2 July 2014

PRESS SUMMARY

The Manchester Ship Canal Company Ltd and another (Respondents) v United Utilities Water Plc (Appellant)
The Manchester Ship Canal Company Ltd (Respondent) v United Utilities Water Plc (Appellant) [2014] UKSC 40
On appeal from [2013] EWCA Civ 40

JUSTICES: Lord Neuberger (President), Lord Clarke, Lord Sumption, Lord Hughes, Lord Toulson

BACKGROUND TO THE APPEALS

The question at issue on this appeal is whether, under the Water Industry Act 1991, a sewerage undertaker has a statutory right to discharge surface water and treated effluent into private watercourses such as the Respondents' canals without the consent of their owners and, if so, whether the right extends to any sewer or only to those which were in existence in 1991 when new sewerage legislation was passed. This depends on the construction of the Water Industry Act 1991, a consolidating Act which was passed in order to tidy up the statute law relating to water and sewerage services. It consolidates with amendments the provisions of the Act of The Water Industry 1989, together with a number of other statutes concerned with water management. At the same time, the Water Consolidation (Consequential Provisions) Act 1991 repealed a number of earlier statutory provisions, including some thought to be "spent and unnecessary". It is on these changes that the issues on this appeal turn.

JUDGMENT

The Supreme Court unanimously allows the appeal to the extent of declaring, in accordance with the second possibility, that subject to section 117(5) of the Water Industry Act 1991, the Appellants are entitled to discharge into the Respondents' canals from any sewer outfall which was in use on or before 1 December 1991. The leading judgment is given by Lord Sumption.

REASONS FOR THE JUDGMENT

- Discharge into a private watercourse is an entry on the owner's land, and as such is an unlawful trespass unless it is authorised by statute. It is common ground that no express statutory right is conferred by the Water Industry Act. The question is therefore whether it should be implied. A statutory right to commit what would otherwise be a tort may of course be implied. But since this necessarily involves an interference with the rights of others, the test has always been restrictive. The implication must be more than convenient or reasonable. It must be necessary. As a general rule, this will involve showing either that the existence of the power is necessarily implicit in the express terms of the statute, or else that the statutory purpose cannot be effectually achieved without the implication. In particular 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 **[2]**.

- There are two bases on which a right of discharge into private watercourses might be implied into the current statutory regime. The first is that a right corresponding to the one recognised

by the Court of Appeal in *Durrant v Branksome Urban District Council [1897] 2 Ch 291* under earlier legislation is implied into the corresponding provision of the Water Industry Act 1991. In particular section 159 (which confers a power to lay pipes). The effect of such an implication would be to authorise discharge from future sewage outfalls as well as from those already in use when the Water Industry Act 1991 came into force. The second possibility is that the only right of discharge into private watercourses which survives under the Act of 1991 is a right of discharge from existing outfalls which were already in use on 1 December 1991 when the Act came into force **[12]**.

- The first basis must be rejected because the language and scheme of the current legislation differs significantly from that of the legislation in force at the time of *Durrant's Case*. However, a right of discharge, limited to outfalls from sewers in existence when the Act of 1991 came into force, exists on the second basis. When the Water Industry Act 1991 (i) imposed on the privatised sewerage undertakers duties which it could perform only by continuing for a substantial period to discharge from existing outfalls into private watercourses and (ii) at the same time applied to them the statutory restrictions in section 116 on discontinuing the use of existing sewers, it implicitly authorised the continued use of existing sewers. A restriction on discontinuing the use of an existing sewer until an alternative has been constructed is not consistent with an obligation to discontinue its use forthwith under the law of tort. The inescapable inference is that although there is no provision of the Act of 1991 from which a general right of discharge into private watercourses can be implied, those rights of discharge which had already accrued in relation to existing outfalls under previous statutory regimes survived **[19]**.

- Lord Sumption rejects the suggestion that this conclusion leaves the owners of private watercourses in a worse position than under the Water Act 1989, because of the more limited provisions for compensation for "damage" and the more limited protections available against abuse. It does not, he considers, give rise to difficulty if a more limited right to continue discharging from existing outfalls into private watercourses is to be implied from the restrictions in section 116 on discontinuing the use of existing sewers **[22]**.

- In a concurring judgment, Lord Toulson concludes that the answers to the questions in this case are to be found within the sections of the 1991 Act. There is, in Lord Toulson's opinion, no need to go back to examine the position under the 1989 Act. There is no claim for damages for trespass during the period when the 1989 Act was in force. However, if it were necessary to do so, he would conclude that there was no trespass during that period **[36]**.

- In a further concurring judgment, Lord Neuberger identifies two questions in the appeal. The first question is whether sewerage undertakers have such a right in relation to all their sewers, irrespective of when they came into use – i.e. present and future sewers. The second question, which only arises if the answer to the first question is no, is whether sewerage undertakers have such a right in relation to any of their sewers, and, if so, whether it is those which were in use immediately before (i) the transfers effected pursuant to the Water Act 1989 or (ii) the coming into force of the Water Industry Act 1991 **[38]**. In Lord Neuberger's view the composite answer to these questions is that sewerage undertakers have the statutory right to discharge surface water and treated effluent into streams and canals (subject to payment of compensation for any damage thereby caused), but only in respect of outfalls in existence before the coming into force of the 1991 Act. He agrees with the reasons given by Lord Sumption and Lord Toulson although would place greater weight on the provisions of the earlier legislation relating to public sewers and the Interpretation Act 1978 **[39]**.

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:
www.supremecourt.uk/decided-cases/index.html