an injunction, the Master of the Rolls concluded at pp 181-182 that, following the long-established practice, it was

appropriate to grant an injunction whose operation was suspended so as to allow the defendants a reasonable time to make better arrangements. The fact that ministerial approval was required in order to carry out further work was not a sufficient reason for withholding an injunction. Romer LJ agreed: the proper course to adopt was to grant an injunction but to suspend its operation for a reasonable time, with liberty to the defendants to apply for a further suspension if necessary. Denning LJ also rejected the arguments advanced against the grant of an injunction, stating (p 192):

> "The power of the courts to issue an injunction for nuisance has proved itself to be the best method so far devised of securing the cleanliness of our rivers … The issue of an injunction does not interfere with the power of the Minister to determine the proper order of priority of public works, but it does mean that, if these works are to be deferred, the court will want to know the reason why. Only an overriding public interest will suffice."

49. *Pride of Derby* might be contrasted with *Smeaton v Ilford Corpn* [1954] Ch 450. The case concerned an "escape" of sewage: a helpful term used by Upjohn J to distinguish between, on the one hand, involuntary escapes of sewage from outlets which were not planned or designed to emit sewage, for example through the bursting of a sewer or, as in that case, from manholes; and, on the other hand, "discharges" of sewage from outlets or channels which were built for the purpose of carrying it away. The escape in question was the result of pressure from an overloaded sewer blowing off a manhole cover. Sewage then erupted from the manhole and flooded the plaintiff's garden. Upjohn J rejected the claim in nuisance, holding that the defendants were not causing or continuing the nuisance. He observed that the position would have been different if the case had concerned a discharge: "a person is liable in nuisance to an adjoining or neighbouring occupier if he himself causes a nuisance; for example, if he discharges sewage over the land of the occupant to his damage, or if he knows of an existing nuisance emanating from his own land but 'continues' it by failing to take reasonable steps to prevent it" (p 462). In relation to the latter situation, Upjohn J added (ibid) that "in order to establish liability for continuing a nuisance by failing to prevent it, one must necessarily prove that the person so failing must be in a position to take effective steps to that end".

(3) The law prior to privatisation in summary

50. On the basis of this review, the state of the relevant law in relation to the pollution of watercourses by sewage before the privatisation of the water and sewerage industries can be summarised as follows:

(1) At common law the pollution of a watercourse is an actionable nuisance, and may also constitute a trespass. As Lord Macnaghten said in *John Young & Co v Bankier Distillery Co* [1893] AC 691, 698, in relation to the rights of riparian proprietors:

> "Every riparian proprietor is thus entitled to the water of his stream, in its natural flow, without sensible diminution or increase and without sensible alteration in its character or quality. Any invasion of this right causing actual damage or calculated to found a claim which may ripen into an adverse right entitles the party injured to the intervention of the Court."

(2) When considering the pollution of watercourses as a result of the activities of sewerage authorities acting under statutory powers, the common law rights of those affected "must be measured precisely as they have been left by the Legislature": *Attorney General v Birmingham Borough Council*, p 539; ER p 225. As was said in *Price's Patent Candle Co Ltd v London County Council*, p 544, considerations of public welfare do not justify the denial of relief to the private person whose rights have been affected.

(3) Parliament has consistently provided specific protection against the pollution of watercourses by sewage, over and above the protection afforded generally to interests in land: see section 145 of the 1848 Act, section 73 of the 1858 Act, section 17 of the 1875 Act and section 30 of the 1936 Act. The rationale may be that a discharge of sewage into a watercourse will affect the downstream environment, and thus have effects on a different scale from a discharge or escape on to land, which will generally affect only the specific area where the escape occurs.

(4) Parliament has consistently required, before a watercourse is injuriously affected by the construction or operation of sewerage works, that the sewerage authority obtain the consent of persons who would at common law be entitled to prevent such injurious affection or to claim damages, failing which such injurious affection is unauthorised: see section 145 of the 1848 Act, section 73 of the 1858 Act, section 332 of the 1875 Act and section 331 of the 1936 Act. This is a leitmotif in the statutory authorisation of the construction and operation of sewerage infrastructure.

(5) Parliament has consistently provided for arbitration of the question of injurious affection at the option of the party complaining: see section 74 of the 1858 Act, section 333 of the 1875 Act and section 332 of the 1936 Act. The fact

that arbitration is at the option of the party complaining reflects the availability of common law remedies as an alternative.

(6) Parliament has consistently made it clear that it is not authorising the pollution of watercourses by sewage. It did so, in the first place, by provisions to the effect that sewage was not to be emptied into watercourses, or disposed of, so as to cause a nuisance: see section 24 of the 1847 Act, section 46 of the 1848 Act, section 135 of the 1855 Act, section 30 of the 1858 Act, section 27 of the 1875 Act and section 31 of the 1936 Act. In addition, it enacted provisions to the effect that there was no authority to convey untreated sewage into watercourses: see section 17 of the 1875 Act and section 30 of the 1936 Act.

(7) Parliament has consistently provided for the payment of compensation to those injuriously affected by the exercise of the powers conferred on sewerage authorities: see section 21 of the 1847 Act, section 144 of the 1848 Act, sections 135 and 225 of the 1855 Act, section 308 of the 1875 Act and section 278 of the 1936 Act. The fact that statutory compensation is restricted to those affected by operations carried out intra vires reflects the fact that tortious conduct which is not authorised by the legislation is actionable at common law: *R v Darlington Local Board of Health*.

(8) Where compensation is not available, there is a presumption that a nuisance or other infringement of private rights is unauthorised, although the presumption will be rebutted where the language of the statute is sufficiently clear to authorise the nuisance notwithstanding the absence of compensation: *Price's Patent Candle Co Ltd v London County Council*.

(9) Sewerage authorities will be liable in nuisance if they carry out operations which result in a nuisance which is not authorised by statute and in respect of which no immunity has been conferred, as in cases such as *Attorney General v Birmingham Borough Council*, *Price's Patent Candle Co Ltd v London County Council* and *Pride of Derby*, where they discharged polluting effluent into a watercourse. Sewerage authorities can also be liable where a nuisance results from their inaction, such as their failure to cleanse or maintain their sewers, as in *Baron v Portslade Urban District Council* and *Attorney General v Lewes Corpn*. Their liability in nuisance is not conditional on negligence or deliberate wrongdoing.

(10) A claim cannot be brought against a sewerage authority at common law where it is an essential ingredient of the cause of action that the authority has failed to drain its district effectually. It is under no common law duty to do so: such an obligation can only be imposed by statute: *Glossop, Robinson* and

Pasmore. Since the duty is one arising only by statute, and the statute provides a means of enforcement, that is the only remedy for non-performance: *Pasmore*.

(11) No action therefore lies at common law in respect of an involuntary escape of sewage from an outlet which was not planned or designed to emit sewage, resulting from the inadequate capacity of a public sewer to accommodate the volume of sewage flowing into it, where that inadequacy is the result of factors over which the authority has no control: *Robinson* and *Smeaton v Ilford Corpn.* Such cases are to be distinguished from cases where sewage is discharged from outlets or channels which were built for the purpose of carrying it away, as in *Pride of Derby*.

(12) The existence of a statutory remedy will not bar an action where the relevant act or omission is not only a contravention of a statutory duty but also constitutes a tort: see *Glossop, Baron v Portslade Urban District Council* and *Attorney General v Lewes Corpn.*

(13) An action may lie against a sewerage authority in respect of a nuisance for which the authority is responsible, where the cause of action does not include as an essential ingredient that the authority has failed to drain its district effectually. That is so, notwithstanding that the nuisance has been caused by such a failure: see, among other examples, *Price's Patent Candle Co Ltd v London County Council* and *Pride of Derby.* As will appear, the distinction between cases of this kind, and cases of the kind described in para 50(10) above (and "escape" cases of the kind described in para 50(11)), is of fundamental importance to the resolution of the issues arising in the present case.

(14) The courts have consistently affirmed the importance of injunctions as a remedy for nuisance caused by the pollution of watercourses: see, in particular, *Pride of Derby*. They have not treated the fact that sewerage authorities recover their costs by imposing charges on consumers as a reason for withholding a remedy. Nor have they been deterred from granting an injunction by the fact that the nuisance could only be remedied by carrying out works to improve the sewerage system. Nor have they been deterred by the fact that such works could only be carried out with ministerial approval: *Pride of Derby.*

(15) At the same time, the courts have taken account of the public interest in preserving the effective removal of sewage from commercial and domestic properties, and the difficulties which may be faced by the authorities responsible for sewerage services if they cannot readily remove the nuisance. They have generally done so by granting injunctions whose effect was suspended so as to allow the authorities a reasonable time to alter the sewerage network to prevent

further pollution: see, for example, *Attorney General v Birmingham Borough Council, Attorney General v Leeds Corpn, Attorney General v Hackney Local Board, Jones v Llanrwst Urban District Council* and *Pride of Derby*. They have also on occasion awarded damages to the affected proprietor or occupier, as for example in *Attorney General v Lewes Corpn*.

4. The law since privatisation

(1) Legislation

(i) The Water Act 1989

51. During the 1980s, as part of the drive for the privatisation of public services, it was decided that the water supply and sewerage functions of water authorities in England and Wales should be taken out of public ownership. The decision was effected through the 1989 Act. Section 4 and Schedule 2 made provision for schemes under which the property, rights and liabilities of water authorities were transferred to water undertakers and sewerage undertakers. The undertakers are private companies. They operate the water and sewerage systems as commercial ventures.

52. The 1989 Act also contained a regime for enforcement of certain of the duties of water and sewerage undertakers by the Secretary of State and the Director General of Water Services ("the director"), the predecessor of the current Water Services Regulation Authority, commonly known as Ofwat. Under section 20, they were empowered to make enforcement orders where an undertaker was contravening a condition of its appointment or certain statutory requirements. Section 20(10) preserved other remedies which were available in respect of an act or omission which constituted a contravention of a requirement enforceable under that section, provided that they were available in respect of the act or omission "otherwise than by virtue of its constituting such a contravention". One of the duties enforceable under section 20 was that imposed by section 67, which required sewerage undertakers to provide a system of public sewers so as to ensure that their area was and continued to be effectually drained, and to make provision for effectually dealing with the contents of their sewers. That re-enacted in modified language the duty previously imposed by section 14 of the 1936 Act, and before that by section 15 of the 1875 Act. Section 69 and Schedule 8 transferred to the new sewerage undertakers the functions of water authorities relating to sewerage services, and provided that the relevant provisions of the 1936 Act (including sections 30, 31, 278, 331 and 332, summarised in para 27 above) were to be read as referring to sewerage undertakers in place of water authorities.

(ii) The Water Industry Act 1991

53. As its long title states, the 1991 Act consolidates enactments relating to the supply of water and the provision of sewerage services, with amendments to give effect to recommendations of the Law Commission. The fact that the 1991 Act is a consolidation statute is of some significance. Such statutes are not intended to make substantive changes to the law, but to present the existing law in a newly organised structure and in language that is both modern and internally consistent: "[t]he essence of consolidation is to reorganise and restate so as to improve clarity and intelligibility without altering the substance of the law": Craies on Legislation, ed Greenberg, 12th ed (2020), para 1.9.3. Minor changes to the law can however be made, and the Bill may be accompanied by a Law Commission recommendation that particular changes should be made. That procedure was followed in the case of the 1991 Act. The changes recommended by the Law Commission were minor and technical, and have no bearing on the issues in the present case.

54. Turning to the details of the 1991 Act, Part I establishes Ofwat as the regulatory body for water and sewerage. Section 2 requires Ofwat and the Secretary of State to exercise and perform their duties under the Act in the manner which they consider is best calculated to protect the interests of consumers, to secure that the functions of water and sewerage undertakers are properly carried out, to secure that undertakers are able to finance the proper carrying out of those functions (in particular, by securing reasonable returns on their capital), to secure that the activities authorised by licences and any consequential statutory functions are properly carried out, and to secure the long-term resilience of undertakers' supply and sewerage systems.

55. Part II of the Act is concerned with the appointment and regulation of undertakers. Chapter I makes provision for the appointment of companies by the Secretary of State or Ofwat to be the water or sewerage undertaker for any area of England and Wales: section 6(1). United Utilities holds an appointment (made in 1989 under the corresponding provisions of the 1989 Act) as both the water undertaker and the sewerage undertaker for the North West of England. By virtue of section 6(2) of the 1991 Act, the company holding such an appointment is under an obligation to comply with the conditions of its appointment, and is required to perform any duty imposed on it by or under any enactment.

56. Chapter II of Part II deals with enforcement. Section 18 (derived from section 20 of the 1989 Act) applies where the Secretary of State or Ofwat is satisfied that a company holding an appointment under Chapter I, or a person holding a water supply or sewerage licence under Chapter IA, is contravening or is likely to contravene any condition of the appointment or licence, or any statutory or other requirement which is enforceable under that section. The section gives the Secretary of State and Ofwat the power to make enforcement orders in order to secure compliance. Such orders may be

made in response to complaints from individuals (section 29(1) and (4)). Section 18(8) provides:

> "Where any act or omission–
>
> > (a) constitutes a contravention of a condition of an appointment under Chapter I of this Part or of a condition of a licence under Chapter IA of this Part or of a statutory or other requirement enforceable under this section; or
> >
> > (b) causes or contributes to a contravention of any such condition or requirement,
>
> the only remedies for, or for causing or contributing to, 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, or causing or contributing to, such a contravention*." (emphasis added)

57. The words which we have emphasised (derived from section 20(10) of the 1989 Act) expressly preserve any common law remedies that are available in respect of acts or omissions which contravene a statutory requirement enforceable under that section, or cause or contribute to that contravention, where the contravention of the 1991 Act is not an essential ingredient of the claim. In other words, if a sewerage undertaker's act or omission gives rise to a cause of action at common law, the fact that it also contravenes or contributes to the contravention of the 1991 Act does not prevent the courts from enforcing the affected claimant's common law rights and awarding any available common law remedies. That reflects the pre-privatisation law, as we explained at para 50(12) above.

58. The Secretary of State and Ofwat are not required to make an enforcement order if satisfied that the contravention is trivial, or that the undertaker has given and is complying with an appropriate undertaking, or that the duties imposed by Part I preclude the making of the order: section 19. The last exception would cover a case where Ofwat considered that making an order would be incompatible with the general duty imposed by section 2, for example because of its impact on the interests of consumers or on the undertaker's ability to finance the proper discharge of its functions.

59. Part IV of the 1991 Act is concerned with sewerage services. Chapter I imposes general duties on sewerage undertakers. The general duty to provide a sewerage system is imposed by section 94(1), which provides:

> "It shall be the duty of every sewerage undertaker—
>
> > (a) to provide, improve and extend such a system of public sewers (whether inside its area or elsewhere) and so to cleanse and maintain those sewers and any lateral drains which belong to or vest in the undertaker as to ensure that that area is and continues to be effectually drained; and
> >
> > (b) to make provision for the emptying of those sewers and such further provision (whether inside its area or elsewhere) as is necessary from time to time for effectually dealing, by means of sewage disposal works or otherwise, with the contents of those sewers."

That provision is derived from section 67 of the 1989 Act, which in turn was derived from section 14 of the 1936 Act, which itself substantially re-enacted section 15 of the 1875 Act. Section 94(3) of the 1991 Act provides that the duty imposed by section 94(1) is enforceable under section 18. Accordingly, section 18(8) preserves any common law remedies which are available in respect of acts or omissions which constitute, or cause or contribute to, a breach of section 94(1).

60. Chapter II of Part IV is concerned with the provision of sewerage services. It contains provisions which impose more specific additional duties on sewerage undertakers and confer powers on them. Sections 98 to 101A impose on sewerage undertakers a conditional duty to provide a public sewer and connecting drains to be used for drainage for domestic purposes. Section 101B empowers sewerage undertakers to construct drains connecting domestic premises to the public sewer. Sections 102 to 105 provide for the vesting in a sewerage undertaker of existing sewers, drains and sewage disposal works within, or serving, its area. Sections 106 to 109 provide for the connection of drains and private sewers with public sewers. In particular, section 106 gives to the owner or occupier of any premises a conditional right to connect to the public sewer, as under the previous law, and section 107 empowers the undertaker to make such a connection. Sections 111 to 114 contain provisions designed to protect the sewerage system from uses which are likely to damage it or to cause a nuisance. Section 115 provides for co-operation between sewerage undertakers and local authorities in relation to the draining of surface water from roads or streets. Section 116 (derived from section 22 of the 1936 Act, as amended by the 1989 Act) gives the sewerage undertaker

power to close or restrict the use of a public sewer, but only where it provides another sewer which is equally effective. That section is of importance to this appeal, as United Utilities' entitlement to use the outfalls into the canal – for the discharge of clean water only – derives from section 116, as explained below.

61. Section 117(5) provides, so far as material:

> "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 –
>
> ...
>
> (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."

That provision is derived from section 30 of the 1936 Act (itself a modified version of section 17 of the 1875 Act), discussed at para 50(6) above. It makes it clear that the provisions referred to, including section 116, do not confer any authority to construct or use sewers, drains or outfalls for the purpose of conveying foul water into canals or other watercourses without adequate treatment.

62. Section 117(6) provides:

> "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."

That provision, derived from section 31 of the 1936 Act, echoes the prohibitions on the creation of a nuisance found in earlier legislation which we summarised at para 50(6) above. It makes it clear that sewerage undertakers are required to carry out their functions under the relevant provisions, including section 116, in such a way as not to create a nuisance.

63. Part V of the Act contains financial provisions. Section 142 confers on undertakers the power to impose charges for their services. Charges schemes are subject to regulation by Ofwat under other provisions of Part V.

64. Part VI of the Act is concerned with undertakers' powers and works. The powers conferred include powers of compulsory acquisition of rights over land (which could include the right to discharge foul water into a watercourse). Chapter III contains supplemental provisions. Section 180 gives effect to Schedule 12, which imposes obligations as to the payment of compensation. Paragraph 4(1) of that Schedule (derived from section 278(1) of the 1936 Act) concerns compensation in respect of sewerage works, and provides:

> "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."

Other provisions of paragraph 4 of Schedule 12 set out the procedure by which the amount of the statutory compensation is to be assessed, generally by arbitration. The expression "the relevant sewerage provisions" is defined by section 219(1):

> "'the relevant sewerage provisions' means the following provisions of this Act, that is to say—
>
> (a) Chapters II and III of Part IV (except sections 98 to 101 and 110 and so much of Chapter III of that Part as provides for regulations under section 138 or has effect by virtue of any such regulations);
>
> (b) sections 160, 171, 172(4), 178, 184, 189, 196 and 204 and paragraph 4 of Schedule 12; and
>
> (c) the other provisions of this Act so far as they have effect for the purposes of any provision falling within paragraph (a) or (b) of this definition".

That definition includes section 116. Paragraph 4 of Schedule 12 is accordingly the current version of the earlier provisions summarised at para 50(7) above.

65. Returning to Chapter III of Part VI, section 186(3) is concerned with the protection of watercourses. It provides:

> "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."

That provision is derived from section 331 of the 1936 Act, which in turn had its roots in the earlier provisions discussed at para 50(4) above.

66. Section 186(7) provides, so far as relevant:

> "Any dispute – …
>
> > (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."

That provision is derived from section 332 of the 1936 Act, which had its roots in the earlier provisions discussed in para 50(5) above.

67. Taken as a whole, these provisions demonstrate a continuity of the parliamentary policy seen in the earlier legislation, in particular in providing specific protection to watercourses. Parliament has preserved in section 117(5)(b) of the 1991 Act the express exclusion from the powers granted to sewerage undertakers by the provisions referred to, including section 116, of authority to construct or use sewers or outfalls to convey untreated foul water into watercourses so as to affect prejudicially the purity and quality of the water. It has preserved in section 117(6) the duty of sewerage undertakers to carry out their functions under the provisions referred to, including section 116, so as not to create a nuisance. It has preserved in section 186(3) the express exclusion from the powers granted by the provisions referred to, including section 116, of authority injuriously to affect the quality of water in any watercourse without the consent of persons entitled to prevent or be relieved against such injurious affection. It has preserved in section 186(7) the possibility of arbitration of the question of injurious affection, at the option of the party complaining. It has preserved in paragraph 4 of Schedule 12 the right to compensation for damage caused by conduct which is authorised by the provisions referred to, including section 116.

(2) Case law prior to Marcic v Thames Water Utilities Ltd

68. In 2001 the Court of Appeal addressed the question whether a sewerage undertaker had an implied power to discharge non-foul surface water into a canal: *British Waterways Board v Severn Trent Water Ltd* [2001] EWCA Civ 276; [2002] Ch 25. The contention advanced was that such a power was incidental to its express power to lay and maintain pipes under section 159 of the 1991 Act. The Court of Appeal held that no such power was to be implied into section 159. There were five main reasons for that conclusion.

69. The first was the difficulty of construing such a detailed and elaborate statute as the 1991 Act as having left the existence of important powers to a process of implication. Section 159 merely authorised the laying of pipes across private land and in itself provided no basis for any implication about the places where those pipes were authorised to discharge. Chadwick LJ commented that the legislation was "replete with express powers to cover activities which water and sewerage undertakers might need or wish to undertake", making it "at the least, unlikely that Parliament would have left anything as fundamental as a power to discharge sewage onto another's land to be inferred" (para 59).

70. The second reason was that, if such a power were implied, it would have the effect of authorising a nuisance. Any power derived from section 159 to discharge into private watercourses would not be qualified by the statutory protections in section 117(5) and (6) against the discharge of foul water. That was because those provisions qualified only specified sections of the 1991 Act, not including section 159. Therefore, if such a right existed, it would authorise the discharge not only of surface water and

treated effluent but also of foul water, routinely and in unlimited quantities. In other words, the statute would impliedly authorise an infringement of private rights.

71. The third reason followed on from the second. The 1991 Act made no provision for the payment of compensation to the victims of such a nuisance. The provisions of Schedule 12, paragraph 2 for compensation for the exercise of a water undertaker's statutory power to lay pipes through private land did not extend to damage caused by discharges from those pipes. The wider duty under paragraph 4 to pay compensation for damage occasioned by a sewerage undertaker's exercise of its powers under "the relevant sewerage provisions" would not apply because the "relevant sewerage provisions" did not include section 159. The absence of any provision for compensation indicated that such a nuisance was not authorised by the Act.

72. The fourth reason was that, although section 159 applied to both water and sewerage undertakers, section 165 conferred an express power of discharge from pipes on water undertakers only. On the face of it, the distinction was deliberate.

73. The fifth reason was that a right of discharge into private watercourses was not necessary to the exercise by the sewerage undertaker of its statutory powers or the performance of its statutory duties. They could discharge into rivers or the sea, or onto their own land, or onto private land or watercourses by agreement with the owner. Any rights which they required but could not obtain (or could not obtain on reasonable terms) could be acquired by compulsory purchase, paying the statutory measure of compensation. Chadwick LJ observed that the fallacy in the undertaker's argument lay in "the underlying (but unspoken) premise that Parliament must have intended that sewerage undertakers should have facilities to discharge (which, plainly, they do require in order to carry out their functions) without paying for those facilities" (para 71). He commented that whether or not that premise could have been supported in the context of a public authority charged with functions imposed in the interests of public health, it could not be supported in the context of legislation enacted following a decision to privatise the water industry.

74. We have discussed this case at some length as the reasoning is highly relevant to the present case, and was approved by this court in earlier proceedings between the present parties: *Manchester Ship Canal Co Ltd v United Utilities Water plc* [2014] UKSC 40; [2014] 1 WLR 2576 ("*Manchester Ship Canal (No 1)*").

(3) Marcic v Thames Water Utilities Ltd

75. It is necessary next to consider the decision of the House of Lords in *Marcic v Thames Water Utilities Ltd* [2003] UKHL 66; [2004] 2 AC 42 ("*Marcic*"). Mr Marcic's property was repeatedly flooded with surface water when heavy rain caused a surface

water sewer to become overloaded. Surface water also entered a foul water sewer so that it also became overloaded, causing sewage to back up into Mr Marcic's property through the drain connecting his house to the public sewer. The sewers had become inadequate to accommodate an increased volume of sewage and surface water as additional houses were built, with a statutory right to connect to the sewers. Mr Marcic brought an action for a prohibitory injunction restraining Thames Water from permitting the use of its sewerage system in such a way as to cause flooding to his property, a mandatory injunction requiring improvements to be made to the system, and damages in respect of the harm to his property. He based his claim on the tort of private nuisance and on a violation of his rights under the European Convention on Human Rights. Thames Water maintained that the only remedy was a complaint to the director, who had the power to take enforcement action under section 18 of the 1991 Act.

76. By the time the case reached the House of Lords, Thames Water had alleviated the flooding problem, leaving only the question whether Mr Marcic was entitled to damages. The House of Lords unanimously rejected his claim, overturning the judgment of the Court of Appeal. The two leading speeches, both of which commanded the support of a majority of the Law Lords, were given by Lord Nicholls of Birkenhead and Lord Hoffmann (a third speech, given by Lord Hope of Craighead, focused on the alleged violation of Convention rights).

77. Lord Nicholls noted that a sewerage undertaker's duty to provide an adequate system of public sewers under section 94(1) of the 1991 Act was enforceable by the director under section 18 (para 21), but that the closing words of section 18(8) expressly preserved remedies for any causes of action which were available in respect of an act or omission otherwise than by virtue of its being a contravention of a statutory requirement enforceable under section 18 (para 22). He observed that Mr Marcic's case was strikingly similar to *Robinson* (paras 36-37 above), and cited Lord Esher MR's dictum in that case that if a duty was imposed by statute which but for the statute would not exist, and the statute provided a remedy for the breach of that duty, then that was the only remedy (para 30). He noted (at paras 30-31) that that approach followed *Glossop* (para 35 above) and had been approved in *Pasmore* (para 39 above). He also noted (at para 32) that the Court of Appeal had considered that the *Glossop* line of cases had been superseded by *Sedleigh-Denfield, Goldman v Hargrave* and *Leakey* (discussed in paras 9-13 above), which established that an occupier must do whatever was reasonable in the circumstances to prevent hazards on his land from causing damage to a neighbour.

78. Lord Nicholls disagreed with the Court of Appeal (para 33), on the basis that "the cause of action in nuisance asserted by Mr Marcic is inconsistent with the statutory scheme" (para 34). In the critical part of his reasoning, he observed that "Mr Marcic, it is said, has a cause of action at law in respect of Thames Water's failure to construct more sewers" (ibid). Lord Nicholls stated that the difficulty he had with that line of argument was "that it ignores the statutory limitations on the enforcement of sewerage undertakers' drainage obligations" (para 35).

79. Like Lord Nicholls, Lord Hoffmann focused on the cause of action asserted by Mr Marcic. He accepted that the effect of section 18(8) was that "if the failure to improve the sewers to meet the increased demand gives rise to a cause of action at common law, it is not excluded by the statute" (para 52). The question, he said, "is whether there is such a cause of action" (ibid). Like Lord Nicholls (para 34), he observed that "[t]he flooding has not been due to any failure on the part of Thames Water to clean and maintain the existing sewers" (para 53). Nor were they responsible for the increased use of the sewers. The omission relied upon as giving rise to an actionable nuisance was their failure to construct new sewers with a greater capacity.

80. Lord Hoffmann noted that until the decision of the Court of Appeal in *Marcic* there was a line of authority which laid down that the failure of a sewerage authority to construct new sewers did not constitute an actionable nuisance. Pausing there, Lord Hoffmann was correctly recognising that, quite apart from the exclusionary effect of the statutory remedy, the earlier authorities had established that there was no cause of action in nuisance in the first place, where the failure to construct a public sewer was an essential ingredient of the claim. Accordingly, as Lord Hoffmann noted, the effect of the authorities was that the only remedy for the failure of a sewerage authority to construct new sewers was by way of enforcement of the statutory duty currently imposed by section 94(1) of the 1991 Act. Significantly, Lord Hoffmann stated (para 54):

> "The existence of this procedure for the enforcement of statutory duties did not (any more than section 18(8) of the 1991 Act) exclude common law remedies for common law torts, such as a nuisance arising from failure to keep a sewer properly cleaned: *Baron v Portslade Urban District Council* ... But the courts consistently held that failure to construct new sewers was not such a nuisance."

In that regard, Lord Hoffmann referred to authorities including *Glossop, Dorking, Robinson* and *Smeaton v Ilford Corpn.* It followed that "Mr Marcic can therefore have a cause of action in nuisance only if these authorities are no longer good law" (para 57).

81. Lord Hoffmann noted that the Court of Appeal considered that those authorities had been overtaken by the decisions in *Sedleigh-Denfield, Goldman v Hargrave* and *Leakey.* Lord Hoffmann rejected that view. He posed the question (at para 61): if *Sedleigh-Denfield* laid down a general principle that an owner of land had a duty to take reasonable steps to prevent a nuisance arising from a known source of hazard, why should that not require him to construct new sewers if the court thought it would have been reasonable to do so? The answer was that, unlike in ordinary disputes between neighbouring landowners, the court was not in a position to make a judgment as to when it would be reasonable for a sewerage undertaker to construct a new sewer, as such a judgment required decisions on matters of public interest "which courts are not

equipped to make in ordinary litigation" (para 64). It was "therefore not surprising that for more than a century the question of whether more or better sewers should be constructed has been entrusted by Parliament to administrators rather than judges" (ibid). That was the position under the 1875 and 1936 Acts, and the 1991 Act "makes it even clearer than the earlier legislation" (para 70), by making elaborate provision for the role of the director.

82. In summary, therefore, an essential ingredient of the cause of action asserted by Mr Marcic was that Thames Water had failed to perform an obligation to construct a new sewer. That followed from his reliance on the *Sedleigh-Denfield* principle, under which liability is based on a failure to take reasonable means to avert a nuisance. The duty to construct a new sewer was imposed by section 94(1) of the 1991 Act, and (following *Glossop, Robinson* and *Pasmore*) would not otherwise exist. It followed that the claim was excluded by section 18, since subsection (8) only preserved common law remedies where a contravention of the statutory duty was not an essential ingredient of the cause of action. Mr Marcic therefore had no cause of action in nuisance. That conclusion was consistent with the case law preceding the 1991 Act, notably *Robinson* and *Smeaton v Ilford Corpn.* That is as one would expect, since section 94(1) of the 1991 Act is a more modern version of the provisions in force at the time of those decisions, as explained in para 59 above.

83. However, Lord Hoffmann's observations about questions of public interest, and similar observations in the speeches of Lord Nicholls and Lord Hope, have been misunderstood in some later cases, and need to be considered in greater detail. To reiterate, Lord Hoffmann made observations to the effect that the court was not in a position to form a judgment as to when it would be reasonable for a sewerage undertaker to construct a new sewer, as such a judgment involved questions of public interest which the court was not equipped to decide, and which the statute had confided to the director.

84. Those observations were apposite to the cause of action asserted by Mr Marcic, because an essential ingredient of his cause of action was that Thames Water should have constructed a new sewer which would have prevented the flooding of his property. The court was not in a position to decide that question, for the reasons which Lord Hoffmann explained. Lord Hoffmann's observations did not imply that claims were excluded in cases where the cause of action did *not* require the court to make any decision of that kind, but where the inadequacy of the existing sewers or other infrastructure was an underlying cause of the nuisance which was the subject of complaint. In cases of the latter kind, since the court would not be required to decide whether new sewers or other infrastructure should have been provided, there would be no problem about the justiciability of the claim. If the position were otherwise, *Marcic* would have implicitly overruled *Pride of Derby,* which was cited with approval, besides a slew of other authorities which were not cited.

85. In *Pride of Derby,* as we have explained, the cause of action in nuisance was based on the pollution of a river by noxious effluent discharged from a sewage treatment works. The underlying cause of the polluting discharge was the inadequate capacity of the sewerage works, but the defendants' failure to improve the works did not form any part of the plaintiffs' cause of action, which was based on the existence of a nuisance caused by the defendants' operation of their works. The court was therefore not required to reach any decision as to whether the defendants should have enlarged the capacity of their sewerage works. As Evershed MR remarked, the plaintiffs "are not concerned with, nor are they complaining about the method by which the citizens of Derby are provided with a sewerage system" (p 180).

86. When we summarised the law in relation to pollution caused by the operation of sewerage systems as it stood before the privatisation of water and sewerage services (para 50 above), we observed the distinction which the law has drawn between two circumstances. The first is the involuntary escape of sewage from an outlet which was not planned or designed to emit sewage, resulting from the inadequate capacity of the sewerage system as a consequence of the increased usage of that system, where the complaint is that the sewerage authority has failed to drain its district effectually by failing to construct new sewerage infrastructure: see para 50(10) and (11) above. The second circumstance is the discharge of sewage from outlets or channels which were built for the purpose of carrying it away. In circumstances of the second kind, the sewerage system is operating as it was designed to operate, and the operator of the sewerage system is therefore responsible for the resultant nuisance. As Denning LJ stated in *Pride of Derby* (p 191), "[the corporation's] act in pouring a polluting effluent into the river makes them guilty of nuisance". That act constituted a tort. The cause of action did not include as an essential element that the corporation had failed to drain its district effectually: see paras 50 (12) and (13). Whether or not the district was drained effectually, the complaint was that the operation of the system for draining the district resulted in effluent being poured into the river. As Evershed MR explained (p 180), the complaint was not of insufficient drainage, but about the consequences of the defendants' drainage.

87. Many of the other authorities which we have cited were similarly concerned with nuisances where the underlying cause was inadequate infrastructure, but injunctions were granted. In several of the authorities, as we have previously noted, the operation of the injunction was suspended for a time so that improvements could be carried out. Examples, besides *Pride of Derby,* include *Attorney General v Birmingham Borough Council, Attorney General v Leeds Corpn, Attorney General v Hackney Local Board* and *Jones v Llanrwst Urban District Council.* Nothing in *Marcic* undermines those authorities.

88. That is not to say that the questions of public interest to which Lord Hoffmann referred in *Marcic* are irrelevant in cases such as these. However, consistently with the general approach explained in *Lawrence* and *Fearn* (para 14 above), and with the

approach to sewerage cases explained in *Price's Patent Candle Co Ltd v London County Council* (para 42 above), they are relevant to determining the appropriate remedy – in particular, to deciding whether the court should suspend the operation of an injunction, or should award damages in lieu of an injunction – rather than justifying the outright denial of any relief.

89. Accordingly, the speeches in *Marcic* neither said nor implied that a claim in nuisance was excluded in every case where preventing the nuisance would involve capital expenditure. Nor did they imply that a claim was excluded in every case where the nuisance resulted from a policy decision. It is also noteworthy that both Lord Nicholls (at para 34) and Lord Hoffmann (at paras 53-54) indicated that the 1991 Act did not exclude liability for nuisances resulting from the inadequate cleaning or maintenance of a sewer. That is significant because cleaning and maintenance are statutory duties imposed by section 94(1), which are capable of being enforced by the statutory procedure under section 18; they involve the expenditure of resources; and they are likely to be the subject of policies adopted by the sewerage undertaker.

90. As Lord Hoffmann explained, the statutory enforcement procedure does not exclude common law remedies for common law torts. Mr Marcic's difficulty was that he had no cause of action at common law. Thames Water had not created or adopted the nuisance caused by the escape of sewage on to his property. They were said to be liable because they had failed to take reasonable steps to avert the nuisance by constructing a new sewer. This was said to amount to "continuing" the nuisance in the sense explained in *Sedleigh-Denfield*. An essential ingredient of the cause of action was accordingly that Thames Water were under a duty to construct a new sewer. That cause of action was excluded by section 18 of the 1991 Act, consistently with the long-established position that there is no common law duty to build public sewers.

(4) Cases since Marcic

91. The claimants in *Dobson v Thames Water Utilities Ltd* [2007] EWHC 2021 (TCC); [2008] 2 All ER 362 ("*Dobson*") lived in the vicinity of a sewage treatment works. They complained that the works emitted foul odours and caused an infestation of mosquitoes, and that these constituted a nuisance which had been caused by the negligence of the defendants. In response, the defendants argued that the claimants were seeking to enforce their duty under section 94(1)(b) of the 1991 Act to make such provision as was necessary for effectually dealing with the contents of their sewers, and that such proceedings were precluded by section 18, following *Marcic*. Since the claim amounted to an argument that the defendants should have dedicated more resources to addressing odours and mosquito problems, it was said to conflict with Ofwat's role under the statutory scheme.

92. The judge rejected this interpretation of *Marcic*. He considered that a claim in private nuisance might in principle lie, if negligence were established, where as a matter of fact and degree the exercise of adjudicating on the cause of action did not involve any inconsistency with the statutory process. The judge considered that the boundary between the two was difficult to draw, but might depend on the distinction between "policy" and "operational" matters, or between capital and revenue expenditure (para 140). This reasoning was followed in the later cases of *Nicholson v Thames Water Utilities Ltd* [2014] EWHC 4249 (QB), *Bell v Northumbrian Water Ltd* [2016] EWHC 133 (TCC) and *Oldcorn v Southern Water Services Ltd* [2017] EWHC 62 (TCC); [2017] Env LR 25, all of which concerned failures in maintenance. It is also relied on by United Utilities in the present case, and was applied by Fancourt J in his judgment at first instance.

93. There are two principal difficulties with the reasoning in *Dobson*, in addition to the inadequacy of the distinction between policy and operations as a tool for deciding whether it is appropriate to impose a duty of care (*Stovin v Wise* [1996] AC 923, 951). The first is the requirement that negligence be established. The judge appears to have thought, in the light of a reference by Lord Wilberforce in *Allen v Gulf Oil Refining Ltd* at p 1011 to a dictum of Lord Blackburn in *Geddis v Proprietors of Bann Reservoir* (1878) 3 App Cas 430, 455-456, that statutory authority conferred an immunity from proceedings under the common law of nuisance unless "negligence" was established. We put the word in inverted commas, as Lord Wilberforce did, because he was using it in a special sense (as he explained at p 1011), to be distinguished from the tort of negligence. Although the term has been used in some later authorities (such as *Department of Transport v North West Water Authority* [1984] AC 336, 359-360, where it was again made clear that it was being used in a special sense), in our view it is best avoided in the context of statutory authority to commit a nuisance, as it has unsurprisingly caused confusion.

94. As we have explained, the modern authorities have made it clear that the test of whether legislation authorises a nuisance is one of inevitability, in the sense described by Viscount Dunedin in *Manchester Corpn v Farnworth*: see para 18 above. That dictum of Viscount Dunedin was expressly intended to summarise the effect of earlier authorities, including *Geddis v Proprietors of Bann Reservoir,* and was followed in *Allen v Gulf Oil Refining Ltd*: see para 19 above. We should add that the test of inevitability is only relevant to deciding whether a nuisance has been authorised by the relevant statute. Where it is clear for other reasons that the nuisance is unauthorised, it is unnecessary to inquire into whether it is inevitable.

95. The second problem with the reasoning in *Dobson* is that the judge interpreted *Marcic* as laying down a wider principle than it did. As we have explained (para 90 above), the defendants in that case had not created or adopted the nuisance. However, they were said to be liable because they had failed to construct a new sewer so as to avert the danger arising from the overloading of the existing sewers. Their failure to do

so amounted, it was said, to their continuing the nuisance. An essential ingredient of the cause of action was therefore that the defendant was under a duty to construct a new sewer. That cause of action was excluded by section 18 of the 1991 Act.

96. That decision was not in point in *Dobson*. The defendants in that case were responsible for the operation of the sewage treatment works. The operation of the works interfered with the enjoyment of neighbouring properties by producing an offensive odour and an infestation of insects. Subject to any statutory defence, the defendants were liable for that nuisance because they had caused it, as explained at paras 6 and 11 above. The position in relation to the operation of the sewage treatment works was essentially the same as in relation to the operation of the oil refinery in *Allen v Gulf Oil Refining Ltd* (para 19 above).

97. We turn next to the earlier proceedings between the present parties. Like the present case, the proceedings in *Manchester Ship Canal (No 1)* concerned discharges from United Utilities' sewerage system through outfalls into the canal. The Canal Company sought damages for trespass. United Utilities applied for summary judgment dismissing the claim in respect of discharges of surface water and treated effluent (not foul water) through outfalls constructed before the 1989 Act came into force, on the basis that it had inherited a pre-existing implied statutory power to discharge surface water and treated effluent into private watercourses without the owners' consent.

98. This court accepted that a right to discharge surface water and treated effluent into private watercourses without the owners' consent could be implied from provisions found in pre-1991 legislation, such as section 17 of the 1875 Act, as had been held in *Durrant* (para 40 above). Those provisions had been re-enacted in the 1991 Act in a modified form and as part of a much more elaborate statutory scheme, which made such an implication more difficult to accommodate. However, since section 116 of the 1991 Act prohibited sewerage undertakers from discontinuing the use of existing sewers until an alternative had been constructed, it implicitly authorised the continued discharge of surface water and treated effluent into private watercourses from existing outfalls, since it would otherwise have been impossible for sewerage undertakers lawfully to perform their functions from the moment when the 1991 Act came into force. Accordingly, the rights of discharge into watercourses which had already accrued in relation to existing outfalls under previous statutory regimes survived under the 1991 Act, as an implication of section 116.

99. Lord Sumption, with whom Lord Clarke of Stone-cum-Ebony and Lord Hughes agreed, and whose reasoning was described by Lord Toulson as essentially the same as his own, observed (para 2) that the law adopts a restrictive approach to the implication of a statutory right to commit a tort. It must be a necessary implication: "a right to commit what would otherwise be a tort may be implied if a statutory power is incapable of being exercised or a statutory duty is incapable of being performed without doing the

act in question." That is another way of expressing the test of inevitability explained at para 18 above, as was indicated by Lord Sumption's citing *Manchester Corpn v Farnworth* and *Allen v Gulf Oil Refining Ltd* to vouch his proposition. In addressing such necessary implication in the 1991 Act he rejected (at para 15) a challenge to the Court of Appeal's reasoning in *British Waterways Board v Severn Trent Water Ltd*. He found the basis for implying the survival of pre-existing rights of discharge (as established in *Durrant*) in section 116. Section 116 would entail, if pre-existing rights of discharge from outfalls had not survived the enactment of the 1991 Act, that surface water and treated effluent would have to be allowed to backwash from the sewers into the streets until a new sewerage system had been constructed (para 18). That meant that a right to continue discharging surface water and treated effluent could be implied from section 116.

100. At the conclusion of his judgment, Lord Sumption addressed the suggestion that this would leave the owners of private watercourses worse off than they were under the pre-1991 legislation. He rejected the argument, first because paragraph 4 of Schedule 12 provided for full compensation for the exercise by the sewerage undertaker of its powers under the "relevant sewerage provisions", of which section 116 was one; and secondly because of the protections in the 1991 Act, the most important of which were section 117(5)(b), which "protects against the discharge of foul water into watercourses", and section 186(3), which "protects against the injurious affection without consent of any canal or watercourse or the supply, quality or fall of water in any canal or watercourse" (para 22). Both provisions "expressly qualify powers derived from specified provisions of the Act, which … include section 116" (ibid).

101. Lord Neuberger of Abbotsbury, with whom Lord Clarke and Lord Hughes also agreed, concurred in the reasons given by Lord Sumption and Lord Toulson but placed greater weight on the provisions of earlier legislation and the decision of the Court of Appeal in *Durrant*. He explained that section 17 of the 1875 Act, with which that case was concerned, had been re-enacted in similar terms in section 30 of the 1936 Act, which in turn was applied to sewerage undertakers by paragraph 1 of Schedule 8 to the 1989 Act. The reasoning in *Durrant* therefore continued to hold good under the 1989 Act. He also relied on section 16(1)(c) of the Interpretation Act 1978 which provides, as a general rule, that when an Act is repealed the repeal does not affect any right acquired under the repealed enactment. He also considered it very unlikely that the 1991 Act, as a consolidation Act, could have been intended to deprive the sewerage undertaker of rights which existed under the 1989 Act, sub silentio and without any consultation or recommendation from the Law Commission. He concluded that sewerage undertakers had, and continue to have, a statutory right to discharge surface water and treated effluent from existing outfalls from sewers which had been vested in them before the 1991 Act came into force but not from subsequently created outfalls or sewers.

5. The present case

(1) The proceedings below

102. As we have explained, the present case concerns the discharge of foul water from United Utilities' outfalls into the canal. As the decision in *Manchester Ship Canal (No 1)* made clear, such discharges are not authorised by the 1991 Act, having regard in particular to sections 117(5) and 186(3). In response to the threat by the Canal Company of a common law action in trespass and nuisance, United Utilities sought a declaration that the Canal Company had no right of action.

103. In his judgment at first instance, Fancourt J concluded that the facts of the case were materially indistinguishable from those in *Marcic:* [2021] EWHC 1571 (Ch); [2021] 1 WLR 5871, paras 80, 82 and 83. The discharge of inadequately treated effluent was unlawful, but it occurred without United Utilities doing anything to cause it, and there was nothing they could do to prevent it, except by carrying out improvements to the sewerage system. Following *Marcic,* a common law claim was excluded. On that basis, a declaration was granted that "where a discharge into the canal from sewers vested in United Utilities contravenes sections 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 on the part of United Utilities leading to the said discharge".

104. That decision was upheld by the Court of Appeal: [2022] EWCA Civ 852; [2023] Ch 1. Nugee LJ, giving the leading judgment, held (paras 45, 46, 73 and 79) that the decision in *Marcic* applied equally to the Canal Company's claims, which were inconsistent with the statutory scheme of the 1991 Act. The *Marcic* case was summarised as follows (para 45):

> "Reducing the case to its simplest, Mr Marcic's complaint was that Thames was flooding his property with sewage. I do not think it was disputed that that was an interference with the reasonable enjoyment of his land, and anyone responsible for it would therefore have normally been liable for nuisance. But the House of Lords held that no action in nuisance lay because of Thames' special position as a sewerage undertaker, and because it would undermine the statutory scheme applicable to the enforcement of sewerage undertakers' duties in relation to sewage if such an action could be brought."

At para 78, in a more detailed analysis of the case, Nugee LJ noted that both Lord Nicholls and Lord Hoffmann "characterised Mr Marcic's claim as being in effect that Thames should have built more sewers", and continued:

> "But that was not his complaint in legal terms. His complaint was that the flooding of his garden with sewage was an interference with the reasonable enjoyment of his land and hence a nuisance. What both Lord Hoffmann and Lord Nicholls meant was that in practical terms the only way to stop that was to build more sewers ...".

Accordingly, *Marcic* was interpreted as excluding claims whenever the underlying cause of the nuisance was the inadequacy of sewerage infrastructure. Nugee LJ acknowledged that this result was in tension with the express wording of section 18(8) of the 1991 Act (para 53); that it was difficult to reconcile with the reasoning in *Manchester Ship Canal (No 1)* (para 70); and that it left it unclear what the practical effect of sections 117(5) and 186(3) might be (para 87).

105. As we have explained, this is a misreading of *Marcic.* In that case, the defendants had not created or adopted the nuisance: the sewers had been adequate when laid by the defendants' predecessors, and their subsequent inadequacy had only resulted from an increase in inflows which the defendants were powerless to control. The defendants' responsibility for the flooding of the claimant's property could only be asserted on the basis that they had "continued" the nuisance, applying the principle established in *Sedleigh-Denfield,* by failing to take reasonable steps to prevent the nuisance by constructing a new sewer. As we have seen, that is the basis on which the Court of Appeal had upheld the claim. Unlike an ordinary case of nuisance, the cause of action therefore included, as an essential ingredient of the claim, the defendants' breach of its obligation to construct a new sewer. Contrary, therefore, to the Court of Appeal's interpretation of the case in the present proceedings, "Mr Marcic's claim … that Thames should have built more sewers" was an essential component of "his complaint in legal terms". His claim was dismissed because the duty to build more sewers arose only under section 94(1) of the 1991 Act, and could only be enforced by proceedings under section 18. Accordingly, the problem with the claim was not merely "Thames' special position as a sewerage undertaker", or that in some broad sense "it would undermine the statutory scheme applicable to the enforcement of sewerage undertakers' duties in relation to sewage", but specifically that it was based on the contravention of a statutory duty for which section 18 of the 1991 Act provided an exclusive remedy. The difficulty was not that a contravention of the statutory duty was an underlying cause of the nuisance, but that it was an essential ingredient of the cause of action for which there was no independent basis at common law.

(2) The parties' contentions

106. United Utilities accepts that discharges into the canal which fall within the scope of sections 117(5) or 186(3) are unauthorised. It also accepts – indeed, contends as a vital part of its argument – that such discharges are in contravention of section 94(1). Since a contravention of section 94(1) falls within the scope of section 18, it argues that enforcement action can be taken by the Secretary of State or Ofwat, if so minded. But, notwithstanding the terms of section 18(8), it denies that any action can be maintained by the person affected, except in cases involving negligence or deliberate wrongdoing. It submits, in summary, that because such discharges can only be remedied by the construction of new infrastructure, to permit private law claims would conflict with the regulatory regime applicable to sewerage infrastructure. Its case is that Parliament's intention was that the circumstances in which new infrastructure should be provided is a matter for the regulators and not for the courts. It relies, in that regard, on the decision in *Marcic.*

107. The Canal Company submits that *Marcic* is distinguishable, in particular because it did not concern a polluting discharge into a watercourse, and therefore did not address the effect of sections 117(5) and 186(3). The Canal Company contends that, on a correct reading of the totality of the 1991 Act, including section 18(8) and the limited provision for statutory compensation in section 180 and Schedule 12, and properly applying all relevant canons of interpretation, there is no statutory ouster of common law claims in respect of discharges of the kinds mentioned in sections 117(5) and 186(3), and that such a conclusion is consistent with *Marcic*. Alternatively, the Canal Company invites this court, if need be, to depart from *Marcic* and hold that the 1991 Act does not preclude private law claims in nuisance or trespass against sewerage undertakers in respect of discharges of the kinds described in sections 117(5) and 186(3); alternatively, that it excludes only injunctive relief.

(3) Application of the law to this case

(i) Are the common law claims of persons interested in watercourses arising out of the pollution of those watercourses by the discharge of effluent from public sewers, sewage treatment works and associated works excluded by the 1991 Act?

108. In our view, the appropriate starting point is to recognise that the owner of a watercourse, or a riparian owner, has a right of property in the watercourse, including a right to preserve the quality of the water: see para 50(1) above. That right is protected by the common law of tort.

109. There is no doubt that the discharge of polluting effluent from sewers, sewage treatment works and associated works into a privately-owned watercourse is an

actionable nuisance at common law, if the pollution is such as to interfere with the use or enjoyment of the relevant property: see, for example, *Oldaker v Hunt* and *Attorney General v Birmingham Borough Council* in relation to discharges from sewers, *Pride of Derby* in relation to discharges from a sewage treatment works, and *Price's Patent Candle Co Ltd v London County Council* in relation to discharges from a pumping station.

110. The question whether a common law claim arising out of an interference with property rights by the discharge of untreated sewage into a watercourse has been excluded by a legislative scheme is one of statutory interpretation. Although the 1991 Act is a consolidation Act, there are circumstances, in the absence of overt ambiguity, in which the court must have regard to earlier enactments and case law in order to understand and give effect to the intention of Parliament in the consolidating statute: *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, 388 per Lord Bingham of Cornhill. In *Manchester Ship Canal (No 1)* Lord Sumption said (para 3) that the 1991 Act cannot be understood without reference to the state of the law as it was when it was enacted. We agree, and for that reason have set out the relevant prior law earlier in this judgment, summarising it in para 50 above.

111. The 1991 Act does not authorise sewerage undertakers to cause a nuisance or to trespass by discharging untreated effluent into watercourses. As we have explained (paras 97-101 above), this court in *Manchester Ship Canal (No 1)* held that section 116 by implication gave sewerage undertakers authority to discharge *treated* effluent from existing sewers and outfalls into watercourses. But section 117(5), which we quoted in para 61 above, provides that nothing in the relevant sections of Chapter II of Part IV of the Act, including section 116, authorises a sewerage undertaker to use a sewer, drain or outfall to convey foul water into a watercourse. The sewerage undertakers therefore do not have statutory authority to discharge untreated sewage into watercourses.

112. Section 186(3), which we quoted in para 65 above, provides further protection for the owners of a watercourse, riparian owners, and other persons entitled at common law to prevent injurious affection of the watercourse, by stating that nothing in the relevant sewerage provisions shall authorise a sewerage undertaker injuriously to affect the watercourse without the consent of that person. The definition of "relevant sewerage provisions" (para 64 above) includes section 116.

113. The conclusion that the 1991 Act does not authorise sewerage undertakers to cause a nuisance or to trespass by discharging untreated effluent into watercourses also follows from the application of the inevitability test laid down in *Manchester Corpn v Farnworth* and *Allen v Gulf Oil Refining Ltd,* and applied by this court in *Manchester Ship Canal (No 1).* The discharge of untreated effluent into watercourses cannot be taken to be the inevitable consequence of the performance of the powers and duties

imposed on sewerage undertakers by the Act, given the terms of sections 117(5) and (6) and section 186(3): see, for example, *Attorney General v Leeds Corpn* (para 31 above). Nor is such a nuisance inevitable in fact, as Romer LJ recognised in *Pride of Derby* (para 47 above). In the present case, it is accepted that the discharge of polluting effluent could be avoided by means of investment in improved infrastructure and better treatment processes.

114. The parties are accordingly correct to agree on this appeal that Parliament has not conferred authority on sewerage undertakers to cause a nuisance by discharging untreated sewage into watercourses. One would therefore expect that the victims of the nuisance retained a common law remedy. As Blackburn J explained in *R v Darlington Local Board of Health*, at p 526; ER p 928, where Parliament has not authorised the wrong, the right of action at common law has not been taken away. The effect of a provision in the form of section 117(5) or section 186(3) of the 1991 Act is therefore to preserve common law rights and remedies, as the Court of Appeal recognised in *Radstock Co-operative and Industrial Society Ltd v Norton-Radstock Urban District Council* [1968] Ch 605.

115. Sections 117(5) and 186(3), in setting limits to the authority conferred by the Act, are predicated on the existence of common law remedies where those limits are exceeded: otherwise, they would have no purpose. United Utilities seeks to meet that point by arguing that there are limited exceptions to the exclusion of common law remedies by the statutory machinery for enforcing the section 94 duty. It was suggested before Fancourt J that there might be cases where a claim in nuisance would not be excluded because the remedy for the matter of complaint did not involve the provision of new infrastructure. It is suggested on this appeal, echoing the reasoning in *Dobson,* that sections 117(5) and 186(3) have no effect in relation to matters involving the exercise of judgement, or cases where preventing the nuisance requires capital expenditure, but might preserve common law rights of action in relation to operational matters, and cases where preventing the nuisance requires current rather than capital expenditure. We are not persuaded that the effect of those sections has been so confined by the scheme of the 1991 Act. Nor are we persuaded that, as submitted by Mr Karas KC, the role of section 117(5) is simply to exclude the possibility that a sewerage undertaker might argue that the implied authority to discharge surface water and treated effluent into watercourses arising out of section 116 allows it routinely to discharge untreated effluent into watercourses. No doubt it has that effect, but that does not exhaust its role.

116. Furthermore, section 117(6) prohibits a sewerage undertaker from carrying out its functions under the relevant sections, including section 116, so as to create a nuisance. That is significant, because section 94(4) provides that the remedies available in respect of contraventions of obligations imposed on a sewerage undertaker by the following Chapters of Part IV of the Act shall be "in addition to any duty imposed or remedy available by virtue of any provision of this section or section 95 below and shall

not be in any way qualified by any such provision." The obligations referred to in that provision include the obligation imposed by section 117(6), which forms part of Chapter II of Part IV. Accordingly, remedies available at common law in respect of the creation of a nuisance in breach of that obligation are available in addition to any remedy available by virtue of section 94.

117. A further indication of the survival of common law rights can be found in section 186(7), quoted at para 66 above. That section provides for arbitration of the question whether the quality of water in a watercourse is injuriously affected by the exercise of powers under the relevant sewerage provisions, so that consent is required under section 186(3). Arbitration under that provision is at the option of the party complaining. Since there is no statutory remedy for such unauthorised injurious affection, one must ask: what is the purpose of the arbitration, unless there is a common law claim available to the party complaining? Further, giving the party complaining the *option* of arbitration strongly suggests that that person has an alternative, namely to enforce its rights of property, preserved by section 186(3) against injurious affection, by means of common law claims in the courts.

118. A further indication can be found in the limitations on the provision of compensation in the 1991 Act. On the interpretation of the 1991 Act advanced on behalf of United Utilities, Parliament has enacted a regime under which sewerage undertakers can, without parliamentary authorisation, discharge untreated sewage into watercourses, and which at the same time both deprives the owners of their common law rights to protect their property and also makes no provision for compensation for the injurious affection of that property.

119. Such an outcome would be surprising. As Mr de la Mare KC submits, a coherent statutory scheme is one in which a statutorily authorised interference with a right of property and the ouster of a private law remedy are balanced by a statutory scheme of compensation. A statutory scheme under which an interference with a right of property is not authorised, and under which compensation is not provided, but under which the private law remedy is nevertheless ousted, would be anomalous: see, for example, *Metropolitan Asylum District v Hill, Price's Patent Candle Co Ltd v London County Council, British Waterways Board v Severn Trent Water Ltd* and *Manchester Ship Canal (No 1),* as well as the recent decision of this court in *Fearn*. In that case Lord Leggatt, with whom Lord Reed and Lord Lloyd-Jones agreed, stated (para 122) that property rights are not absolute and that there are circumstances in which they may be subordinated to the general good of the community. But, he continued, it is fundamental to the integrity of a system of property rights that an individual whose rights are so infringed receive compensation therefor.

120. The anomalous nature of the interpretation urged on the court by United Utilities does not end there. According to its submission, as we have explained, the 1991 Act

ousts a private law remedy for the victims of a nuisance which has not been authorised, and does not provide them with any compensation, so that they are left without any remedy for the invasion of their rights (unless Ofwat chooses to intervene; and even then, such intervention, being prospective in effect, will leave unremedied the damage which has already been suffered). On the other hand, the same statute provides compensation for interferences with rights of property which *are* authorised. Section 180 provides:

> "Schedule 12 to this Act shall have effect for making provision for imposing obligations for the purpose of minimising the *damage caused in the exercise of certain powers conferred on undertakers* and for imposing obligations as to the payment of compensation." (Emphasis added)

The relevant paragraph in Schedule 12 is para 4 which provides:

> "(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 … of any of its powers under the relevant sewerage provisions*." (Emphasis added)

121. Section 180 and Schedule 12 therefore provide compensation for damage caused by the authorised acts of sewerage undertakers, but no compensation for damage caused by acts of sewerage undertakers which are unauthorised. If persons who suffer such damage are also deprived of a right of action which would otherwise be available to them at common law, the result is that the victims of unauthorised interferences with their property are treated less favourably than the victims of authorised interferences. Such a result would, as Mr de la Mare submitted, be perverse.

122. A further pointer against the interpretation urged on the court by United Utilities, if any were needed, is that it would mean that the 1991 Act had made a substantial change to the law, depriving the victims of a nuisance of the right of action which they enjoyed at common law. There are three reasons why that argument should be rejected.

123. The first is the fact that the 1991 Act is a consolidation statute. It is unlikely that a statute of that nature made important changes to the law as set out in the 1989 Act, for the reasons explained in para 53 above. Almost all the provisions which are relevant to this case – sections 94(1), 117(5), 117(6), 186(3) and 186(7), and paragraph 4 of Schedule 12 – are modified versions of provisions which not only appeared in the 1989 Act but have a much longer history, as we have explained. Section 18(8) is a more recent provision, in so far as it establishes a wider-ranging power of enforcement than

existed prior to the 1989 Act, but it expressly preserves existing common law rights of action, as we have explained. The second consideration is that the 1991 Act is detailed and elaborate. One would not expect that such a statute left an important change in the law to be a matter of implication. The third and most important consideration is the principle of legality: that fundamental common law rights, such as rights of action to protect private property, are not taken to be abrogated by statute in the absence of express language or necessary implication. Those three considerations were brought together by Lord Neuberger in *Manchester Ship Canal (No 1),* para 58, in a dictum which applies equally to the present case:

> "There is in my view a strong presumption that (i) private rights are only to be taken away by a statute by means of clear and specific words, and (ii) where a statute deals in considerable detail with the rights and obligations in a certain field, it is intended to be exhaustive – particularly where the legislation is both consolidating the law and giving effect to Law Commission recommendations."

124. The question whether common law remedies in trespass and nuisance have been preserved by the 1991 Act is put beyond doubt by section 18(8), which expressly preserves common law remedies that are available in respect of an act or omission which contravenes a condition of an appointment or licence or of a statutory or other requirement enforceable under that section, or causes or contributes to such a contravention, so long as the remedy does not arise "by virtue of [the act or omission] constituting, or causing or contributing to, such a contravention". Such an act or omission might, in particular, constitute a contravention of a duty imposed by section 94. But if the act or omission gives rise to remedies at common law which do not depend upon its also being a breach of the statutory duty, such common law remedies are not excluded by section 18(8). That subsection is, as Mr de la Mare submits, a qualified ouster of common law remedies and not an absolute ouster. Common law remedies remain available where a contravention of a condition of an appointment or licence, or of a statutory or other requirement enforceable under section 18, is not an essential ingredient of the cause of action.

125. One argument advanced against the survival of a common law remedy is that the grant of an injunction requiring a sewerage undertaker to provide sewerage infrastructure to abate the injurious affection caused by the discharge of untreated effluent into watercourses would cut across the operation of the statutory regime by which improvements to the sewerage infrastructure are prioritised. In this regime, which Mr James Haslett, United Utilities' Director of Wastewater Network Plus, describes in his witness statement, discussions between the Environment Agency, Ofwat and the relevant sewerage undertaker lead to the agreement of a five-year programme of service provision, including capital expenditure on improvements to the sewerage infrastructure, and the level of revenue through charges to customers which the

sewerage undertaker may impose to recoup such expenditure. It is said that it will often not be practical for a sewerage undertaker to incur significant additional capital expenditure to abate a nuisance in response to a private law claim.

126. Sewerage authorities also faced practical problems in the past. We have seen in the case law concerning the earlier legislation that courts were aware of the difficulties which public authorities faced in funding and carrying out improvements to their sewerage systems, and took them into account by postponing the operation of injunctions. The courts on granting a postponed injunction often gave the public authorities leave to apply in case practical problems arose.

127. The privatisation of the provision of sewerage services may have increased those practical difficulties because of the way in which the funding of capital expenditure in five-year programmes is agreed between the sewerage undertaker and Ofwat. The Secretary of State and Ofwat operate the provisions for the making of enforcement orders against sewerage undertakers under section 18 and following of the 1991 Act against the backdrop of the agreed five-year programmes. They have a discretion not to make an enforcement order when a sewerage undertaker gives an undertaking to take steps which they consider appropriate: section 19(1).

128. Against that background, we accept that the scheme of the 1991 Act, including this enforcement mechanism, might be disrupted if the court were to grant injunctions which required the sewerage undertaker to spend large sums to create 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 consequent charges imposed on the sewerage authority's customers. In this regard we note Mr Haslett's evidence, quoted by Nugee LJ at para 25 of his judgment in the Court of Appeal, but as yet untested, that funding for a particular project can only be raised by increasing customers' bills or by diverting resources from other projects, and that the regulatory regime provides a sophisticated way of identifying the projects to be prioritised.

129. Nonetheless, in the context of the statutory provisions which we have discussed, this potential incompatibility does not provide a basis for the exclusion of the causes of action at common law which those provisions preserve. The incompatibility may militate against the court, in the exercise of its discretion, granting injunctions which require the upgrading of a sewerage system. But it does not follow from a court's conclusion that it should not grant such an injunction that a remedy in damages is also excluded. In *Lawrence*, Lord Neuberger, delivering the leading judgment, adopted a flexible approach to the award of damages in lieu of granting an injunction and recognised the relevance of the public interest in the choice of remedy for a private wrong (paras 116-124). Similarly, in *Fearn* Lord Leggatt stated that the public interest is a relevant factor not in relation to liability for nuisance but in relation to the

appropriate remedy, the selection of which, following *Lawrence*, involves an exercise of judicial discretion (para 120).

130. There is therefore no basis for excluding a common law claim or an award of damages at common law. Further, as explained in para 7 above, section 50 of the Senior Courts Act 1981 provides that the Court of Appeal or the High Court may make an award of damages "in addition to, or in substitution for," an injunction or specific performance where the court has "jurisdiction to entertain an application for an injunction or specific performance". As a result, the court has the power at common law to award damages for past invasions of property rights, and the power in equity to award damages for future or repeated invasions of those rights: see *Jaggard v Sawyer* [1995] 1 WLR 269, 276-277 ("*Jaggard*"). The power to award damages is not curtailed when a court exercising its discretion does not grant an injunction. So long as the court has jurisdiction to grant an injunction, it may award such damages under section 50: see the fourth and fifth propositions of Millett LJ in *Jaggard*, pp 284-285, and *One Step (Support) Ltd v Morris-Garner and another* [2018] UKSC 20; [2019] AC 649, para 45. In our view the 1991 Act does not remove that jurisdiction. It constrains by implication the court's exercise of its discretion as to the grant of injunctions which would be inconsistent with the operation of the statutory mechanisms for the allocation of capital expenditure and the enforcement of the section 94 duty, but it does not remove the court's jurisdiction. In so far as the court is implicitly constrained by the scheme of the 1991 Act from granting such an injunction, it has the power to award damages both at common law and, in equity, in substitution for the injunction.

131. Subject to our consideration below of the decision of the House of Lords in *Marcic*, we are accordingly of the view that, even if there may well be cases where it is not appropriate to grant an injunction as a remedy for claims of nuisance or trespass concerning the pollution of watercourses by sewerage undertakers, a remedy can nevertheless be given in such cases in the form of an award of damages. Such an award does not cut across the statutory scheme in the 1991 Act: on the contrary, it gives effect to express provisions in that Act, including sections 117(5) and 186(3). Further, the award of damages does not force the sewerage undertaker to depart from the prioritisation of capital investment on improvements to the sewerage system which it has agreed with the regulatory authority. The award of damages vindicates the property rights in relation to watercourses until the sewerage undertaker is in a position, with the approval of Ofwat, to invest in a long-term solution to prevent the harm to the claimant's property. A successful claim for damages for an incident or incidents of pollution of a watercourse will impose costs on a sewerage undertaker; but the effect is merely to prevent it from externalising the costs of its operations by leaving them to be borne by the victims of its unlawful behaviour.

132. The circumstances of this case are readily distinguishable from cases to which we were referred such as *Deutsche Morgan Grenfell Group plc v Inland Revenue Comrs* [2006] UKHL 49; [2007] 1 AC 558 and *R (Child Poverty Action Group) v Secretary of*

State for Work and Pensions [2010] UKSC 54; [2011] 2 AC 15, where it has been held that a parliamentary regime, by creating special rights and remedies, has displaced common law rights and remedies. First, those cases did not engage the principle of legality in the interpretation of the relevant statutes and, secondly, in each there was an inconsistency between the statutory regime and the continuation of the common law remedy otherwise available. Such an inconsistency is an essential element of an ouster of a common law remedy: *Revenue and Customs Comrs v Total Network SL* [2008] UKHL 19; [2008] 1 AC 1174, para 130 per Lord Mance. Any inconsistency could only arise in the present context in respect of the choice of remedy, in circumstances where the grant of an injunction would conflict with the statutory regime as we have explained. Even in those circumstances, there can be no inconsistency in respect of an award of damages for the injurious affection of a watercourse, pending the upgrading of the sewerage infrastructure.

133. In summary, the 1991 Act contains no express ouster of all common law causes of action and remedies to protect the enjoyment of the property of the persons to whom section 186(3) refers, ie those who would have been entitled by law to prevent or be relieved from the injurious affection of the watercourse. Nor do the provisions of the Act oust those rights and remedies by necessary implication. On the contrary, sections 117(5) and (6) and 186(3) and (7) envisage that the common law rights survive and that a common law remedy remains available to protect those property interests. Those provisions are consistent only with the preservation of a common law remedy for polluting discharges. A further factor pointing in that direction is the incoherence of the statutory arrangements that provide compensation for damage if those common law rights and remedies were removed: para 121 above. The only ouster, by section 18(8), is of causes of action of which a contravention of a condition of an undertaker's appointment or licence, or of a statutory or other requirement enforceable under that section, forms an essential ingredient. A cause of action in trespass or nuisance brought against a sewerage undertaker on the basis of the discharge of polluting effluent from its sewers, sewage treatment works or associated works into a watercourse does not normally include, as an essential ingredient, the contravention of a statutory requirement, and in those circumstances is therefore not excluded.

134. It is necessary finally to consider whether this conclusion can be reconciled with the decision of the House of Lords in *Marcic*.

(ii) Whether the decision of the House of Lords in Marcic can be distinguished from the current case?

135. The court sat in an enlarged constitution on this appeal because it was thought that it might be necessary to consider whether to depart from the decision in *Marcic.* In the event, however, it is clear that that decision can readily be distinguished. We can deal with the point briefly, in the light of our earlier discussion of *Marcic* at paras 82-

90, 95 and 105 above. First, unlike in the present case, Mr Marcic's unfortunate circumstances did not engage the statutory provisions which limit the authority of a statutory undertaker to discharge effluent into watercourses and require the consent of interested parties to the injurious affection of those watercourses; nor did the House of Lords address those provisions, since they were not relevant to the outcome of the appeal. Secondly, again in distinction to the present case, Thames Water were not alleged to have created or adopted the nuisance caused by the escape of sewage on to Mr Marcic's property. They were said to be liable for continuing the nuisance, by failing to take reasonable steps to avert it by constructing a new sewer. Previous authorities established that a duty to construct a public sewer could only arise under statute. Furthermore, the question whether it would have been reasonable to construct a new sewer could not be determined by the court consistently with the regime created by the 1991 Act. Accordingly, the duty to build more sewers arose only under section 94(1) of the 1991 Act, and the performance of that duty could only be enforced by proceedings under section 18.

136. That decision has no bearing on the present case. United Utilities is responsible for discharges of noxious effluent into watercourses from its sewers, sewage treatment works and associated works which occur as a result of its sewerage system operating as it is designed to do when its hydraulic capacity is exceeded. United Utilities points to the fact that the connection of more homes to the sewerage system leads to the system being overloaded and results in more effluent being discharged into the canal more frequently. But that is not what gives rise to the cause of action in nuisance. If the discharges constitute a trespass (a matter on which we express no view), United Utilities is the body responsible for the commission of that tort. If the discharges constitute a nuisance, that is something which United Utilities has caused or adopted, since its sewerage system is designed in a way that deliberately involves the discharge of effluent into the canal when the hydraulic capacity of the system is exceeded. Its liability does not depend on the application of the *Sedleigh-Denfield* principle, ie on establishing that it has failed to take reasonable steps to prevent a hazard on its land from causing a nuisance. Unless the commission of the tort has been authorised by Parliament, or common law rights of action have been excluded, the Canal Company therefore has a cause of action. As we have explained, the 1991 Act does not authorise the commission of such a tort; and it does not exclude a common law right of action.

6. Conclusion

137. We would allow the Canal Company's appeal.