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How has the *Manchester Ship Canal* decision changed existing thinking on private law and environmental protection, and how do you advise your clients?

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Overview

(1) The decision –background & judgment

(2) When does *Marcic* still apply?

(3) Private nuisance

` (4) Remedies

(5) Implications of the decision

The decision –background and judgment

- Manchester Ship Canal: a canal running from Manchester to the Mersey Estuary
- Constructed pursuant to the Manchester Ship Canal Act 1885.
- Manchester Ship Canal Company (the Claimant/Appellant) is the owner of the beds and banks of the canal.
- United Utilities Ltd (the Defendant/Respondent) is the sewerage undertaker for the North West of England.

The previous decisions in the litigation

- *Manchester Ship Canal Co Ltd v United Utilities Water Plc* [2014] UKSC 40 (sewerage undertaker under WIA 1991 had statutory right to discharge water and treated effluent into the canal from outfalls predating WIA 1991).
- Then declaratory proceedings re discharges allegedly in breach of the 'foul water proviso' in s.117(5) WIA 1991:

> *"Nothing in sections 102-109 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."*

The main issue and the lower courts' decisions

- Key issue: whether UU requires the consent of MSCL to discharge foul water into the canal (and must therefore pay for a licence) or can discharge without consent and free of charge because MSCL is precluded by the Water Industry Act 1991 from bringing actions in nuisance or trespass.

- CA: [2022] EWCA Civ 852 & ChD: [2021] EWHC 1571 (Ch) –granted UU's declaration.
- They regarded themselves as bound by the House of Lords' decision in *Marcic v Thames Water Utilities Ltd* [2004] 2 AC 42.

The key question for the Supreme Court

Q. 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, sewerage treatment works and associated works excluded by the 1991 Act?

A: No

Supreme Court's reasoning

- Starting point: the owner of a watercourse/riparian owner has a right of property in the watercourse, including a right to preserve the quality of the water, protected by the common law of tort (J109).
- There is "*no doubt*" that the discharge of polluting effluent from sewers (etc) 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*" (J110).
- The question of whether a common law claim arising out of "*an interference with property rights*" by the discharge of sewerage is excluded is a question of statutory interpretation (J109).

Supreme Court's reasoning cont'd

- WIA 1991 is a consolidating Act. It cannot be understood without reference to the state of the law as it was when it was enacted (J110). Summary of the key points of the law pre-1991 set out in J50.
- WIA 1991 does not authorise sewerage undertakers to cause a nuisance or trespass by discharging untreated effluent into watercourses (J111).
- S.186 WIA envisages that common law rights survive and a common law remedy remains available (J133).

Supreme Court's reasoning cont'd

- The conclusion that the WIA 1991 did not authorise a nuisance or trespass by discharging untreated effluent into watercourses also followed from applying the inevitability test in *Allen v Gulf Oil Refining Ltd* [1981] AC 1001.
- Discharge of untreated effluent into watercourses cannot be taken to be the "*inevitable consequence*" of UU's performance of its powers and duties under WIA 1991 (UU accepted it could be avoided through investment in improved infrastructure/better treatment processes) (J113).

Supreme Court's reasoning cont'd

- Removal of common law rights without compensation would be surprising (J118-119).
- Especially in a consolidating statute which made detailed and elaborate provision for this area of law (J123).
- Principle of legality: fundamental common law rights, such as rights of action to protect property, are not taken to be abrogated by statute in the absence of express language or necessary implication.

(2) When does *Marcic* still apply?

Q: Can the decision of the House of Lords in Marcic be distinguished from the present case?

A: Yes – Marcic can be "readily distinguished"

- (1) Marcic not about limits on undertakers' statutory authority.
- (2) Thames Water were not alleged to have created or adopted the nuisance, but said to be liable for continuing it by not taking reasonable steps to avert it by constructing a new sewer.
- (3) Q of whether it would have been reasonable to construct a new sewer could not be determined by the court consistently with the regime under WIA 1991.

Marcic confined to accidental capacity-related "escapes" of sewage

- *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 –liability based on a failure to take reasonable steps to avert a nuisance.

(3) Private nuisance

- *Fearn v Board of Trustees of the Tate Gallery* [2024] AC 1

(1) Tort to land;

(2) Evaluative judgment whether D's use of land has caused (a) a substantial interference with (b) the ordinary use of C's land;

(3) Objective test of whether interference is substantial;

(4) No liability for "ordinary use" of land;

(5) No freewheeling assessment of reasonableness;

(6) Planning permission/environmental permit not a defence.

Continuing nuisances

- *Jalla v Shell International Trading and Shipping Co Ltd* [2024] AC 595.
- Continuing nuisances: repeated activity by D, or an ongoing state of affairs for which D is responsible, which causes continuing undue interference with the use and enjoyment of C's land.
- E.g repeated discharges of effluent into a watercourse, but not pollution caused by a one-off spill.

Three types of liability of nuisance

- MSCCL explains that there are three types of liability for nuisance:
- The person who created the nuisance;
- The person who adopts the nuisance; and
- The person who continues the nuisance i.e. failed, with actual or constructive knowledge of the state of affairs which resulted in the nuisance, to take reasonable steps to prevent it.

(4) Remedies

- WIA 1991 "*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 but for the allocation of capital expenditure and enforcement of the section 94 duty but it does not remove the court's jurisdiction*" (J130).
- Injunctive relief remains available in principle.
- Damages at common law or in equity may be awarded in lieu (J130).

Measure of damages –*MSCCL v UU No.3?*

- A key question left open by the Supreme Court is how should damages in lieu be calculated?
- Diminution in value or negotiating damages *(Morris-Gerner v One Step (Support) Ltd* [2019] AC 649)?
- Fancourt J [95]
- *"The quantum of damages … would be determined by assessing the sum that UU and MSC would reasonably negotiate for the grant to UU of the necessary rights. That assessment will be informed by the cost that UU would have to incur to avoid any incident of foul discharge into the Canal, and so will reflect the cost of building a better sewerage system. The damages would be likely to be substantial and, in a given case, could be replicated many times over as a result of cases brought by numerous affected riparian owners. The resources of the statutory undertaker, funded by the consumers, will as a result be being diverted from expenditure approved under the regulatory scheme, and, regardless of payment of damages, the larger environmental objectives will not be being achieved".*

Measure of damages Cont'd

- Did the Supreme Court hint at lower damages awards?
- *"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 prioritization 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 externalizing the costs of its operations by leaving them to be borne by the victims of its unlawful behaviour"* (J131).

(5) Implications

- Common law remedies in respect of discharges (etc) not authorised under WIA 1991 remain available to affected landowners.
- But distinction remains between a cause of action where ‘essential ingredient’ is that authority has not complied with general s.94 duty (e.g. in providing new/improved sewers) and those where it is not.

Unanswered questions

Nuisance or trespass? (Court did not express a view on trespass J 136)

Nuisance: what is the interference with the use/enjoyment of MSCL's property? Assumed rather than evidenced.

Causation: how do you prove what caused the alleged interference with use/enjoyment if more than one potential source?

Damages in lieu of an injunction: on what basis should they be calculated?

Need for a legislative response?

Advice to undertakers

- Discharges operate under an environmental permit.
- Permit does not authorise a nuisance but may be relevant to any remedy.
- Compliance or otherwise with permit (and any assessments underpinning its terms) might also be relevant to whether there has been an interference.

Advice to claimants

- MSCCL does not establish any general rights to prevent the discharge of untreated sewerage: it relates only to property based torts.
- However, the groups of potential “property” claimants could be extensive and include riparian owners.
- Group litigation by property owners (e.g. River Wye) may serve similar purpose to a public law environmental claim.
- Proving causation and substantial interference may be difficult.

The common law responding to modern environmental problems

- Judicial review of regulators isn't a promising route to prevent pollution given broad regulatory discretion: see e.g. R (River Action) v EA [2024] EWHC 1279 (Admin).
- New Zealand Supreme Court in *Michael John Smith v Fonterra Co-op Grp Ltd* [2024] NZSC 5:
- "The common law has not previously grappled with a crisis as all-embracing as climate change. But in the 19th and early 20th centuries it had to deal with another existential crisis, albeit one of lesser scale, when the industrial revolution dramatically enlarged the risk of accidents through the mechanisation of factories, transportation and mining. The law's response was a mixture of the flawed (e.g. the common employment rule restricting claims by employees for injury) and the inspired (e.g. the duty of care based on neighbourhood, expounded by Lord Atkin in Donoghue v Stevenson). Importantly, where the common law's response proved flawed, it was revised by the legislature either enlarging or limiting its reach (e.g. via the Factory Acts, workers' compensation and ultimately in this country by the accident compensation scheme)." [156]

Thank you

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