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Group Actions

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Manchester Ship Canal (No.2) and Group Litigation

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The Supreme Court in *Manchester Ship Canal (No.2)* [2024] UKSC 22 has decided that a riparian owner will have a right of action in private nuisance against a water company for discharge of foul water, without needing to show the water company's negligence or deliberate misconduct. This is a substantial clarification of *Marcic v Thames Water Utilities Ltd* [2003] UKHL 66, which (it was thought) decided that such claims were barred against sewerage undertakers by the existence of the statutory scheme following privatisation. This decision may mark the beginning of group litigation against sewerage undertakers for discharging untreated sewage into rivers and canals.

INTRODUCTION

1. The Supreme Court has decided that owners of watercourses will have a claim in nuisance for discharge of sewage into watercourses, without having to prove that the discharge was negligent.

2. It was previously thought that common law claims for discharge of inadequately treated effluent into watercourses was barred where the defendant did nothing to cause it, and there was nothing they could do to prevent it except by carrying out improvements to the sewerage system. This position was thought to derive from the role of water companies as sewerage undertakers under the Water Industry Act 1991 (the "**1991 Act**").

3. This orthodox position was based on *Marcic v Thames Water Utilities Ltd* [2003] UKHL 66, and was adopted by Fancourt J in *Manchester Ship Canal (No.2)* at first instance ([2021] EWHC 1571 (Ch) at [80]–[83]). The Court of Appeal agreed ([2022] EWCA Civ 852), describing the effect of *Marcic* as being that (at [45]):

> *"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."*

DECISION OF THE SUPREME COURT

4. A 7-strong bench of the Supreme Court decided 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. 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 (at [108]–[109]).

5. Further, the 1991 Act does not authorise sewerage undertakers to cause a nuisance or to trespass by discharging untreated effluent into watercourses (at [111]). Such discharge cannot be taken to be the inevitable consequence of the performance of the powers and duties imposed on sewerage undertakers by the 1991 Act (at [113]).

6. Because Parliament has not authorised that nuisance, the common law causes of action survive – the 1991 Act contains no express or implied ouster of all common law causes of action and remedies (at [133]). In particular, the Supreme Court rejected the argument that a cause of action

should not arise because of the need to carry out capital improvements to sewerage facilities, noting that although in such circumstances an injunction may (on the facts) be inappropriate, that does not mean an award of damages should be excluded (at [125]–[129] and [131]).

7. The Supreme Court distinguished *Marcic* rather than overruling it. Following an extensive review of authorities going back to the early Victorian period, the Supreme Court noted a distinction between two situations (at [50] and [86]):

    a. An 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:

    b. Cases where sewage is discharged from outlets or channels which were built for the purpose of carrying it away.

8. In *Marcic*, Mr Marcic's property was repeatedly flooded by surface water in heavy rain. That surface water also entered a foul water sewer so that it 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. As such, on proper analysis, *Marcic* was a case concerning failure to construct a new sewer, not a case concerning discharge of noxious effluent into watercourses, and had no bearing on the situation in *Manchester Ship Canal (No.2)* (at [135]–[136]).

9. As such, United Utilities failed to obtain a declaration that the Canal Company had no right of action against it in trespass and nuisance. It seems likely the Canal Company will now issue those proceedings, but it remains to be seen what any proceedings on this right of action will look like.

POTENTIAL FOR GROUP LITIGATION

10. The Supreme Court raises a number of interesting points concerning the interplay of common law rights with public authorities operating under statutory schemes. However, the most immediate consequences are that sewerage undertakers that have discharged untreated sewage into watercourses are now potentially liable in damages for doing so.

11. In *Manchester Ship Canal (No.2)* the parties were an individual landowner and a utilities company, but there may in future be large-scale group actions bought by the owners of watercourses and riparian owners downstream from the emissions. As the Supreme Court hinted in its references to *Allen v Gulf Oil Refining Ltd* [1981] AC 1001, such claims are likely to draw inspiration from oil spill cases, the most significant being the decisions in the *Jalla v Shell International Trading and Shipping Co Ltd* litigation, most obviously [2021] EWCA Civ 1389.

12. The size of the potential claimant pool may be relatively limited. Although individuals with non-proprietary rights might sue under Article 8 ECHR, any group claim would likely centre on the claims of riparian owners or some other proprietary right in the watercourse. This is not least because damages awarded at common law to proprietary owners have been said to normally constitute just satisfaction under section 8(3) Human Rights Act 1998 to those using the land without proprietary rights in it, particularly when

combined with a declaration that the Article 8 rights of the user have been infringed (*Dobson v Thames Water Utilities Ltd* [2009] EWCA Civ 28).

13. As ever in such cases, there is an issue as to what procedural mechanism is apt, and both potential claimants and defendants will have to reckon with this issue. This usually starts with the vexed question of whether class members can be said to have the "same interest" for the purposes of a representative action under CPR 19.8.

14. This will be fact-dependant, but *Jalla v Shell International Trading and Shipping Co Ltd* is a good indication that nuisance claims arising from an emission from the same source but giving rise to different issues of causation and loss are not suitable for representative actions (see [49]–[59]), and the GLO route is preferred. The Court noted that while an injunction may mean the parties have the same interest, claims for damages are likely to make different claimants' interests divergent.

15. This analysis may be particularly apposite in sewage discharge cases where damage to water quality may be due to multiple individual discharges rather than one large spill (raising potentially distinct issues of factual causation and limitation between claimants), and there is likely to be most acute damage near the discharge site rather than far downstream. There will also be a difference in loss where there has been a loss of use and enjoyment versus where there are commercial interests that have lost profit.

16. Another procedural route that may be adopted is the so-called "bifurcated" process set out in *Lloyd v Google* [2021] UKSC 50 *"whereby common issues of law or fact are decided through a representative claim, leaving any issues which require individual determination whether they relate to liability or the amount of damages to be dealt with at a subsequent stage of the proceedings"* (at [81]). Certain situations may lend themselves to an approach by which the facts

relating to a discharge are ascertained in a representative claim, and individual causation and loss is left to individual claimants.

17. Much will depend on the precise composition of the claimant group and the causes of action open to each: whether the watercourse's owner, the owner of some other actionable right, or whether the group involves claimants with non-proprietary rights suing for just satisfaction for breach of Article 8 ECHR.

CONCLUSION

18. *Manchester Ship Canal (No.2)* has clarified that the 1991 Act does not prevent a riparian owner from suing a sewerage undertaker in nuisance or trespass when untreated sewage is discharged into their watercourse. Individuals downstream of these discharges may well be tempted to use this right of action in a group claim against the polluting party. Litigants will need to consider carefully the practical and procedural issues in bringing and defending such claims.

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