Trinity Term
[2014] UKSC 40
On appeal from: [2013] EWCA Civ 40

JUDGMENT

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)

before

Lord Neuberger, President
Lord Clarke
Lord Sumption
Lord Hughes
Lord Toulson

JUDGMENT GIVEN ON

2 July 2014

Heard on 6-7 May 2014

Appellant
Jonathan Karas QC
Julian Greenhill
Richard Moules
James McCreath
(Instructed by Pinsent Masons LLP)

Respondent
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Intervener
Stephen Tromans QC
Catherine Dobson
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Intervener (The Middle Level Commissioners)
Charles Morgan
Laura Elizabeth John
(Instructed by Taylor Vinters)

Intervener
Douglas Edwards QC
Richard Honey
(Instructed by Anglian Water Services Limited)

LORD SUMPTION (with whom Lord Clarke and Lord Hughes agree)

Introduction

1. The question at issue on this appeal is whether a sewerage undertaker under the Water Industry Act 1991 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.

2. 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: *Manchester Corporation v Farnworth* [1930] AC 171, 183 (Viscount Dunedin), *Allen v Gulf Oil* [1981] AC 1001, 1013 (Lord Wilberforce).

The law before 1991

3. It has been said that a court "should not routinely investigate the statutory predecessors of provisions in a consolidation statute": *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, 388 (Lord Bingham of Cornhill). This is not so much a rule of construction as a valuable warning against the over-ready assumption that a consolidating Act means exactly the same as the enactments which it replaces. There are, however, cases where a consolidating Act cannot be understood without reference to the state of the law as it was when it was enacted. This is one of them.

4. Until 1973, sewerage services in England were generally provided by local authorities, initially under powers conferred by local Acts of Parliament and then under powers successively conferred by the Public Health Acts of 1848, 1875 and

1936. The Water Act 1973 transferred the sewerage and water supply functions of local authorities to statutory regional water authorities. The Water Act 1989 privatised the water industry, transferring the sewerage and the water supply functions of the regional water authorities to commercial water undertakers and sewerage undertakers, and comprehensively restated the powers and duties of those charged with these functions. The Water Industry Act 1991 is a consolidating Act which was passed on the recommendation of the Law Commission in order to tidy up the statute law relating to water and sewerage services. It consolidates with amendments the provisions of the Act of 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": see section 3(1). It is on these changes that the issues on this appeal turn.

5. No right to discharge from public sewers into private watercourses has ever been expressly conferred by statute. It is, however, common ground that such a right existed at least until 1989 and was the basis on which the industry operated for many years. In *Durrant v Branksome Urban District Council* [1897] 2 Ch 291, the Court of Appeal held that a right to discharge surface water and treated effluent into private watercourses was impliedly conferred on local authorities by the Public Health Act 1875. Section 15 of that Act imposed on local authorities a duty to cause such sewers to be made as might be necessary for effectually draining their district. The extent of that duty was largely demand-led. This was because section 21 entitled any owner or occupier of premises in a local authority's area to connect to a public sewer, and section 18 provided that a local authority should not be entitled to discontinue the use of a sewer unless it made available another sewer which was as effectual for the use of those served by the existing one. The critical sections from which the Court of Appeal derived the right of discharge into private watercourses were sections 16 and 17. Section 16 empowered a local authority to "carry any sewer" through, across or under any street or road or, on notice to the owner or occupier, any land within their district. Section 17 was a proviso in the following terms:

> "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."

The Court of Appeal did not say that an implied right of discharge into private watercourses was necessary to the efficacy of a local authority's statutory powers and duties. Nor did they derive it from the mere existence of a power under section 16 to lay sewage pipes through streets, roads or private land. Since the Public Health

Act 1875 conferred extensive powers of compulsory purchase on local authorities for the purpose of enabling them to perform their sewerage functions, neither point would have been sound. What they said, adopting the reasoning of North J, the trial judge, was that the right of discharge was implicit in the express terms of section 17, which by restricting the right to discharge foul water into any watercourse impliedly recognised the existence of a right to discharge treated effluent and surface water: see pp 295 (North J), 302 (Lindley LJ), 303 (Lopes LJ), 304-305 (Chitty LJ). There was no provision requiring local authorities to pay for mere exercise of their rights under sections 16 and 17, but they were required by section 308 to pay "full compensation" for any "damage" caused by the exercise of any of their powers. This was held to be a sufficient answer to any objection based on the adverse effect on property owners.

6. All of the features of the Public Health Act 1875 on which the Court of Appeal relied in *Durrant's Case* were reproduced in the Public Health Act 1936, which replaced the earlier Act and continued to govern the sewerage powers of local authorities and then of the regional water authorities and privatised sewerage undertakings until 1991. In particular section 17 of the Act of 1875 (the protection against discharges of foul water) and section 308 (the compensation provision) were re-enacted with no material changes as sections 30 and 278 of the Act of 1936.

7. When the water industry was privatised by the Water Act 1989, the transfer of sewerage functions and associated assets, rights and duties from the regional water authorities to the new sewerage undertakers was achieved by section 4 of the Water Act 1989 and by schemes made under that section. The object of the schemes was to transfer the "property, rights and liabilities" of the regional water authorities: see section 4(1). Their contents were regulated by Schedule 2, paragraph 2(1) of which provided that with effect from the "transfer date" the scheme would transfer to the privatised undertakers in accordance with its provisions all the property, rights and liabilities of the statutory water boards which were not required to be transferred to the National Rivers Authority. In accordance with that provision, the transfer scheme in this case transferred to the undertaker "on the transfer date all property, rights and liabilities to which the water authority is entitled or subject immediately before that date." The object of these provisions is to achieve a seamless transfer of the relevant functions, assets, powers and duties to the new undertakers. Under section 4(1), the Secretary of State was empowered to appoint the "transfer date" on which the functions of the regional water authorities would be transferred to the new undertakers and the transfer schemes would come into effect.

8. Section 194(3)(b) of the Water Act 1989 provided that among other provisions Part II, Chapter III (Provision of Sewerage Services) should automatically come into force on the transfer date, i.e. simultaneously with the transfer of the rest of the undertaking. Part II, Chapter III included all the relevant provisions governing the duties of the privatised sewerage undertakers. These

included sections 67 and 69. Section 67 imposed on the privatised sewerage undertakers the duty of effectually draining their area. Section 69 provided that Schedule 8 should "have effect for transferring to sewerage undertakers the functions of water authorities relating to the provision of sewerage services and for making amendments of the enactments relating to the transferred functions." Subject to immaterial amendments, Schedule 8, paragraph 1 applied to the privatised sewerage undertakers certain of the provisions of the Public Health Act 1936 which had governed the powers of the regional water authorities since their inception in 1973, as if references in those provisions to a water authority were references to a sewerage undertaker. The incorporated provisions of the Act of 1936 included section 22 (which prevented them from discontinuing the use of a sewer without providing an alternative sewer), section 30 (the protection against the discharge of foul water into watercourses), section 34 (the right of the owner or occupier of any premises to void his drains or sewers into a public sewer) and section 278 (the obligation to make full compensation for any damage sustained by the exercise of the undertaker's powers). These provisions included all the provisions of the 1936 Act previously found in the Act of 1875 from which the Court of Appeal in *Durrant's Case* had derived a general right of discharge into private watercourses. The draftsman must therefore have intended in 1989 that that right should subsist.

The legislation of 1991

9. All of these features can be traced through the labyrinthine scheme of amendments, repeals and re-enactments into the legislation of 1991, but with significant changes of both form and context. Section 94 of the Water Industry Act 1991, which corresponds to section 15 of the Act of 1875, provides:

> "(1) 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 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."

Sections 106 and 116 re-enact the provisions originally found in sections 21 and 18 respectively of the Act of 1875 conferring a right on owners and occupiers of

premises to connect to a public sewer and forbidding local authorities to discontinue the use of a sewer without providing another equally effective sewer for the use of those served by it. Sections 158 and 159 substantially re-enact the power to lay pipes across streets, roads and other land which dated back to section 16 of the Act of 1875.

10. The protection against the use of the powers conferred by the Act to discharge foul water into any watercourse, which was originally enacted as section 17 of the Act of 1875 and section 30 of the Public Health Act 1936, is now to be found in modified form in section 117(5) and (6) of the Water Industry Act. These provide:

> "(5) 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-
>
> (a) in contravention of any applicable provision of the Water Resources Act 1991; or
>
> (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.
>
> (6) 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."

11. The provision for compensation for "damage" caused by any exercise of sewerage powers, which had originally been found in section 308 of the Act of 1875 and section 278 of the Act of 1936, is now represented by the provisions of Schedule 12 of the Water Industry Act 1991, which are at the same time more specific and more elaborate. Paragraph 2 of Schedule 12 is confined to the pipe-laying functions of a sewerage undertaker. It confers a right to compensation in respect of the depreciation of the value of land on which pipe-laying works are carried out, injurious affection of other land, and other loss or damage attributable to the exercise of an undertaker's power to lay pipes through private land. Paragraph 4 confers a right of "full compensation" for "damage" occasioned by the exercise by a sewerage undertaker of its powers under the "relevant sewerage provisions". I will return later to this expression.

The issues

12. 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's Case* is implied into the corresponding provisions of the Water Industry Act 1991. 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.

The alleged general right of discharge: section 159 of the Water Industry Act 1991

13. The argument for the sewerage undertakers on this appeal is that a general right to discharge into private watercourses should be implied into the Water Industry Act 1991 from the power conferred on an undertaker by section 159 to lay pipes across private land "for the purpose of carrying out its functions", together with the definition of those functions in section 94. The problem which confronts this argument is that the particular provisions of the earlier legislation which justified the implication of such a right before 1991 are re-enacted in the Water Industry Act 1991 in a somewhat different form and as part of a much more elaborate statutory scheme in which such an implication is more difficult to accommodate. For substantially that reason the Court of Appeal rejected an identical argument in *British Waterways Board v Severn Trent Water Ltd* [2002] Ch 25. The judgments, and particularly that of Chadwick LJ, contain a detailed analysis of the relevant provisions of the Water Industry Act which makes it unnecessary to repeat the exercise here.

14. In summary, the Court of Appeal held that the Water Industry Act had to be construed as a coherent scheme in its own right, without any *a priori* assumption that it was intended to reproduce everything in the previous statute law. They considered that that scheme did not include an implied right of discharge into private watercourses, for five main reasons. The first was that 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. Second, any power derived from section 159 to discharge into private watercourses would not be qualified by the statutory protection in section 117(5) and (6) against the discharge of foul water. This was because in the Act of 1991 these provisions qualify only specified sections of the Act, not including section 159. Therefore, if such a right existed, it would authorise the discharge not only of treated effluent and surface water but foul water, routinely and in unlimited quantities. Third, the provisions of Schedule 12, paragraph 2 of the Act of 1991 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" is a defined term and does not include section 159. Fourth, 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. Fifth, 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 proper statutory measure of compensation. The Court's conclusion is summarised by Chadwick LJ at para 71:

> "The fallacy, as it seems to me, lies 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. 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 cannot be supported, as it seems to me, in the context of legislation enacted following a decision to privatise the water industry."

15. We were invited to hold that *British Waterways Board v Seven Trent Water Ltd* was wrongly decided. In my view we should decline that invitation. The reasoning of the Court of Appeal in that case is compelling as applied to the only argument that they were actually considering, namely that a power of discharge could be derived from sections 94(1) and 159 of the Act of 1991.

Survival of pre-existing rights of discharge

16. This issue might have arisen in *British Waterways Board v Severn Trent Water Ltd*. That case arose out of a dispute about discharges from a sewer outfall into the Stourbridge canal which had been constructed by a regional water authority in about 1976, under the previous statutory regime. The relevant outfall was therefore already in use at the transfer date pursuant to a right enjoyed by the regional water authorities under the Public Health Act 1936 and transferred to the privatised sewerage undertakers under the Water Act 1989. However, no argument was addressed to the Court of Appeal in that case about the significance of this fact. Its factual and legal significance is, however, critical to the outcome of the present appeal.

17. Manifestly, the purpose of a sewer is to carry away effluent and surface water and discharge it elsewhere. A sewer can be lawfully used only if it is lawful to discharge from it. A sewerage undertaker bringing an outfall into use for the first time after 1 December 1991 can reasonably be expected to have obtained any necessary consents to discharge onto private property in advance of laying the pipes, either by negotiation or by compulsory purchase in the course of the planning or the works. But if the outfall was already in use at that date, it cannot do this. The pipes will already have been laid. The location of their outfalls will have been determined. Where they discharge into a private watercourse, those outfalls will have been created under a statutory regime which entitled the sewerage undertaker or its statutory predecessors to discharge from them. The compulsory acquisition of such a right cannot be achieved overnight. Statutory procedures have to be observed, which may include a public inquiry. It is obvious, and confirmed by the evidence in this litigation, that by 1989 drainage from the existing public sewerage system depended to some extent on outfalls into private watercourses. After well over a century in which sewerage authorities were entitled as of right to construct and discharge from such outfalls one would expect the degree of dependence to be significant. Unless the entitlement to discharge from existing outfalls into private watercourses survives the transfer to privatised water undertakers, the consequence is that in law such discharge must cease forthwith on 1 December 1991. Any continuing discharge thereafter will become tortious from that date.

18. Under the Water Industry Act, the statutory duties of a sewerage undertaker include a duty to operate the system of public sewers so as effectually to drain their area (section 94) and a duty to allow the owners or occupiers of premises to connect to the public sewer system (section 106). Moreover, the undertaker is not permitted to discontinue the use of a sewer until it has provided an alternative sewer capable of serving as effectually (section 116). The result, if the right to discharge into private watercourses ceases as the canal owners suggest, is to make it impossible for the sewerage undertakers lawfully to perform their statutory functions or observe the statutory restrictions on the discontinuance of existing sewers from the moment that the new Act comes into force. This state of affairs will continue thereafter for a considerable period while the existing sewerage system is partially redesigned and rebuilt or the necessary easements are acquired by negotiation or compulsory purchase. When pressed to say how a sewerage undertaker was to comply with this view of the law immediately after 1 December 1991, the canal owners had no answer except that the law would not in practice be enforced by injunction but that if it was they must block the outfalls and allow surface water and treated effluent to backwash through the system into the streets. In fact, section 116 of the Act would rule out even that possibility. This is not just a practically inconvenient way of dealing with an issue which engages an important public interest. It is legally incoherent. Without the clearest possible indication that Parliament intended such a preposterous result, I decline to accept that it is the effect of the current legislative scheme.

19. In my opinion, 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, (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.

20. The basis of this implication is not section 30 of the Public Health Act 1936, whose statutory predecessor was the basis of the decision in *Durrant's Case*, but section 116 of the 1991 Act viewed against the background of the general duties of sewerage undertakers under the Act. It follows that the repeal of section 30 by the Water Consolidation (Consequential Provisions) Act 1991 is irrelevant. In any event, its repeal would not affect rights of discharge which had already accrued by virtue of the use of existing outfalls: see section 16(1)(c) of the Interpretation Act 1978.

21. It is true that although over a period of time after the coming into force of the Water Industry Act new rights of discharge could have been acquired by negotiation or compulsory purchase or existing sewers or outfalls replaced, the effect of the conclusion which I have reached is that a sewerage undertaker is entitled under the Water Industry Act 1991 to continue discharging into private watercourses from existing outfalls indefinitely. The solution is therefore more extensive than the problem. But that is a lesser anomaly and one which is inherent in the nature of the issue. Once one concludes that because of the time required to do these things after the law was changed, the right of discharge for existing outfalls must survive, it is not possible to arrive by a process of construction at a positive obligation to address the issue after transfer in a different way by acquiring new easements or replacing sewers or outfalls.

22. I should finally deal with the suggestion that this conclusion leaves the owners of private watercourses in a worse position than they were under the Water Act 1989, because of the more limited provisions for compensation for "damage" and the more limited protections available against abuse. This is a serious objection to the attempt to imply a general right to discharge into private watercourses from section 159 of the 1991 Act, as the Court of Appeal pointed out in *British Waterways Board*. It does not give rise to difficulty if, as I consider, 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. As

far as compensation is concerned, Schedule 12, paragraph 4 of the Water Industry Act confers a right of full compensation for any exercise by a sewerage undertaker of its powers under the "relevant sewerage provisions". Unlike section 159, section 116 is one of the "relevant sewerage provisions": see section 219(1). Turning to the question of statutory protection, the Act of 1991 contains a large number of protections against the abusive or harmful use by undertakers of their statutory powers. This is not the place to examine all of them, and many are of no potential relevance. The most important are to be found in sections 117(5) and 186(3). Section 117(5)(b) protects against the discharge of foul water into watercourses. It is the successor of section 17 of the Public Health Act 1875 and section 30 of the Act of 1936. Section 186(3) 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. Both provisions expressly qualify powers derived from specified provisions of the Act, which do not include section 159 but do include section 116.

Conclusion

23. I would accordingly allow the appeal to the extent of declaring 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. For the avoidance of doubt, I should make it clear that this in no way affects any binding agreement under which the parties may have regulated for themselves the use of particular outfalls. We were informed that here may be such agreements with some proprietors, but we have not been concerned with them. I would leave the precise form of the declaration to be agreed between counsel.

LORD TOULSON

24. I agree that under the Water Industry Act 1991 sewerage undertakers are impliedly empowered to continue to discharge surface water and other non-pollutant water through sewers vested in them into watercourses to which they were already discharging at the time the Act came into force, but have no right to create new outfalls into canals or rivers without the agreement of the body which owns or is responsible for the canal or river.

25. The case has assumed a complexity which I do not think is necessary. In disagreeing with the Court of Appeal, I have sympathy with the court which seems to me to have been led into a forest. The reasons for my conclusions are simple and accord essentially with those given by Lord Sumption.

26. As to the broader power claimed by the appellants, the argument that section 159 gives to a sewerage undertaker the right to create a new public sewer by connecting pipework, laid under the powers given to it by the section, into a river or canal without the agreement of the river or canal owner or operator, is in my view untenable for the reasons given by the Court of Appeal in *British Waterways Board v Severn Trent Water Ltd* (summarised by Lord Sumption).

27. The purpose of section 159 is to enable a sewerage undertaker to obtain the means of access for foul or surface water to reach wherever it proposes (lawfully) to treat or dispose of the water (such as a sewage treatment plant), and no more. To treat the section as silently empowering the undertaker to dispose of the water by discharging it onto the land of another person without their consent requires an unnatural and unwarranted reading of the section.

28. The appellants' argument for giving the section a wider meaning is based on comparison with the Public Health Acts 1875 to 1961. That argument overlooks the major change in the scheme of water legislation introduced by the Water Act 1989 (which was consolidated, with other enactments, by the 1991 Act). The 1989 Act did much more than to introduce privatisation of the water industry. Its purposes, stated in the long title, included to amend the law relating to the provision of sewers and the treatment and disposal of sewage. It provided a much more comprehensive statutory code than the previous legislation. There is no warrant for assuming that Parliament intended under the new legislative scheme that the privatised authorities should have a general right to create new outfalls, discharging water onto the property of other parties, without having to pay for the facility.

29. On the question of the lawfulness of the continued use of public sewers established prior to the coming into force of the Act, I agree with Lord Sumption that the answer lies in section 116 of the 1991 Act, read in conjunction with sections 106(1) and 117(5) and (6).

30. Under section 106 the owner of premises in the area of a sewerage undertaker has the right to have his drains or sewer communicate with the undertaker's public sewers and has a continuing right thereby to discharge foul water and surface water from those premises.

31. Section 116 prohibits the sewage undertaker from depriving that person of the use of the public sewer for that purpose, unless the undertaker provides alternative means of communication (which Parliament cannot realistically have supposed that the undertaker would be in a position to do instantly on the passage of the Act).

32. Section 117(5) provides that nothing in section 116 is to be construed as authorising a sewerage undertaker to use a public sewer for the purpose of conveying foul water into any natural or artificial stream, watercourse, canal, pond or lake, without the water having been treated so as not prejudicially to affect the purity and quality of the water into which it is being discharged. Section 117(6) also requires a sewerage undertaker to carry out its functions under section 116 in such a way as not to create a nuisance.

33. The conditions for section 116 to apply are, in the words of subsection (1), that the sewer is a "public sewer which is vested in the undertaker", but I do not understand it to be disputed that the relevant sewers are public sewers as defined in section 219 of the 1991 Act:

> "'public sewer' means . . . a sewer for the time being vested in a sewerage undertaker in its capacity as such, whether vested in that undertaker by virtue of a scheme under Schedule 2 to the Water Act 1989 or Schedule 2 to this Act or under section 179 above or otherwise . . ."

34. As a matter of history, it would appear that the sewers vested in the sewerage undertakers by virtue of schemes under Schedule 2 to the 1989 Act but I do not see that it is necessary to refer to the 1989 Act for any other purpose.

35. Since section 116 of the 1991 Act expressly prohibits a sewerage undertaker from discontinuing the use of an existing public sewer vested in it, unless it creates an alternative means of disposal, it thereby impliedly (if not expressly) empowers the undertaker to continue to use such sewers, subject to the qualifications in section 117(5) and (6) that the undertaker must not cause pollution or a nuisance.

36. For those reasons, it seems to me that the answers to the questions in this case are to be found within the sections of the 1991 Act to which I have referred. Save where necessary for the limited purpose of establishing as a fact that a sewer is a public sewer vested in a sewerage undertaker within the definition section in the 1991 Act, I see 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, I would conclude that there was no trespass during that period. Section 69 of the 1989 Act provided that Schedule 8 to the Act should have effect for the purpose of transferring to sewerage undertakers the functions of water authorities relating to sewerage services "and for making amendments of the enactments relating to the transferred functions". Paragraph 1 of Schedule 8 provided that references to water authorities in sections 30 and 278 of the Public Health Act 1936 were to be construed as references to sewerage

undertakers. Those sections re-enacted the sections in the 1875 Act which were the subject of the decision in *Durrant's* case, as explained in para 6 of Lord Sumption's judgment. Reading those sections as amended by paragraph 1 of Schedule 8 to the 1989 Act (ie as applying to sewerage undertakers from the commencement of the 1989 Act), the conclusion is clear in my view that sewerage undertakers did not commit the tort of trespass by continued use of the public sewers which they inherited.

37. Although that historical examination of the position under the 1989 Act is unnecessary to my conclusion about the 1991 Act, it fortifies it for this reason. If, as I have concluded, sewerage undertakers did not commit the tort of trespass between 1989 and 1991 by continued use of public sewers vested in them under schemes made under the 1989 Act, Parliament cannot be taken to have intended to change that position by the 1991 Act, which was presented to it as a consolidation Act with minor immaterial amendments explained in the Law Commission's report. Consolidation Acts have a speedy parliamentary process precisely because they are not intended to involve changes meriting detailed scrutiny. It follows also from what I have said that I do not think that it is necessary to invoke the provisions of the Interpretation Act; but if I am wrong, I would agree with Lord Neuberger's analysis of its effect.

LORD NEUBERGER (with whom Lord Clarke and Lord Hughes agree)

38. This appeal raises two questions in relation to the statutory right of sewerage undertakers to discharge surface water and treated effluent from their sewers into streams and private watercourses. The first question is whether sewerage undertakers have such a right in relation to all their sewers, irrespective of when they came into use – ie 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 ("the 1989 Act") or (ii) the coming into force of the Water Industry Act 1991 ("the 1991 Act").

39. In my 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. I agree with the reasons given by Lord Sumption and Lord Toulson although I would place greater weight on the assistance which can be gained from the provisions of the earlier legislation relating to public sewers and the Interpretation Act 1978 ("the 1978 Act").

The relevant statutory provisions

The statutory provisions relating to sewerage before 1989

40. By section 13 of the Public Health Act 1875, all "existing and future sewers" within their districts were "vest[ed]" in local authorities. Certain rights were granted to local authorities, including, in section 16, the right to construct sewers "into, through or under any lands whatsoever in their district". Duties were also imposed on local authorities, including the duty to provide and maintain sewers to drain their districts in section 15, and the duty to enable property owners and occupiers to be connected to sewers in section 21.

41. The right to discharge from sewers was not expressly granted to local authorities by the 1875 Act. However, section 17 of the 1875 Act stated that "[n]othing in" the Act "authorise[s]" the use of sewers constructed under the Act "for the purpose of conveying sewage or filthy water into any natural stream or watercourse … until such sewage or filthy water is freed from all … foul or noxious matter". Section 308 of the 1875 Act contained a rather generally expressed right to "full compensation" to anyone who suffered damage as a result of the exercise of a local authority's statutory rights with regard to sewerage.

42. The Public Health Act 1936 repealed the relevant provisions of the 1875 Act, and re-enacted many of its provisions in very similar, if somewhat more modern, terms. The opening part of subsection (1) of section 20, the successor to section 13 of the 1875 Act, provided that any sewers "vested in a local authority" under the 1875 Act "shall continue to be vested in them". Section 20(1)(b) of the 1936 Act stated that "all sewers" subsequently "constructed by" local authorities "shall also vest in them". Sections 14, 15, 22, 34 and 278(1) of the 1936 Act were to the same effect as, respectively, sections 15, 16, 18, 21 and 308 of the 1875 Act, albeit that section 15 of the 1936 Act was considerably more detailed in its terms than section 16 of the 1875 Act. Section 30 of the 1936 Act was in very similar terms to section 17 of the 1875 Act, although it used somewhat different language, referring to "foul water [having to be] so treated as not to affect prejudicially the purity and quality of the water" rather than "sewage or filthy water [having to be] freed from all … foul or noxious matter", and it extended its reach to "artificial", as well as "natural", watercourses and streams, and to "canals".

43. The provisions of section 17 of the 1875 Act, supported by those of sections 15, 16, and 308, were held by the Court of Appeal in *Durrant v Branksome Urban District Council* [1897] 2 Ch 291 to lead to the "inevitable" or "irresistible" inference that a local authority could discharge treated effluent and surface water from its sewers, whether constructed before or after 1875, into natural streams and

watercourses – see at pp 302, 303 and 304-305 per Lindley, Lopes and Chitty LJJ respectively. In other words, the Court of Appeal held that the 1875 Act impliedly granted a right to discharge from that sewer, a right whose width was cut down by section 17. That right was continued by the 1936 Act, as it contained provisions which were very similar to those in the 1875 Act, and in particular section 30 and, albeit of lesser significance in this connection, sections 14, 15 and 278, whose statutory predecessors were considered by the Court of Appeal to support its conclusion in *Durrant* [1897] 2 Ch 291.

44. The statutory rights and duties of local authorities in relation to sewerage became vested in water authorities pursuant to sections 14 and 15 of the Water Act 1973. Section 14(2) provided that the functions of local authorities under, inter alia, sections 15-24 and 27-31 of the 1936 Act "shall be exercisable by water authorities", and that "references [therein] to a local authority … shall be construed … as references to a water authority". Para 33 of Schedule 8 to the 1973 Act amended section 20 of the 1936 Act to make it clear that all sewers in an area were vested in the relevant water authority.

The Water Act 1989

45. During the 1980s, as part of the drive for privatisation, it was decided that the water supply and sewerage functions of water authorities should be taken out of public ownership and vested in "water undertakers" and "sewerage undertakers" respectively. This was effected through the medium of the 1989 Act, which provided for the creation of these new undertakers in section 11.

46. Section 4(1)(a) of the 1989 Act stated that the sewerage functions of water authorities should become the functions of the new sewerage undertakers from a day appointed by the Secretary of State, and section 11 enabled the Secretary of State or the Director General of Water Services to appoint a company as a "sewerage undertaker for any area of England and Wales". Section 4(1)(b) provided for "schemes under Schedule 2" for the division of "the property, rights and liabilities" of the water authorities to, *inter alia*, the sewerage undertakers.

47. The effect of section 67 of the 1989 Act, which replaced section 14 of the 1936 Act, was to impose a duty on sewerage undertakers from the date of the transfer of the sewerage functions to drain the area for which it was responsible. Section 153 of, and Schedule 19 to, the 1989 Act empowered sewerage undertakers to lay sewers, and they effectively replaced section 15 of the 1936 Act. Section 69 of the 1989 Act stated that Schedule 8 had the effect of "transferring to sewerage undertakers the functions of water authorities relating to the provision of sewerage services and for making amendments of the enactments relating to the transferred

functions". By para 1 of Schedule 8, such functions included those set out in sections 22, 30 and 34 and (at least in so far as it related to surviving sections of the provisions of the 1936 Act) section 278 of the 1936 Act. However, section 20 of the 1936 Act was repealed by the 1989 Act.

48. Para 2 of Schedule 2 to the 1989 Act was concerned with "transfers by scheme", and it provided that there should be transferred to a sewerage undertaker the "property, rights and liabilities of a water authority", and para 2(3) stated:

> "The property, rights and liabilities of a water authority that shall be capable of being transferred … shall include-
>
> (a) property, rights and liabilities that would not otherwise be capable of being transferred or assigned by the water authority;
>
> (b) property situated anywhere …;
>
> (c) rights and liabilities under enactments, including—
>
> (i) such rights and liabilities as may arise after the transfer date by virtue of enactments amended or repealed by this Act and, in pursuance of provision contained in Schedule 26 to this Act, may be the subject of an allocation made by a scheme under this Schedule; and
>
> (ii) other rights and liabilities under enactments which are amended or repealed by this Act subject to a saving;
>
> (d) …"

49. In so far as it dealt expressly with the ownership of, or equivalent rights over, existing sewers, the 1989 Act was laconic. Section 153(1) granted powers to sewerage undertakers to lay and maintain sewers, and section 153(2)(a) provided that sewers so laid should be vested in that undertaker (subject to irrelevant exceptions). However, they were not concerned with existing sewers, which were obliquely referred to in section 153(6), which stated that the provisions of section 153 were "without prejudice to the vesting of anything … in a company appointed to be a … sewerage undertaker, in accordance with a scheme under Schedule 2 …" Section 70, which dealt with sewers which crossed two local authority areas, referred in subsection (1) to such sewers being "vested in a water authority" and set out how they were to be treated "[f]or the purposes of any scheme under Schedule 2", and subsection (3) referred to a case "[w]here any part of a sewer is vested in any sewerage undertaker by virtue of this section". The definition of "public sewer" in section 189(1) was "a sewer … vested in a sewerage undertaker … whether ... by virtue of a scheme under Schedule 2 … or under section 153".

50. On the same day as the 1989 Act came into force, 1 September 1989, various transfers came into effect, as contemplated by section 4. They were (or at least the one we were shown was) expressed in relatively general terms, so far as identifying

what precisely was transferred to the new sewerage undertaker, namely "the property, rights and liabilities specified in ... Schedule 2". With effect from 1 September 1989, the new sewerage undertakers took over the sewerage rights and responsibilities of the previous water authorities, subject of course to such amendments as were laid down in the 1989 Act.

The 1991 legislation

51. Some two years later, the law relating to the water supply and sewage industries was comprehensively re-enacted and consolidated in 1991, principally by the 1991 Act, but also by the Water Consolidation (Consequential Provisions) Act 1991 ("the 1991 Consolidation Act"), which received Royal Assent on the same day, 25 July 1991. The long title of the 1991 Act described its purpose as being "to consolidate 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 long title of the 1991 Consolidation Act explained that its purpose was to effect "consequential amendments and repeals, and for transitional and transitory matters and savings, in connection with the consolidation of certain enactments in … the Water Industry Act 1991, …and to repeal certain related enactments which are spent or unnecessary".

52. As the long title to the 1991 Act indicated, its purpose was largely to consolidate the law, but it was also to implement the recommendations of the Law Commission, which were made in a report presented in April 1991, Law Com No 198. Although there were some recommendations relating to drainage, none of them impinges on the issues raised in this appeal. Accordingly, much of the 1991 Act simply re-enacted the provisions of the 1989 Act and (in so far as they related to water and sewerage services) the surviving provisions of the 1936 Act, sometimes with modifications. Such provisions included sections 158 and 159, which gave sewerage (and water) undertakers the power to lay pipes "in streets" and "in other land" respectively (replacing paragraph 1 of Schedule 19 to the 1989 Act). Section 94 imposed a duty on sewerage undertakers to operate a sewerage system so as effectually to drain their area (replacing section 67 of the 1989 Act), and section 106 required them to allow the owners or occupiers of premises to connect to the public sewer system (replacing section 34 of the 1936 Act). Section 116(1) empowered a sewerage undertaker to "discontinue and prohibit the use of any public sewer", subject to providing an alternative and "equally effective" sewer (replacing section 22 of the 1936 Act). Section 117(5) provided that nothing in section 116 entitled a sewerage authority to discharge foul water into a natural or artificial waterway (replacing, albeit in a limited respect, section 30 of the 1936 Act).

53. Section 179 of the 1991 Act provided that, subject to agreement to the contrary and subject to certain other exceptions, any sewer laid by an undertaker

"shall vest in the [sewerage] undertaker which laid it". The definition of "public sewer" in section 219 includes any sewer "vested in [an] undertaker by virtue of a scheme under Schedule 2 to the Water Act 1989". Paragraph 4(1) of Schedule 12 to the 1991 Act effectively replaced section 278 of the 1936 Act in relation to sewerage undertakers.

54. By Schedule 3, the 1991 Consolidation Act repealed certain statutory provisions, including section 30 of the 1936 Act. Section 2(5) of the 1991 Consolidation Act provided that those repeals were "without prejudice to sections 16 and 17 of the Interpretation Act 1978".

The Interpretation Act 1978

55. The 1978 Act lays down general rules applicable to the interpretation of statutes. Section 16(1)(c) of that Act provides that "where an Act repeals an enactment, the repeal does not, unless the contrary intention appears, … affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment".

56. The traditional view is that section 16(1)(c) (like its statutory predecessors) applies only to existing or "vested" rights. However, the precise nature of a vested right is somewhat elusive. The problem is very close to that thrown up by the presumption against retrospective legislation, which was illuminatingly discussed by Lord Rodger in *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816, paras 186-201. At para 196, Lord Rodger said this of the cases on vested rights:

> "It is not easy to reconcile all the decisions. This lends weight to the criticism that the reasoning in them is essentially circular: the courts have tended to attach the somewhat woolly label 'vested' to those rights which they conclude should be protected from the effect of the new legislation. If that is indeed so, then it is perhaps only to be expected since, as Lord Mustill observed in *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486, 525A, the basis of any presumption in this area of the law 'is no more than simple fairness, which ought to be the basis of every general rule.'"

At para 201, Lord Rodger suggested that the test could well be expressed thus:

> "would the consequences of applying the statutory provision retroactively, or so as to affect vested rights or pending proceedings, be 'so unfair' that Parliament could not have intended it to be applied in these ways? In answering that question, a court would rightly have regard to the way the courts have applied the criterion of fairness when embodied in the various presumptions."

The first question

57. So far as the first question is concerned, Mr Karas QC, on behalf of United Utilities, a sewerage undertaking, relied primarily to support his case for a positive answer, on the provisions of section 159 of the 1991 Act. I would reject that case and there is nothing I can usefully add to what Lord Sumption and Lord Toulson say in paras 13-15 and 26-28 of their respective judgments. At least in relation to sewers laid after the 1991 Act came into force, United Utilities' argument is not supported by the language of section 159 or any other provision of the 1991 Act. It is inconsistent with some other provisions of the 1991 Act, and it is not supported by any practical considerations (although it is fair to add that it is not undermined by any practical considerations either). The reasoning of all three members of the Court of Appeal in *British Waterways Board v Severn Trent Water Ltd* [2002] Ch 25, summarised in para 14 above, appears to me to be unanswerable.

The second question

58. The question whether sewerage undertakers can claim any rights in respect of any outfalls must ultimately turn on the 1991 Act, but in my view, the issue should be addressed by first identifying the water authorities' rights in respect of outfalls from public sewers immediately before the 1989 Act came into force. Mr Karas's argument is that it is a necessary inference from the terms of the 1991 Act that sewerage undertakers have a right to discharge from existing outfalls. A court should not be easily persuaded that a new right has been created by implication, particularly where that right (i) interferes with the private rights of third parties (in this case waterway owners), and (ii) arises out of a long and detailed statute. 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.

59. Accordingly, in my judgment, the inference which we are invited to draw is, at least in principle, far more likely to be justified if sewerage undertakers had the right to discharge from existing outfalls under the 1989 Act, when their sewerage

functions started, than if they did not. The rights vested in the sewerage undertakers by the 1989 Act were based on the rights vested in the water authorities, whose rights and obligations in relation to sewers and sewerage were derived from the 1936 Act, as amended. Accordingly, I start by addressing the position under the 1936 Act, and only then turn to the 1989 and 1991 Acts.

60. For the reasons I shall give below, it appears to me that there are two alternative reasons for concluding that the new water undertakers had the right to discharge from existing outfalls under the 1989 Act, and one reason for concluding that that right continued under the 1991 Act.

The position prior to the 1989 Act

61. As explained in para 43 above, the provisions of section 17 of the 1875 Act, supported by those of sections 15, 16 and 308, were held by the Court of Appeal in *Durrant* [1897] 2 Ch 291 to lead to the "inevitable" or "irresistible" inference that a local authority could discharge treated effluent and surface water from its sewers (subject to payment of compensation in case of damage), and that right continued under the 1936 Act.

62. As I see it, the effect of the reasoning in *Durrant* is that the inclusion of section 17 in the 1875 Act had two relevant consequences. First, it indicated clearly that Parliament intended that local authorities had the right to discharge from the sewers "vested" in them by section 13. Secondly, it equally clearly cut down the way in which that right could be exercised. As to the first point, section 17 did not itself grant the right: it merely enabled the courts confidently to conclude that the right was intended by Parliament to be granted to local authorities under the 1875 Act. As to the second point, it is clear from the terms of section 17 itself that that right was capable of being cut down or regulated by statute. These two points apply equally to the 1936 Act.

63. Accordingly, as at the date the 1989 Act came into force, water companies had vested in them the right (subject to payment of compensation in case of damage) to discharge water through existing outfalls, by virtue of the continued existence of section 30 (supported by sections 14, 15 and 278) of the 1936 Act as amended by the 1973 Act.

The first argument in relation to the 1989 Act

64. It appears to me that the reasoning in *Durrant* compels the conclusion that the 1989 Act impliedly granted the new sewerage undertakers the right to discharge

from outfalls from sewers vested in them (subject to payment of compensation in case of damage). Section 30 of the 1936 Act (the provision which precluded discharge of foul water) was not repealed by the 1989 Act; indeed, by virtue of paragraph 1 of Schedule 8 to that Act, it remained in force, save that it was amended so as to apply to sewerage undertakers. Given that it was held in *Durrant* [1897] 2 Ch 291 that section 17 of the 1875 Act, the statutory predecessor of section 30 of the 1936 Act, had the effect of implying a right in water authorities to discharge from their sewers into canals and streams prior to September 1989, then, in the absence of a good reason to the contrary, section 30 as amended by the 1989 Act must have had the same effect in relation to those sewers when vested in the new sewerage undertakers after August 1989.

65. Far from there being a good reason to the contrary, there are two significant factors which support this conclusion. The first is based on the statutory provisions. As mentioned above, the Court of Appeal in *Durrant* [1897] 2 Ch 291 placed some reliance on other provisions of the 1875 Act. Albeit in re-enacted and modified form, those provisions remained in existence after the 1989 Act was in force. Sections 15 and 16, which had been replaced by sections 14 and 15 of the 1936 Act, were in turn replaced by sections 67 and 153 of the 1989 Act, and section 308 was replaced by section 278 of the 1936 Act, which continued to apply after 1989 by virtue of paragraph 1 of Schedule 8.

66. Secondly, the practical implications of a new sewerage undertaker having no right of discharge from existing outfalls of existing sewers from the date of the transfer under the 1989 Act are striking. Such an undertaker was, from the date of the transfer of sewerage functions to it, under statutory duties to drain its area, to permit people to connect into its sewers for the purposes of drainage, and to provide new sewers in the event of shutting off existing sewers. A sewerage undertaker could only have complied with such obligations in practice if it had a right of discharge from the existing outfalls of the sewers vested in it. Lord Sumption and Lord Toulson develop this argument more fully in paras 17-18 and 30-35 of their respective judgments, albeit in relation to the 1991 Act, but the argument is equally sound in relation to the 1989 Act.

The alternative argument under the 1989 Act

67. Were the argument based on the 1989 Act's retention and amendment of section 30 of the 1936 Act to be rejected, I would accept United Utilities' alternative argument that the transfers to sewerage undertakers pursuant to the 1989 Act included the water authorities' existing rights of discharge. This would be on the basis that the water authorities' rights of discharge from existing outfalls under the 1936 Act (as amended by the 1973 Act) constituted "property" or (as I tend to think is more likely) "rights", which would have been transferred as part of the water

authorities' "property, rights and liabilities" in section 4(1)(b) of the 1989 Act. It seems to me that, whether such rights were "property" or "rights", they were "vested" in the water authorities, and it would be unrealistic to think that the 1989 Act could have intended that they be removed when the functions of those authorities were being transferred to other entities. In the absence of any transitional provisions, the ability to be able to discharge through existing outfalls was essential: indeed, it was an integral part of the sewerage authorities' continuing functions and duties, as explained in para 66 above. It would have been "so unfair", or the better but equally appropriate expression may be "so absurd", if the water authorities' existing rights of discharge had been removed by the 1989 Act "that Parliament could not have intended it", to quote Lord Rodger in *Wilson* [2004] 1 AC 816, para 201.

68. In answer to this, Mr McCracken QC for the Manchester Ship Canal Company Limited, a canal owner, relies, first, on the precise terms of paragraph 2(3) of Schedule 2 to the 1989 Act, and, secondly, on the anomalous nature of the "right" involved. As to the first point, he says that paragraph 2(3) restricts the breadth of the expression "property, rights and liabilities", and in particular that subparagraph (c)(ii) limits the transferable rights to those "under enactments which are amended or repealed by this Act subject to a saving". He points out that section 30 of the 1936 Act was amended by the 1989 Act without a saving provision. I do not accept that argument, because, in my view, paragraph 2(3) was intended to widen, not to narrow, the meaning of "property, rights and liabilities", as is apparent from the phrase "shall include". In any event, it is highly arguable that (i) the "right" involved was not in fact granted "under" section 17 of the 1875 Act as I have explained in para 62 above, and (ii) section 30 of the 1936 was not relevantly "amended" for the purpose of subparagraph (c)(ii). However, given that paragraph 2(3) is not a definition provision, it is not necessary to consider those two points.

69. Mr McCracken's second argument is summarised in para 64 of Arden LJ's judgment in the Court of Appeal, where she said that she thought that the right of discharge enjoyed by the water authorities was not within the expression "property, rights and liabilities", as used in section 4 and elsewhere in the 1989 Act. She explained that this was because "the implied right of discharge was not a right in the usual sense" and "was simply an incident of the statutory functions of the sewerage undertaker". For my part, I do not see why the fact that a right is implied or incidental prevents it from falling within the word "rights" in the 1989 Act, or indeed from being a vested right for the purposes of section 16(1)(c) of the 1978 Act. This view is reinforced by the fact that the precise legal characterisation of the rights of local authorities as a result of sewers being statutorily vested in them appear to be somewhat unclear – see the discussion in *Taylor v North West Water* (1995) 70 P & CR 94, 96-110. Thus, there is, as was pointed out by Lord Russell CJ in *Bradford v Mayor of Eastbourne* [1896] 2 QB 205, 211, a number of cases which support his view that "the vesting [under section 13 of the 1875 Act] is not a giving of the

property in the sewer and in the soil … but giving such ownership and such rights only as are necessary for the purpose of carrying out the duties of a local authority". Yet there can be no doubt but that those rights were regarded as vested rights which survived the repeal of section 20 of the 1936 Act, and were transferred to sewerage undertakers pursuant to the 1989 Act.

The 1989 Act: conclusion

70. Accordingly, it seems to me to follow that the sewerage undertakers had an implied right (subject to payment of compensation in case of damage) to discharge from existing outfalls from the sewers vested in them in 1989, because (i) the provisions of the 1989 Act conferred such a right on them by implication in accordance with the reasoning in *Durrant* or, if that is wrong, (ii) the implied right to discharge from those outfalls enjoyed just before the 1989 Act came into force was transferred by the water authorities to them. The effect of conclusion (i) is, as I see it, that the right to discharge applied to outfalls created after 1989, including those from sewers brought into use after the 1989 Act came into force, as section 30 (as amended to apply to the sewerage undertakers) continued in force, and, following the reasoning in *Durrant*, so did the right to discharge.

The position under the 1991 legislation

71. Section 30 of the 1936 Act (as amended by the 1973 and 1989 Acts) was repealed by the 1991 Consolidation Act (and section 278 of the 1936 Act was effectively replaced with new compensation provisions in the 1991 Act), and therefore there was no further express statutory basis, as established in *Durrant* [1897] 2 Ch 291, for saying that any sewerage undertakers could claim any right of discharge in respect of outfalls created after 1991. As Arden LJ rightly pointed out in para 22 of her judgment in the Court of Appeal, although section 30 of the 1936 Act, which she called "the foul water proviso", was re-enacted in the 1991 Act, it was only in "a limited form by section 117(5) … so that there was no 'foul water proviso' applying to the pipe-laying power". Accordingly, as section 30 was repealed, the sewerage undertakers cannot rely on the arguments which, in my view, justify their first argument under the 1989 Act.

72. However, the repeals effected by the 1991 Consolidation Act were, rather unusually and arguably unnecessarily, expressly without prejudice to section 16 of the 1978 Act, which applies unless a contrary intention appears. Far from the contrary intention appearing, it seems to me clear that the factual context of the Acts of 1991, as discussed in paras 17-18 and paras 30-35 of the judgments of Lord Sumption and Lord Toulson, and more summarily discussed in paras 66-67 above, strongly supports the statutory presumption that the existing right to discharge from

existing outfalls survived the repeal of section 30 (and the replacement of section 278) of the 1936 Act by the 1991 Act.

73. Indeed, it seems to me that the notion that the 1991 Act removed the rights of discharge in relation to existing outfalls from sewers vested in the sewerage undertakings is even more unlikely than the notion that this was the effect of the 1989 Act. The 1989 Act was intended to give effect to a wholesale overhaul of the water and sewerage industries, and in particular to bring them into private ownership, and to subject them (subject to modifications to protect the public interest) to market forces. While it is impossible to accept for the practical reasons already mentioned that in 1989 private sewerage companies were to be deprived of the right to discharge from existing sewers and were to be left to negotiate what rights they could, the proposition is not fanciful, at least in principle. However, even in principle, it seems very unlikely indeed that such a deprivation could have been intended to have been effected *sub silentio*, without any consultation or recommendation from the Law Commission, by the 1991 legislation, and in particular by two Acts whose purposes were as described in their long titles (as set out in para 51 above). My scepticism is reinforced by the fact that it is even more unlikely that such a deprivation was intended so soon after the 1989 Act.

74. Some concern was expressed in argument about the fact that the right of discharge (which in the light of this conclusion exists under the 1991 Act) is potentially more onerous on waterway owners, than the right when it existed under the 1936 Act. I agree with what Lord Sumption says about this in para 22 above. Quite apart from that, as explained in para 62 above, the right identified in *Durrant* was, as I see it, a right of discharge, which could be qualified by the provisions of the same or other legislation. I see no cause for concern if Parliament, having given a right of discharge, is free to change the terms as to conditions and compensation (subject to complying with common law and human right principles) upon which such discharge can be effected. On the contrary: such a conclusion appears to me to make good sense.

Conclusion

75. In these circumstances, it appears to me to follow that sewerage undertakers had, and therefore continue to have, a statutory right to discharge surface water and treated effluent from existing outfalls from sewers which had been vested in them by the time that the 1991 Act came into force, but not from subsequently created outfalls or outfalls from sewers which they may have laid after that date.