

Court of Appeal

**\*Barratt Homes Ltd v Dŵr Cymru Cyfyngedig (No 2)**

[2013] EWCA Civ 233

2012 Nov 29, 30;  
2013 March 27

Pill, Arden, Lloyd Jones LJJ

*Water — Sewerage — Foul water — Right to connect to public sewer — Developer giving sewerage undertaker notice of intention to connect drains to public sewer — Sewerage undertaker refusing permission to connect drains in breach of statutory duty and blocking developer's pipe to prevent connection — Whether action for damages for breach of statutory duty maintainable against sewerage undertaker — Whether developer having claims in nuisance, trespass to goods or negligence — Water Industry Act 1991 (c 56), s 106 (as amended by Competition and Service (Utilities) Act 1992 (c 43), ss 35(8)(a), 43(2) and Water Act 2003 (c 37), ss 36(2), 99(3)(5))*

The claimant, a major property developer, built a school and houses as part of a development. It gave notice, pursuant to section 106(3) of the Water Industry Act 1991<sup>1</sup>, to the defendant, the sewerage undertaker for the area, of its intention to connect the development's drains to a public sewer at a particular point. The defendant refused to permit the connection, informing the claimant that it could instead make a connection at a point some 300 metres away. When the claimant laid some pipe with the intention of connecting it to the sewer at its chosen point, the defendant blocked the pipe with concrete, damaging the pipe and preventing any connection from being made. In proceedings brought by the claimant for injunctive relief the Supreme Court held that the defendant had had no right under section 106 of the 1991 Act to refuse to permit the claimant to connect its pipe with the public sewer at its chosen point. The claimant commenced further proceedings against the defendant claiming damages for breach of statutory duty, nuisance, trespass to the claimant's pipe and negligence. The defendant applied for summary judgment and to strike out all the claims. The judge allowed the application in part, accepting and agreeing with the claimant's concession that no cause of action lay for breach of statutory duty, and holding that although the claimant was entitled to pursue its claims in nuisance and in trespass to goods, no cause of action lay in negligence, save in respect of the damage to the pipe and the cost of its repair and reinstatement. The defendant appealed against the decision not to strike out the claims in nuisance and in trespass to goods and the claimant cross-appealed against the decision to strike out its claim in negligence.

On the appeal and the cross-appeal—

*Held*, allowing the appeal and dismissing the cross-appeal, that (per Pill and Lloyd Jones LJJ) it was neither the policy nor the proper construction of the Water Industry Act 1991 that a sewerage undertaker's failure to satisfy a private sewer owner's right under section 106 to have his drains or sewer communicate with the undertaker's public sewer should give rise to a private right to claim damages for breach of statutory duty, nor could such breach of duty provide the essential basis for a cause of action for damages in nuisance, trespass to goods or negligence; or that (per Arden LJ) since the claimant had not appealed the judge's ruling that no cause of action had arisen out of the events in issue for breach of statutory duty, that ruling was binding as a matter of law in the present proceedings, and any other claim which sought to circumvent that proposition of law should not be allowed to proceed; that the essential nub of the claimant's claims in nuisance, trespass to goods and

<sup>1</sup> Water Industry Act 1991, s 106, as amended: see post, para 15.

- A negligence, save in respect of the damage to the pipe, was the defendant's refusal to permit the required connection in breach of its statutory duty; and that, accordingly, none of the claimant's claims could succeed, save for the claim in negligence in so far as it related to the cost of damage to the pipe, its repair or reinstatement, and they would be struck out (post, paras 35–36, 38–41, 47–48, 63–66, 88, 95–97, 113–114).  
*Lingke v Mayor of Christchurch* [1912] 3 KB 595, CA and *Marcic v Thames Water Utilities Ltd* [2004] 2 AC 42, HL(E) distinguished.
- B Decision of Judge Seys Llewellyn QC sitting as a judge of the Queen's Bench Division in the Cardiff District Registry reversed in part.

The following cases are referred to in the judgments:

- Anglian Water Services Ltd v Crawshaw Robbins & Co Ltd* (unreported) 6 February 2001, Stanley Burnton J
- Bowden v South West Water Services Ltd* [1998] 3 CMLR 330
- C *British Waterways Board v Severn Trent Water Ltd* [2001] EWCA Civ 276; [2002] Ch 25; [2001] 3 WLR 613; [2001] 3 All ER 673, CA
- Butler (or Black) v Fife Coal Co Ltd* [1912] AC 149, HL(Sc)
- Church of Jesus Christ of the Latter-Day Saints v Price* [2004] EWHC 3245 (QB)
- Dobson v Thames Water Utilities Ltd (Water Services Regulation Authority (Ofwat) intervening)* [2007] EWHC 2021 (TCC); [2008] 2 All ER 362
- Francovich v Italian Republic* (Joined Cases C-6/90 and C-9/90) [1995] ICR 722; [1991] ECR-I 5357, ECJ
- D *Hubbard v Pitt* [1976] QB 142; [1975] 3 WLR 201; [1975] ICR 308; [1975] 3 All ER 1, CA
- Hunter v Canary Wharf Ltd* [1997] AC 655; [1996] 2 WLR 348; [1996] 1 All ER 482, CA
- Kent v Griffiths* [2001] QB 36; [2000] 2 WLR 1158; [2000] 2 All ER 474, CA
- Lingke v Mayor of Christchurch* [1912] 3 KB 595, CA
- E *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173; [1981] 3 WLR 33; [1981] 2 All ER 456, HL(E)
- Marcic v Thames Water Utilities Ltd* [2003] UKHL 66; [2004] 2 AC 42; [2003] 3 WLR 1603; [2004] 1 All ER 135, HL(E)
- Nicholls v Ely Beet Sugar Factory Ltd* [1936] Ch 343, CA
- Southport Corp'n v Esso Petroleum Co Ltd* [1954] 2 QB 182; [1954] 3 WLR 200; [1954] 2 All ER 561, CA
- Stovin v Wise* [1996] AC 923; [1996] 3 WLR 388; [1996] 3 All ER 801, HL(E)
- F *Thomas v National Union of Mineworkers (South Wales Area)* [1986] Ch 20; [1985] 2 WLR 1081; [1985] ICR 886; [1985] 2 All ER 1
- X (Minors) v Bedfordshire County Council* [1995] 2 AC 633; [1995] 3 WLR 152; [1995] 3 All ER 353, HL(E)

No additional cases were cited in argument.

- G **APPEAL** from Judge Seys Llewellyn QC sitting as a judge of the Queen's Bench Division in the Cardiff District Registry
- On 27 April 2010 the claimant, Barratt Homes Ltd, which had been granted planning permission by Monmouthshire County Council for the construction of a school and 98 houses, commenced proceedings alleging against the defendant sewerage undertaker, Dŵr Cymru Cyfyngedig (Welsh Water), breach of statutory duty, negligence, nuisance, and trespass to or wrongful interference with the claimant's drainage pipe. On 28 February 2012 the judge, on an application by the defendant, held that the claimant was entitled to pursue its action in nuisance and in trespass to goods but had no cause of action in negligence save for the claim in respect of damage to the pipe and the cost of its repair or reinstatement.
- H

By a notice of appeal filed on 11 May 2012 and pursuant to permission given by the Court of Appeal (Sir David Keene) on 29 June 2012 the defendant appealed on the grounds that the judge had wrongly held that the plugging of the claimant's pipe was causally relevant to the claimant's loss and damage, and the judge had erred in concluding that the facts alleged gave rise to a cause of action in nuisance. Pursuant to permission given by the Court of Appeal (Pill LJ) on 8 October 2012 the claimant cross-appealed on the ground that the judge had erred in holding that the claimant had no maintainable claim in negligence for the loss suffered as a consequence of the physical damage to the pipe.

The facts are stated in the judgment of Lloyd Jones LJ.

*Robert Weir QC* and *Jessica Simor* (instructed by *Geldards LLP*) for the defendant.

*Steven Gasztowicz QC* and *Clare Parry* (instructed by *Darwin Gray*) for the claimant.

The court took time for consideration.

27 March 2013. The following judgments were handed down.

#### LLOYD JONES LJ

1 This is an appeal by Dŵr Cymru Cyfyngedig ("DCC") against the decision of Judge Seys Llewellyn QC sitting as a judge of the Queen's Bench Division handed down on 28 February 2012, refusing to strike out the claims in nuisance and trespass to goods and also refusing to grant summary judgment to DCC in respect of those claims. There is a cross-appeal by the claimant, Barratt Homes Ltd ("Barratt"), in respect of the judge's ruling that, with the exception of a claim in respect of physical damage to a pipe and its reinstatement, the claim in negligence be struck out.

2 This appeal is the most recent stage of a prolonged legal dispute between the parties which has already been once to the Supreme Court.

3 It is convenient to start with the facts alleged by the claimant in the amended particulars of claim. On 14 May 2007 Barratt was granted planning permission by Monmouthshire County Council for the construction of a school and 98 houses at Llanfoist. On 29 May 2007 Barratt gave notice, pursuant to section 106 of the Water Industry Act 1991, to the defendant, the sewerage undertaker for the area, of its intention to connect the development by its drains to the public sewer at point SO29131302 ("the connection point"). Section 106(4) provides that notice of refusal to permit the communication may be given by the undertaker within 21 days of receiving a notice under section 106. No such notice of refusal was given by the defendant. Barratt alleges that on or about 25 June 2008 DCC poured concrete into the claimant's drainage pipe by which it intended to make the connection to the public sewer pursuant to the section 106 notice, preventing the connection from taking place or disconnecting the connection. By that date the claimant had built a total of 38 houses on the development land and was in the course of constructing the school. In addition the claimant intended to build further houses on the development land pursuant to the planning permission. Barratt claims to have suffered loss and damage as a result of DCC

A preventing the connection in that it had to place a temporary storage tank within the land to receive foul sewage from the houses and the school which then had to be pumped out and removed by tanker during the period to 10 December 2008.

B 4 In the amended particulars of claim it is alleged that DCC's conduct amounted to a breach of statutory duty and/or an act of trespass to or wrongful interference with Barratt's drainage pipe and/or a nuisance which constituted a wrongful interference with Barratt's use and enjoyment of the development land. It is further alleged that DCC "was negligent in that it failed to take reasonable care to prevent injury to the claimant in that it poured concrete into the claimant's pipes and/or prevented the claimant's lawful connection, thereby causing foreseeable loss to the claimant".

C 5 The detail of the case which Barratt proposes to advance at trial is set out in the first witness statement of Mr D Huw Llewellyn, technical director of Barratt's South Wales division, dated 31 December 2010. He explains that on 29 May 2007 Barratt gave notice to DCC under section 106 that it proposed to make a connection at the connection point on the public highway. No notice of refusal was served in accordance with section 106(4). On 26 June 2007 DCC informed Barratt that it could connect but specified that the connection should be at "the point of adequacy", some 300 metres from where Barratt wanted to connect. It is common ground that this was a refusal to permit the communication to be made. Barratt took the view that DCC had no legal right to dictate the point of connection or to refuse a connection based on lack of capacity in the system. The matter was referred to the regulator, OFWAT, which in a letter dated 25 January 2008 informed DCC that DCC had no right to prevent the proposed connection at the connection point and that, even if there had been grounds to do so, DCC had failed to serve a counter-notice in time. Nevertheless, DCC maintained the position that it could decide the point of connection and stated that in the event that Barratt tried to connect at the connection point it would take immediate legal action. In a further letter dated 20 June 2008 OFWAT maintained its position that DCC had no right to prevent the connection at the connection point. Barratt had also obtained advice from leading counsel that DCC was not entitled to refuse to allow the connection to be made. On leading counsel's advice Barratt asked Monmouthshire County Council to discharge planning condition 10, which required submission to and approval by the local authority of a scheme for sewerage and water drainage. On 29 February 2008 the planning authority discharged that condition. Nevertheless, DCC maintained its position and stated that it would take legal action if Barratt tried to connect at the connection point.

H 6 Mr Llewellyn states that by the beginning of April 2008 it was clear that Barratt and DCC had reached an impasse. He states that meanwhile some of the houses had been sold and were already occupied. As a result Barratt had to "plug" the on-site drainage system to allow the sewage to gather and then pump the sewage into a tanker for removal from the site. This commenced in October 2007 but the frequency increased as houses were sold and occupied and started to produce flows of sewage.

7 Mr Llewellyn states that Barratt then instructed its groundwork contractor (Macob) to build a length of sewer from where the completed on-site sewers finished to a manhole just off the site at the connection point for it to connect to DCC's drains. In the event Macob made the connection to a different manhole from that specified in the section 106 notice. DCC issued a disconnection notice under section 109 and complained to OFWAT. Barratt apologised, disconnected the sewer and met DCC's costs of the disconnection. Barratt then instructed Macob to lay the sewage pipe up to the manhole at the connection point specified in the section 106 notice but not to connect. That manhole was beneath the highway. Macob was instructed to build a "spur" into the manhole which, when connected, would link the flow into the main sewage network. Macob inserted a pipe through the wall of the manhole and adjusted the manhole "benching" so that the pipe led to an open channel cut through the concrete benching within the manhole, which in turn led to DCC's sewer. A sewage pipe was waiting to be attached to the other end of the spur. At no stage was the sewage pipe connected to Barratt's on-site network nor to Barratt's spur and so there was no communication between Barratt's sewer and DCC's sewer.

8 On 25 June 2008 DCC served a notice purportedly under section 109 notifying Barratt that this was an unlawful communication, that Barratt's conduct constituted an offence and that it intended "to disconnect the unauthorised connection". On the evening of 25 June 2008 DCC's contractors blocked the spur that had been built on behalf of Barratt, thereby preventing any connection from being made. Mr Wyatt, who was then new business manager of DCC, states that he recommended that a stopper be placed inside DCC's existing manhole as far as possible up the new sewer, ie, Barratt's pipe, and that there be re-benching of the manhole back to its original arrangement. He states that this was intended to form a permanent disconnection. Mr Wyatt explains that DCC operatives would have entered DCC's manhole chamber and then would have placed a stopper "within approximately the curtilage of its own manhole chamber". He states that no concrete was poured directly onto Barratt's pipes, that a small amount of concrete was placed behind the stopper within the area of DCC's manhole chamber and that the purpose was to safeguard the stopper's operation. However, these statements are explicable by the fact that Mr Wyatt considers the spur pipe to form an integral part of DCC's system. Mr Kevin Lawrence, a contract manager for Barratt, states in his witness statement that when Macob came to remove the concrete and make the connection the concrete had been poured or plugged into the benching and up the enclosed part of the spur. It was necessary to reform the benching back to the manhole wall. Mr Llewellyn states in his first witness statement that he has not been able to establish exactly how far up the spur the concrete plug reached. However, he states that Macob rebuilt the spur at a cost to Barratt of £600 and this sum is claimed in these proceedings in respect of removal of the concrete plug from the manhole.

9 It is now established by the decision of the Supreme Court that Barratt had a right to connect at the connection point and that DCC had no authority to act under section 109(2).

A *The proceedings*

10 Barratt brought proceedings under CPR Pt 8 seeking a declaration that it was entitled to connect with DCC's sewers at the connection point and also claiming an injunction

B “requiring the defendant to remove the concrete it has put in place to prevent the connection of such drains and sewers in accordance with the notice under the said section and a further injunction restraining the defendant itself or through others from preventing or interfering with such connection.”

C The claim form was issued on 3 July 2008. On 1 August 2008 Wyn Williams J sitting in Cardiff refused the application for relief. On 28 November 2008 the Court of Appeal (Pill, Carnwath and Lawrence Collins LJ) allowed the appeal and granted injunctive relief [2009] Env LR 547. DCC's appeal to the Supreme Court was unsuccessful, speeches being delivered on 9 December 2009 [2010] PTSR 651.

D 11 On 27 April 2010 the present action was commenced. In September 2011 Judge Seys Llewellyn QC gave judgment on an application by Barratt that certain parts of the defence be struck out on the basis that they were the subject of *res judicata* or issue estoppel and/or that to dispute the issues would otherwise constitute an abuse of process. At that hearing DCC contended that the present claim was barred because of unlawfulness in the discharge of the planning condition. The judge ruled against that contention.

E 12 Thereafter DCC discovered the decision of Carnwath J in *Bowden v South West Water Services Ltd* [1998] 3 CMLR 330. In that case a claim was made for breach of statutory duty under the 1991 Act. Those proceedings were not concerned with the contravention of section 106. However, Carnwath J struck out the claim, to the extent that it was based on alleged contraventions of the 1991 Act, on the ground that no claim lay for damages for breach of statutory duties under the Act. It was against that background that on 2 December 2011 DCC issued an application notice

F making the following application:

“(a) An application under CPR Pt 14 for judgment and/or summary judgment/strikeout under CPR Pt 24 and/or rule 3.4 in relation to the claimant's claim for breach of statutory duty.

G “(b) An application under CPR r 3.4 and/or rule 24 for strikeout and/or summary judgment in relation to the claimant's claims for negligence, nuisance, trespass to/wrongful interference with the claimant's pipes.”

H 13 The application was heard by Judge Seys Llewellyn QC, who had to consider whether the statement of case disclosed reasonable grounds for bringing the various claims (CPR r 3.4) and whether the claimant has a real prospect of success (CPR r 24.2). Barratt did not seek to pursue its claim for damages for breach of statutory duty. In his judgment handed down on 28 February 2012 Judge Seys Llewellyn held that Barratt is entitled to pursue its action in nuisance and in trespass to goods. That part of his decision is now appealed by DCC pursuant to leave granted by Sir David Keene on 29 June 2012. The judge also held that Barratt had no cause of action in negligence save for the claim in respect of damage to the pipe itself and the

cost of its repair or reinstatement. That part of his decision forms the subject of a cross-appeal brought by leave of Pill LJ granted on 8 October 2012. On the hearing of the cross-appeal Mr Gasztowicz QC, on behalf of Barratt, has made clear that his client's claim to recover in negligence its economic loss is not founded on negligence by DCC in refusing to permit the connection but on the negligent causing of damage to Barratt's pipe from which the consequential loss is said to flow.

### *The appeals*

14 The grounds of appeal advanced by DCC on its appeal fall into two groups. First, it is submitted that the judge wrongly held that the plugging of the claimant's pipe was causally relevant to the claimant's loss and damage. It is said that that ground, if made good, applies equally to the claims in negligence, nuisance and trespass to goods. Secondly, DCC points to particular features of the alleged nuisance, and submits that for a variety of reasons the judge erred in concluding that the facts alleged give rise to a cause of action in nuisance. On the cross-appeal Barratt submits that the judge erred in holding that Barratt had no maintainable claim in negligence for the loss suffered as a consequence of the physical damage to the pipe.

### *The statutory provisions*

15 Part IV of the 1991 Act concerns sewerage services, and the statutory provisions governing connection with public sewers are contained in Chapter II, "Provision of sewerage services". Section 106, as amended by sections 35(8)(a) and 43(2) of the Competition and Service (Utilities) Act 1992 and sections 36(2) and 99(3)(5) of the Water Act 2003, provides in relevant part:

"(1) Subject to the provisions of this section— (a) the owner or occupier of any premises; or (b) the owner of any private sewer which drains premises, shall be entitled to have his drains or sewer communicate with the public sewer of any sewerage undertaker and thereby to discharge foul water and surface water from those premises or that private sewer."

"(3) A person desirous of availing himself of his entitlement under this section shall give notice of his proposals to the sewerage undertaker in question.

"(4) At any time within twenty-one days after a sewerage undertaker receives a notice under subsection (3) above, the undertaker may by notice to the person who gave the notice refuse to permit the communication to be made, if it appears to the undertaker that the mode of construction or condition of the drain or sewer (a) does not satisfy the standards reasonably required by the undertaker; or (b) is such that the making of the communication would be prejudicial to the undertaker's sewerage system."

"(6) Any question arising under subsections (3) to (5A) above between a sewerage undertaker and a person proposing to make a communication as to— (a) the reasonableness of the undertaker's refusal to permit a communication to be made; or (b) . . . may, on the application of that person, be determined by the authority under section 30A above."

A The authority referred to in section 106(6) is the regulator, OFWAT. It was common ground before us that section 106(6) and the procedure there prescribed do not apply where, as here, no valid counter-notice was served within the stipulated time.

B 16 Section 107 empowers the sewerage undertaker to undertake the making of the connection if he gives notice within 14 days of receiving the notice under section 106(3). Section 108 governs the execution of the communication by the developer:

C “(1) Where a sewerage undertaker does not under section 107 above elect itself to make a communication to which a person is entitled under section 106 above, the person making it shall— (a) before commencing the work, give reasonable notice to any person directed by the undertaker to superintend the carrying out of the work; and (b) afford any such person all reasonable facilities for superintending the carrying out of the work.

D “(2) For the purpose— (a) of exercising his rights under section 106 above; or (b) of examining, repairing or renewing any drain or private sewer draining his premises into a public sewer, the owner or occupier of any premises shall be entitled to exercise the same powers as, for the purpose of carrying out its functions, are conferred on a sewerage undertaker by sections 158 and 161(1) below.”

17 Section 109 deals with unlawful connections:

E “(1) Any person who causes a drain or sewer to communicate with a public sewer— (a) in contravention of any of the provisions of section 106 or 108 above; or (b) before the end of the period mentioned in subsection (4) of that section 106, shall be guilty of an offence . . .

F “(2) Whether proceedings have or have not been taken by a sewerage undertaker in respect of an offence under this section, such an undertaker may— (a) close any communication made in contravention of any of the provisions of section 106 or 108 above; and (b) recover from the offender any expenses reasonably incurred by the undertaker in so doing.”

*The scheme and policy of the 1991 Act*

18 In the course of argument we invited counsel to address us on whether the proposed causes of action are compatible with the scheme and policy of the 1991 Act. On the second morning of the hearing we heard counsel on this point and were referred to a number of authorities.

G 19 In *Marcic v Thames Water Utilities Ltd* [2004] 2 AC 42 the claimant’s land had repeatedly been flooded by sewage discharged from sewers operated and maintained by the defendant undertaker as a result of the overloading of a section of the system. It had become inadequate because of increased user following the connection of third parties to the system as of right. Mr Marcic sued in nuisance and for an infringement of his rights under the Human Rights Act 1998.

H 20 Section 94(1) of the 1991 Act provides in relevant part:

“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.”

Where the Director General of Water Services is satisfied that a sewerage undertaker is contravening a statutory requirement enforceable under section 18 he “shall” by a final enforcement order make requisite provision for the purpose of securing compliance with that requirement under section 18(1). Section 94(3) provides that the duty in section 94(1) is enforceable under section 18(1). Section 18(8) limits the availability of other remedies:

“Where any act or omission constitutes a contravention of . . . a statutory or other requirement enforceable under this section, the only remedies for that contravention, apart from those available by virtue of this section, shall be those for which express provision is made by or under any enactment and those that are available in respect of that act or omission otherwise than by virtue of its constituting such a contravention.”

21 No enforcement order had been made against Thames Water in respect of the inadequate drainage of Mr Marcic’s property. However, in asserting claims in nuisance and under the Human Rights Act 1998 he did not assert any right derived from section 94. Furthermore, although the claims advanced were on their face a contravention of the general statutory duties under section 94(1)(a) they were not excluded by section 18(8) because they did not derive from a statutory requirement to which section 18 applied.

22 Nevertheless, the House of Lords, reversing the Court of Appeal, held that the claimant had no claim in nuisance or under the Human Rights Act 1998. Lord Nicholls of Birkenhead explained that a cause of action in nuisance was inconsistent with the statutory scheme. The essential complaint was that Thames Water ought to build more sewers as that was the only way it could prevent flooding of the claimant’s property. Lord Nicholls considered that this argument ignored the statutory limitations on the enforcement of the obligations of undertakers. He drew attention to the fact that undertakers have no control over the volume of water entering their sewerage systems, and considered that as a result it would be surprising if Parliament intended that whenever sewer flooding occurred every householder affected could sue the appointed sewerage undertaker for an order that the company build more sewers or pay damages. On the contrary he considered that it was an important purpose of the enforcement scheme that individual householders should not be able to launch proceedings in respect of failure to build sufficient sewers. They could bring proceedings in respect of inadequate drainage only when the undertaker had failed to comply with an enforcement order. The existence of a parallel common law right where no enforcement order had been made would defeat the statutory scheme and would effectively supplant the regulatory role of the Director: paras 34–35.

A 23 Mr Weir QC, on behalf of DCC, very properly drew to our attention  
a more recent decision on the 1991 Act: *Dobson v Thames Water Utilities*  
Ltd (*Water Services Regulation Authority (Ofwat) intervening*) [2008] 2 All  
ER 362. This decision was, once again, concerned with the general duties to  
provide a sewerage system set out in section 94(1). In *Dobson's* case the  
claimants lived in the vicinity of a sewage treatment works. They  
B complained that odours and mosquitoes from the works had created a  
nuisance which had been caused by the negligence of the defendant  
undertaker. They also claimed for infringement of their rights under the  
Human Rights Act 1998. Ramsey J tried preliminary issues, including the  
issue of whether the claimants were seeking to enforce duties which arise  
under section 94(1)(b). The defendant and OFWAT (intervening) contended  
that the claimants were seeking to enforce those general duties, and that this  
C was inconsistent with the decision of the House of Lords in *Marcic's* case.

24 The judge in *Dobson's* case took as his starting point the decision in  
*Marcic's* case that the claimants could not bring a claim based on nuisance  
or breach of human rights in relation to the duty to provide, improve and  
extend the system of public sewers under section 94(1)(a). However, he  
considered that the case before him raised a wider question as to whether the  
D *Marcic* principle was limited to that particular duty under section 94(1)(a)  
or whether it applied more generally to the duties under section 94(1)(a) and  
(b). Having concluded that the claimants were seeking to enforce duties  
which arose under section 94(1)(b) in respect of odours and mosquitoes, he  
went on to consider whether they were precluded by *Marcic's* case from  
bringing a claim in nuisance involving allegations of negligence. The judge  
concluded that a cause of action in nuisance, in the absence of negligence,  
E would be inconsistent with the scheme of the 1991 Act: paras 86–88.  
However, in the case of nuisance involving negligence he came to the  
opposite conclusion. On the basis of the second limb of section 94(1)(a) and  
section 18(8) he came to the conclusion, at para 120, that certain causes of  
action in nuisance based on negligence are available, in parallel to duties  
under the 1991 Act. He said, at para 140:

F “I consider that there is in principle, a boundary to be drawn between  
matters which would fall within the duties under section 94(1) and are  
actionable solely under section 18 and matters which are actionable apart  
from the existence of any statutory duty. That boundary may be difficult  
to draw and may depend on such uncertain phrases as matters or  
decisions relating to ‘policy’ or ‘capital expenditure’ matters or decisions  
G as contrasted with ‘operational’ or ‘current expenditure’ matters or  
decisions. In *Marcic's* case the boundary fell between building new  
sewers and cleaning and maintaining the existing sewers.”

He also said, at para 143:

H “There are, in my judgment, two aspects to the reasoning [in *Marcic's*  
case]. First, there is the emphasis on absence of fault. Secondly, there is  
the concept of an inconsistent court process which conflicts with the  
statutory scheme. If there is fault in the form of negligence and if there is a  
different cause of action which is not inconsistent and does not conflict  
then I consider there is nothing to preclude a claim being made on that  
basis. Policy matters are likely to lead to such inconsistency and conflict

whilst operational matters are less likely to do so. It must be a question of fact and degree. Where an allegation is tantamount to requiring major plant renewal that will fall on one side of the line whilst an allegation that a filter should be cleaned will lie on the other side. The mere fact that the effect of the cause of action is to enforce the duty in section 94(1) does not in itself preclude the cause of action.”

25 He summarised his conclusions on this point as follows, at para 148:

“Whilst the principle in *Marcic’s* case precludes the claimants from bringing claims which require the court to embark on a process which is inconsistent and conflicts with the statutory process under the 1991 Act, it does not preclude the claimants from bringing a claim in nuisance involving allegations of negligence where, as a matter of fact and degree, the exercise of adjudicating on that cause of action is not inconsistent and does not involve conflicts with the statutory process under the 1991 Act.”

26 We were told by Mr Weir that this decision was appealed to the Court of Appeal but not on this point. We were also told that thereafter the action went to trial and, following judgment, an appeal was lodged which has now been compromised.

27 The provisions of the 1991 Act with which the courts were concerned in *Marcic’s* case and in *Dobson’s* case have no application here. Nevertheless the decisions demonstrate the need to consider whether there would be any conflict with the scheme and policy of the statute if an otherwise maintainable cause of action at common law were available. As Lord Nicholls observed in *Marcic’s* case [2004] 2 AC 42, para 33, the public sewers are vested in undertakers but their obligations with respect to those sewers cannot sensibly be considered without having regard to the statutory scheme.

28 In this regard Mr Weir drew our attention to the fact that the 1991 Act includes express provision for compensation in relation to the discharge by DCC of its functions under section 106 in the circumstances specified in section 180 and paragraph 4 of Schedule 12. Section 180 provides that Schedule 12 shall have effect for the purpose of minimising the damage caused in the exercise of certain powers conferred on undertakers and imposing obligations as to the payment of compensation. Paragraph 4 of Schedule 12, which applies to section 106, provides that an undertaker shall make full compensation to any person who has sustained damage by reason of the exercise by the undertaker, in relation to a matter as to which that person has not himself been in default, of certain specified powers. However, as Mr Gasztowicz points out, these provisions address the lawful exercise of a power under section 106 and can have no application to the present case where DCC’s refusal to permit connection was not authorised. Moreover, there is nothing here which supports an argument that the existence of an otherwise available cause of action in negligence, nuisance or trespass to goods would be in conflict with the scheme of the Act in the circumstances of the present case.

29 Mr Gasztowicz also drew to our attention in this regard a number of other provisions of the 1991 Act. (1) Section 41(4) provides that any breach of the duty to provide a water main to a person which causes that person loss or damage should be actionable at the suit of that person but it shall be a

A defence for the undertaker to show that it took all reasonable steps and exercised all due diligence to avoid the breach. (2) Section 112 permits an undertaker to require that a person constructing a drain or sewer construct it in a particular manner. An undertaker exercising that power is required by section 112(6) to repay the person the extra expenses reasonably incurred in complying with this requirement. (3) Section 209 provides that where an escape of water, however caused, from a pipe vested in a water undertaker causes loss or damage the undertaker shall be liable for the loss or damage except as otherwise provided in section 209. The liability does not arise if the escape was due wholly to the fault of the person who sustained the loss or damage or his servant, agent or contractor. Section 209(3) provides a further exception, in the case of certain identified persons, in respect of any loss or damage for which the undertaker would not be liable apart from section 209(1). As Mr Gasztowicz correctly submits, none of these provisions has any application to the present case. However, as Pill LJ points out in his judgment, the first and third of these provisions have an important bearing on the question whether breach of section 106 was intended to give rise to a private law action for damages.

30 Mr Gasztowicz also relied on certain observations of Fletcher Moulton LJ in *Lingke v Mayor of Christchurch* [1912] 3 KB 595. There a defendant authority had carried out works pursuant to powers conferred on them by the Public Health Act 1875 which had prevented access to the plaintiff's house and shop. Section 308 of the Act provided that where any person sustained any damage by reason of the exercise of the powers under the Act in relation to any matter as to which he was not himself in default, full compensation should be made by the local authority and any dispute should be referred to arbitration. Mrs Lingke brought a claim, which she referred to arbitration. The arbitrator made an award in her favour. The defendants then disputed their liability and brought an action on the award in the county court. The county court judge gave judgment for the defendants and his decision was confirmed by the Divisional Court. The Court of Appeal allowed a further appeal, holding that temporary obstruction causing inconvenience and loss of business may constitute damage for which the occupier was entitled to compensation under section 308. The importance of the decision for present purposes lies in the observations of Fletcher Moulton LJ. At p 607 he observed that if any negligence or undue delay were proved against the authority the act would have been a wrongful act and a remedy would not be compensation pursuant to section 308 but an action for damages. He said, at p 609:

“I consider that this interference with her premises by this obstruction was so direct and so individual and special that if it had been unauthorised she could have proved special damage . . . Therefore I have no doubt that had this been done by unauthorised persons she would have had a right of action against them.”

H In this instance the existence of a statutory right to compensation for permitted acts would not have excluded a cause of action at common law for damages had the conduct in fact been unauthorised.

31 However, to my mind, there is an important distinction between the present case and *Lingke's* case. For the moment I set to one side the claims

based on the blocking of the pipe and I limit my consideration to the claim based on the refusal to permit connection. In *Lingke's* case the alternative cause of action referred to was a free-standing cause of action in nuisance which was in no sense dependent on any provision of the statute. By contrast, in the present case the essence of this limb of the proposed cause of action in nuisance is that DCC should have permitted connection and received sewage from Barratt's land into its sewer. That obligation cannot be derived from DCC's use or occupation of its sewers alone but is dependent on the duty under section 106 to permit connection. There is no free-standing cause of action in nuisance independent of section 106. Section 106 is the basis for the contention that DCC's refusal is an unlawful interference with Barratt's enjoyment of its land.

32 The present case differs from *Marcic's* case and *Dobson's* case in the same respect. While it is correct that in *Dobson's* case [2008] 2 All ER 362 Ramsey J held that the claimants were seeking to enforce duties arising under section 94(1)(b) (paras 42–84) the causes of action relied on by the claimants were not dependent on obligations imposed by the 1991 Act. Thus Ramsey J observed, at para 81: “In *Marcic's* case the claim was not phrased as a claim under section 94(1)(a) any more than the claimants here seek to rely on section 94(1)(b).” By contrast, in the present case Barratt has to invoke what Lord Phillips of Worth Matravers PSC in the Supreme Court [2010] PTSR 651, para 62 described as its “vested right” under section 106 as the foundation of this limb of its nuisance claim. But for the statute there would be no duty on DCC to permit connection or to accept sewage into its sewer.

33 The question then arises whether it is consistent with the policy of the 1991 Act to permit Barratt to invoke section 106 in this way. In considering this question it is convenient to start by considering whether section 106 gives rise to a cause of action for damages for breach of statutory duty.

34 In *Bowden v South West Water Services Ltd* [1998] 3 CMLR 330 Carnwath J considered that generally the provisions of the 1991 Act constitute an elaborate “regulatory code” analogous to the social welfare legislation reviewed in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, and that the expectation, in the absence of any indication to the contrary, is that such a code is enforceable in public, not private, law.

35 Following the discovery of that authority Barratt no longer sought to maintain its claim for damages for breach of statutory duty in the present proceedings. Nevertheless Judge Seys Llewellyn in the judgment which is now appealed explained at some length why there was no cause of action for damages for breach of section 106, a matter which he rightly considered had an important bearing on the question of whether there was a parallel cause of action in negligence. He drew attention to the following matters. First, he considered it striking that a number of sections of the 1991 Act express a duty which is in terms actionable at the suit of the person to whom the duty is owed and yet in the case of section 106 the Act does not do so. Secondly, he noted that the ordinary scheme under section 106 is of notice, met by counter-notice, and an express scheme is provided for resolution of issues on service of such a counter-notice. The judge considered that it would be surprising if omission to serve a counter-notice should impliedly give rise to

A a right of action in damages if the undertaker fails to permit connection to the public sewer. Thirdly, he considered that this is legislation which provides a regulatory framework for the provision of services for the benefit of the community as a whole. Fourthly, he referred to the decision of Carnwath J in *Bowden's* case which he found highly persuasive. Fifthly, he observed that the observation of Lord Phillips PSC that the developer had a vested right to connection was made in the context of an action for an injunction only where the court was neither invited nor required to express a view on whether damages were recoverable. Judge Seys Llewellyn added:

“I suspect that he, and other members of the Supreme Court, would find it surprising if his words were construed as if they were in a statute themselves, so as to support a right of action in damages.”

C The judge concluded that it is neither the policy nor the proper construction of the statute that a developer should enjoy a right to damages in circumstances such as these for failure to satisfy the entitlement of the owner or occupier of premises to have his drains or sewer communicate with the public sewer.

D 36 The case that section 106 gives rise to a remedy in damages for breach of statutory duty having been conceded below, it was not raised in the notice of appeal and has not been argued before us. However, I consider that the concession was correctly made for the reasons stated by the judge.

37 The relevance of such considerations to the existence of a parallel cause of action in negligence was explained by Lord Hoffmann in *Stovin v Wise* [1996] AC 923, 952:

E “Whether a statutory duty gives rise to a private cause of action is a question of construction: see *R v Deputy Governor of Parkhurst Prison, Ex p Hague* [1992] 1 AC 58. It requires an examination of the policy of the statute to decide whether it was intended to confer a right to compensation for breach. Whether it can be relied upon to support the existence of a common law duty of care is not exactly a question of construction, because the cause of action does not arise out of the statute itself. But the policy of the statute is nevertheless a crucial factor in the decision. As Lord Browne-Wilkinson said in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 739C in relation to the duty of care owed by a public authority performing statutory functions: ‘the question whether there is such a common law duty and if so its ambit, must be profoundly influenced by the statutory framework within which the acts complained of were done’. The same is true of omission to perform a statutory duty. If such a duty does not give rise to a private right to sue for breach, it would be unusual if it nevertheless gave rise to a duty of care at common law which made the public authority liable to pay compensation for foreseeable loss caused by the duty not being performed. It will often be foreseeable that loss will result if, for example, a benefit or service is not provided. If the policy of the Act is not to create a statutory liability to pay compensation, the same policy should ordinarily exclude the existence of a common law duty of care.”

H In the present case Judge Seys Llewellyn, having cited this passage, went on to conclude that there was no parallel cause of action in negligence. He considered that the nub of the claim is that the developer had a right to connect to the public sewer but the defendant failed to act in such a way as to

permit that. He asked rhetorically, at para 56, why in circumstances where there is no right of action for damages for breach of statutory duty there should be a common law duty of care to protect the developer from economic loss in respect of the identical failure. As a result he struck out the claim in negligence, with the exception of the claim limited to the cost of repairing or reinstating the pipe. I consider that the judge was clearly correct in holding that there was no cause of action in negligence in respect of economic loss flowing from a wrongful refusal to permit connection. There is no appeal against that decision.

38 The present question for consideration is whether the right conferred by section 106 can be invoked by Barratt as the basis of a cause of action in nuisance. I have come to the conclusion that it cannot. I have explained earlier in this judgment (at paras 31–32) why I consider that there is no cause of action in nuisance in respect of the failure to permit connection independent of the duty under section 106. Here section 106 is the basis for the contention that DCC’s refusal is an unlawful interference with Barratt’s enjoyment of its land. To my mind the unchallenged conclusions in relation to the policy of the statute apply with equal force to the proposed cause of action in nuisance in respect of the failure to permit connection. The policy of the statute is clear: section 106 is not intended to confer a right to compensation for breach. If failure to perform a statutory duty does not give rise to a private right to sue for damages for breach it is difficult to see how it can provide the essential basis for a cause of action for damages in nuisance.

39 A further consideration in relation to this limb of Barratt’s claim in nuisance is that if Barratt is correct and section 106 may found a claim for damages in nuisance this cause of action would be available in every case in which an undertaker was in breach of its obligation to permit connection. While not conclusive this does provide further support for the view that it cannot have been the intention of Parliament that section 106 might be used in this way.

40 To my mind the alternative limb of Barratt’s claim in nuisance based on the blocking of the pipe with concrete is equally dependent on the right to connect and discharge conferred by section 106. The judge expressed it in this way, at para 64:

“the nub of the action in nuisance is that the claimant had the means of connection via its pipe and . . . an entitlement to connect to and have sewage pass into the public sewer, but the defendants have by positive action thereby unlawfully interfered with exercise by the claimant of enjoyment of ownership and occupation of their development site.”

For the reasons given above I do not consider that section 106 can be used in this way as a basis for a private law claim in damages.

41 I conclude therefore that Barratt has no cause of action in nuisance to the extent that such claim is founded on its rights under section 106.

#### *Causation*

42 As indicated above, the judge, who allowed the claim in nuisance to proceed, approached the question of nuisance, at para 64, on the basis that:

“[while] the nub of the action for breach of statutory duty and in negligence is one of failure to permit connection . . . the nub of the action

A in nuisance is that the claimant has a means of connection via its pipe and an entitlement to connect to and have sewage pass into the public sewer but the defendants have by positive action thereby unlawfully interfered with exercise by the claimant of enjoyment of ownership and occupation of their development site.”

B The question he was addressing at para 63 was whether an action may lie in principle for nuisance by reason of pouring concrete to block a connection. He concluded at para 74 that there may in principle be a claim in nuisance for losses incurred in mitigating an interference with the enjoyment of the claimant’s land by pouring concrete into the claimant’s pipe and preventing sewage being drained from the development site through it.

C 43 The claim in nuisance based on the blocking of the pipe raises an issue of causation which Mr Weir, on behalf of DCC, placed at the forefront of his submissions before us.

D 44 DCC submits that it had set its face against Barratt’s proposal to connect to the public sewer at the location and that Barratt risked committing a criminal offence contrary to section 109(1) if it persisted in seeking to make the connection. DCC submits that the subsequent plugging of the pipe was nothing to the point and that if it was the plug itself which was preventing Barratt from making the connection Barratt would have removed it. DCC submits that in order to succeed Barratt must establish that the blocking of the pipe was the effective cause of the economic loss, but submits that the pouring of the concrete was causally irrelevant. DCC also complains of an inconsistency in the judge’s reasoning. When considering the cause of the economic loss in the context of a claim in negligence the judge accepted that the gist of the claimed duty was to permit discharge and would have been pursued whether or not the concrete plug intruded into the pipe. However, when considering the claim in nuisance and trespass to goods he considered that the gist of the action was the blocking of the pipe.

E 45 On behalf of Barratt, Mr Gasztowicz submits that the basis of the claim is that DCC blocked Barratt’s pipe with concrete, an act for which it had no lawful basis. He points to the fact that an injunction was granted by F the Court of Appeal requiring the removal of the concrete, and submits that it was this blockage which was preventing the communication between Barratt’s drains and the public sewer. He submits that it is a simple point. If anyone had come along and poured concrete into Barratt’s pipe with the result that Barratt could not use it and had to tanker away sewage, that person would be liable for the damage. He submits that DCC should be G liable in the same way, and that it is from that wrongful interference that the losses flow.

H 46 The issue of causation may not have been addressed in these terms or in such detail before the judge. In his judgment he does not deal with the starkly opposed submissions on causation which were advanced before us. However, in his observations, on the application for permission to appeal, he does state that he considers it plain that the act of plugging the pipe could and did on the facts alleged cause the claimant to incur expense.

47 To my mind Mr Gasztowicz’s submissions over-simplify the problem. This is not a case where a third party has interfered and prevented discharge by Barratt of sewage from its land. The complaint in the present case is essentially bound up with the refusal of the undertaker to permit

connection and discharge in breach of its statutory duty. To my mind the essential nub of the complaint is the refusal to permit connection and discharge. I have come to the conclusion that it is not arguable on behalf of Barratt that DCC's act of blocking the pipe with concrete was an operative or effective cause of the loss which it suffered. This is the case if one examines the events which actually occurred. The concrete was not a physical cause of the inability to discharge sewage into the defendant's sewer. It merely blocked a connection which Barratt had inserted in order to receive its drain, a drain which in the event was never connected. The concrete did not prevent the discharge. However, it is also the case at a more general level. The connection and blocking of the spur were purportedly carried out pursuant to statutory provisions relating to the statutory duties of the undertaker. The dispute between the parties was essentially about, and bound into, the statutory scheme. The use of cement to close the access pipe was merely incidental. The operative and effective cause of the loss suffered was, in my view, DCC's refusal to permit connection and discharge.

48 For this further reason I consider that Barratt's claim for damages in nuisance, to the extent that it is founded on the pouring of concrete into Barratt's pipe, cannot succeed and should be struck out. By the same token the claim in trespass to goods and that in negligence save to the extent that it relates to the cost of damage to the pipe, its repair or reinstatement similarly cannot succeed and should be struck out.

#### *Further issues on nuisance*

49 On behalf of DCC, Mr Weir made a series of further submissions in support of his contention that no cause of action for damages in nuisance is available in the particular circumstances of this case. In the light of the conclusions to which I have come earlier in this judgment I consider that these further submissions cannot affect the outcome of the appeal. Nevertheless I propose to set out briefly my conclusions on these issues.

#### *(1) No injury to land*

50 First, Mr Weir submits that it is of the essence of a claim in nuisance that it involves injury to land. Here he submits that the sewage which was transported by tanker emanated from land no longer owned by Barratt. Sewage produced by the school and the home owners in the properties which had been sold was not sewage produced on Barratt's land. He submits that Barratt's claim for damages relates to (a) the cost of removing sewage produced from land other than its land and (b) the economic costs associated with making the properties on its land, from which no sewage had been produced, attractive for sale. That, he submits, is a claim for economic loss, not for injury to land.

51 On behalf of Barratt, Mr Gasztowicz submits, first, that if the sewage from occupied houses and the school had not been carried away Barratt's own retained land would have been adversely affected by the sewage and smells that would have been likely to have spilt out onto the land retained by Barratt. Secondly, he submits that for the land held by Barratt to be dealt with by way of occupation, lease or sale Barratt had to pay for the sewage to be tankered away. If Barratt had not spent money putting in place

A and operating a system for the removal of sewage from the estate no one would have occupied, leased or bought the land held by Barratt.

52 The judge rejected the submission by DCC on the basis that Barratt wished to use the property it owned and occupied in order to develop it. An essential adjunct of development by building properties for residential occupation was that the properties should enjoy connection to water and sewerage services.

B 53 An action in private nuisance is available in respect of acts directed against the claimant's enjoyment of his rights over land. I agree with the judge that an essential adjunct of Barratt's use of land in the present case was its ability to connect properties in the development to water and sewerage services. I consider that if an action for damages in nuisance were otherwise maintainable it would be arguable on the facts alleged that there was a wrongful interference with the use of land.

C

(2) *No use by the defendant of land*

54 On behalf of DCC, Mr Weir submits that in order to support an action for private nuisance the defendant must have used his own land or some other land in such a way as injuriously to affect the enjoyment of the claimant's land: *Southport Corpn v Esso Petroleum Co Ltd* [1954] 2 QB 182, 196, per Denning LJ. He submits that even if the concrete plug is considered causally relevant it cannot be said that this involved DCC in using or making use of land.

D

55 On behalf of Barratt, Mr Gasztowicz submits, first, that DCC did use its own or someone else's land to interfere with the use and enjoyment of Barratt's land, namely, by going onto the land and blocking Barratt's drainage pipe. Secondly, he submits that it is not a requirement of nuisance that the conduct complained of constitute a use of land. Thirdly, he submits, on the authority of *Nicholls v Ely Beet Sugar Factory Ltd* [1936] Ch 343, 348–350, which involved interference with fishing rights, that in the circumstances of the present case it is sufficient that DCC disturbed Barratt's legal right to use its drainage pipe for the passage of sewage from the development land.

E

F

56 This point does not appear to have been taken below. The judge in his observations, on refusing permission to appeal, noted that this was a new point and stated that he considered it plain that a nuisance may lie if the defendant deals with its own sewer in such a way as to interfere with the claimant's enjoyment of use of its land.

57 It is clearly arguable that DCC's conduct involved a use of its sewer. That is sufficient to dispose of this point. I note, however, that nuisance does not require a use by the defendant of its land: see *Hubbard v Pitt* [1976] QB 142; *Thomas v National Union of Mineworkers (South Wales Area)* [1986] Ch 20 and *Church of Jesus Christ of the Latter-Day Saints v Price* [2004] EWHC 3245 (QB) at [154], per Beatson J.

G

H (3) *No emanation onto the claimant's land*

58 Mr Weir submits that there is no arguable claim for damages in nuisance here because there has been no emanation onto the claimant's land. He relies on the observations of Lord Goff of Chieveley and Lord Lloyd of Berwick in *Hunter v Canary Wharf Ltd* [1997] AC 655, 685H, 700B–C. He

also relies on the decision of Stanley Burnton J in *Anglian Water Services Ltd v Crawshaw Robbins & Co Ltd* (unreported) 6 February 2001, in which he held, at para 142, that the negligent interruption of a supply of gas by a third party was not actionable as a private nuisance because it did not involve an invasion of any substance or form of energy onto the claimant's land and was not one of the exceptional cases of liability in nuisance without such an invasion.

59 In this case Mr Weir submits that there has been no invasion from DCC's land onto Barratt's land. The plugging of a pipe in a manhole chamber on a public highway did not cause any transfer from the defendant's or another's land onto the claimant's land. He submits that the build-up of sewage on Barratt's land is an accretion of material which has not emanated from the defendant's land.

60 However, as Mr Gasztowicz submits, the authorities relied on by DCC do not establish an invariable rule that nuisance always requires an emanation onto the claimant's land. In the circumstances of the present case I consider it arguable that if an action in nuisance were otherwise maintainable it would not be necessary to demonstrate an emanation onto the claimant's land.

*(4) No unreasonable user*

61 DCC submits that the action in nuisance would require an assessment of reasonable user which would involve a balancing of both parties' interests and would be a question of degree. It submits that it is no answer that it was subsequently established in proceedings that Barratt had the right to connect to the public sewer at a place of its choosing. It submits that prior to that litigation DCC had good reason to believe that Barratt did not have such a right. Furthermore, it submits that it was properly concerned to avoid environmental damage and damage to a gas main and that these considerations provided proper grounds for its conduct.

62 The most fundamental difficulty with this argument is, as Mr Gasztowicz points out, that DCC's conduct in blocking the spur has been demonstrated in earlier proceedings to be unlawful. In these circumstances questions of the reasonableness of a defendant's lawful user of land do not arise.

*Conclusion*

63 For these reasons I would allow the appeal and dismiss the cross-appeal.

**ARDEN LJ**

64 I agree with the judgment of Lloyd Jones LJ save on one point.

65 I would prefer to leave open the question whether the court would have decided that a cause of action lay in nuisance in the absence of the judge's unappealed ruling that no cause of action has arisen out of the events in issue for breach of statutory duty. I have reached no concluded view on this point and it has not been fully argued on this appeal.

66 In his careful and concise judgment the judge took the view that the events in issue could not give rise to an action for breach of statutory duty.

A Barratt has not appealed that ruling. By not appealing that ruling it concedes that that ruling is binding as a matter of law in these proceedings.

67 The judge held the cause of action in nuisance was distinguishable from that for breach of statutory duty:

B “The nub of the action in nuisance is that the claimant had the means of connection via its pipe, and (subject to the defences raised on the facts under para 5 of the amended defence) an entitlement to connect to, and have sewage pass into, the public sewer, but the defendants have by positive action thereby unlawfully interfered with exercise by the claimant of enjoyment of ownership and occupation of their development site.”

C 68 However, as that passage shows, nuisance depends on showing that DCC has *unlawfully* interfered with Barratt’s enjoyment of ownership and occupation of its site.

D 69 Thus Barratt is using its claimed cause of action in nuisance to circumvent the proposition of law (for the purposes of these proceedings) that no cause of action lies for breach of statutory duty. If, as we must assume, the proposition of law reflects the true interpretation of section 106 of the 1991 Act, such a cause of action must be impliedly excluded. To allow a cause of action in nuisance to proceed would be to allow the statute to be undermined.

E 70 Sometimes the court does not accept that the parties can simply agree a proposition of law. But in this case it would be manifestly unfair to DCC if Barratt could seek to challenge the judge’s conclusion on a matter which it neither argued below nor appealed.

F 71 There are cases where a person injured as a result of a non-actionable breach of statutory duty has been able to bring an action for negligence at common law: see, for example, *Kent v Griffiths* [2001] QB 36. That, however, was a case where the statutory duty was a wide and general target duty to provide a health service. The obligation in this case is specific. If, therefore, we are constrained to accept that there is no breach of statutory duty where DCC fails to comply with its statutory obligation we cannot in my judgment conclude that a cause of action lies at common law in nuisance.

72 The following points may be said to be arguments why Parliament must have intended there to be a remedy at common law.

G 73 First, a person in the position of Barratt is within the limited class of persons for whose benefit section 106 was enacted. Furthermore, the damage of which Barratt complains is a foreseeable consequence of the failure to connect.

74 Second, section 106 does not require the exercise of any discretion to permit enforcement once the notice procedure under section 106 has been completed: the duty is not of a regulatory or policy nature.

H 75 Third, the existence of paragraph 4(1) of Schedule 12, which confers a full right of compensation if damage occurs in the *proper* performance of the duty of section 106, might be said to give rise to an inference that Parliament intended to exclude a private common law cause of action in nuisance. However, it is difficult to see why this is the logical inference especially when section 106 is outside the express exclusion of common law

causes of action contained in section 18(8) of the 1991 Act set out in para 20 above. A

76 Fourth, this court has held that a person has a claim under a statutory predecessor of paragraph 4(1) of Schedule 12 for damage caused by a sewerage undertaker acting pursuant to its statutory functions: see *Lingke v Mayor of Christchurch* [1912] 3 KB 595. If it is not inconsistent with the statutory scheme for the statutory undertaker to have to pay compensation for acts done pursuant to section 106(1), it may be difficult to conclude that it would be inconsistent with the statutory scheme for there to be liability in nuisance for acts which *purport* to be done pursuant to that section. B

77 In order to meet the difficulty caused by its acceptance of the judge's ruling on breach of statutory duty Barratt has formulated the issue at stake on the nuisance issue as one of causation. However, the question whether, on the basis of the proposition in law which we must take as accepted for the purposes of these proceedings, a cause of action exists in nuisance is a logically anterior issue. C

78 I move from that threshold issue to consider and reject three minor objections taken to liability in nuisance.

79 First, it is said that there was no injury to Barratt's land. However, there was certainly interference with the enjoyment by Barratt of its residual land. In my judgment this is enough for the purposes of the law of nuisance. I agree with what Lloyd Jones LJ has said at paras 50–53 above. D

80 Second, it is contended that DCC was not making use of its land. In my judgment it was doing so because it installed the plug which prevented the connection of the sewers. E

81 Third, it is said that there cannot be liability in nuisance because there was no emanation from DCC's land. However, I agree with Lloyd Jones LJ (see paras 58–60 above) that this is not a necessary requirement. Accordingly I too would regard the cause of action as arguable with respect to this point. E

82 I further agree with the judge that liability in nuisance is not excluded by the statutory scheme in this case. *Marcic v Thames Water Utilities Ltd* [2004] 2 AC 42, where the House of Lords held that a cause of action in nuisance was inconsistent with the statutory scheme in various provisions of the 1991 Act, is distinguishable. There the claimant relied on section 94(1) of the 1991 Act ("General duty to provide sewerage system") which Lloyd Jones LJ has set out in para 20 above. F

83 There is no statutory right of compensation for a breach of section 94. Furthermore, under the 1991 Act there is a special procedure for the enforcement of the duty imposed by section 94 which is described by Lord Nicholls of Birkenhead at para 21: G

"Section 94(3) provides, so far as relevant, that a sewerage undertaker's duty to provide an adequate system of public sewers under section 94(1) is enforceable by the director under section 18, in accordance with a general authorisation given by the Secretary of State. Hence, as provided in section 18, the remedy in respect of a contravention of the sewerage undertaker's general drainage obligation lies solely in the enforcement procedure set out in section 18. Thus, a person who sustains loss or damage as a result of a sewerage undertaker's contravention of his H

A general duty under section 94 has no direct remedy in respect of the contravention. A person in the position of Mr Marcic can bring proceedings against a sewerage undertaker in respect of its failure to comply with an enforcement order if such an order has been made. In the absence of an enforcement order his only legal remedy is, where appropriate, to pursue judicial review proceedings against the director or the Secretary of State, who has similar enforcement functions regarding section 94, in respect of any alleged failure by the director or the Secretary of State to make an enforcement order as required by section 18(1).”

84 In this case the duty to allow connections to a sewer is not made enforceable in the same way as the duty imposed by section 94. Moreover, as already explained, there is a statutory right to compensation for damage caused by acts undertaken pursuant to section 106 of the 1991 Act: see paragraph 4(1) of Schedule 12 taken with the definition of “the relevant sewerage provisions” in section 219(1). A person claiming compensation under this provision does not have to show any default or tort on the part of the statutory undertaker.

85 In the present case there is no question of the sewerage undertaker causing a nuisance in the *proper* performance of its statutory functions.

D 86 Nor did Mr Weir argue that there could be no liability in nuisance without negligence. Normally, where a statutory undertaker is sued in nuisance, negligence must be shown: see, for example, *Clerk & Lindsell on Torts*, 20th ed (2010), paras 20-87-20-92. However, that principle would not in my judgment apply here because DCC acted outside its powers.

E 87 Finally, it is of some relevance that it was conceded in *British Waterways Board v Severn Trent Water Ltd* [2002] Ch 25 that the 1991 Act did not authorise a sewerage undertaker to commit a nuisance. This court accepted that that concession was plainly right, though reserving the situation where nuisance was caused by a sewerage undertaker performing its statutory functions: see per Peter Gibson LJ (with whom Chadwick and Keene LJ agreed), at para 36.

F 88 For these reasons I too would make the order Lloyd Jones LJ proposes but with the reservation stated at the start of this judgment.

## PILL LJ

### *Background*

G 89 When the case was previously before this court and, on appeal, the Supreme Court, the principal issue was whether the right of a property owner to connect his private drain or sewer to a public sewer for the purpose of discharging his sewage into the public sewer is entitled to determine the point at which the property owner’s drain or sewer is to connect to the public sewer. Lord Phillips of Worth Matravers PSC, with whom Lord Saville of Newdigate, Lord Walker of Gestingthorpe and Lord Clarke of Stone-cum-Ebony JJSC agreed, described the issue, at [2010] PTSR 651, para 59, as “the narrow issue of statutory interpretation raised in relation to the point of connection”. Lord Phillips PSC added:

“For the reasons that I have given I would endorse the judgments of the Court of Appeal in holding that a sewerage undertaker has no right to

select the point of connection or to refuse a developer the right to connect with a public sewer because of dissatisfaction with the proposed point of connection.”

It was common ground (para 56) “that no objection can be taken by a sewerage undertaker to connection with a public sewer on the ground of lack of capacity of the sewer”. Lord Phillips PSC described the property owner’s right conferred by section 106 of the 1991 Act to connect to a public sewer, without any requirement to give more than 21 days’ notice, as “an absolute right”.

90 Lord Phillips PSC went on to identify the “real problem” as one arising from that right. The public sewer may well not have surplus capacity capable of accommodating the increased load. Lord Phillips PSC noted that the judgments in this court suggested that the practical answer to the problem was in the requirement that a housing development requires planning permission under the Town and Country Planning Act 1990. Appropriate conditions can be imposed on development to safeguard the sewerage authority: see [2009] Env LR 547, per Carnwath LJ, at paras 46–48, and Pill LJ, at paras 56–67. These comments appear to have been approved by Lord Phillips PSC at [2010] PTSR 651, para 58, where he referred to more thought needing to be given “to the interaction of planning and water regulation systems under the modern law to ensure that the different interests are adequately protected”.

### *The central issue*

91 It is against that background that the court has to decide whether there is a private law right of action in nuisance for damage resulting from the breach of statutory duty by DCC in refusing to permit Barratt to exercise its absolute right to connect. That, in my view, is the central issue in this case, and the court’s view that it was an important issue was made clear at the hearing. The nub of Barratt’s claim is the refusal of DCC, in breach of statutory duty, to permit connection and discharge into DCC’s system.

92 I agree with the reasoning to that effect of Lloyd Jones LJ at para 47 of his judgment. When connection was prevented the parties sensibly resorted to the courts rather than engage in a physical battle on the ground.

93 Judge Seys Llewellyn QC considered the question in relation to negligence, and Lloyd Jones LJ has set out the judge’s conclusions at para 35. On being confronted with the decision of Carnwath J in *Bowden v South West Water Services Ltd* [1998] 3 CMLR 330 Barratt had not maintained a claim for damages for breach of statutory duty. That was a surprising decision, given that private law claims in negligence, nuisance and trespass to goods were maintained. The judge plainly took the view that the concession did not prevent consideration of whether a private law right of action could be brought based on DCC’s breach of duty because he considered in detail whether there was a concurrent common law duty of care “in circumstances where Parliament has seen fit not to create a cause of action sounding in damages”: para 43. The judge cited *Stovin v Wise* [1996] AC 923 and *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, which are relevant to that issue.

94 At para 64 the judge expressly addressed the concession made and went on to consider whether a private law right of action existed. He stated:

A “the nub of the action in nuisance is that the claimant had . . . an entitlement to connect . . . but the defendants have by positive action thereby unlawfully interfered with exercise by the claimant of enjoyment of ownership and occupation of their development site.”

B There would have been no point in conducting that analysis if the concession as to breach of statutory duty was thought by the parties or the court inevitably to defeat any claim to rely on a private law cause of action. The judge permitted a claim in nuisance to proceed.

C 95 At no stage has the litigation been conducted on the basis that consideration of whether a private law right of action arising from a breach of section 106 of the 1991 Act could not proceed. Summarising grounds of appeal the judge identified DCC’s relevant ground as that “there was no place for the tort of nuisance in relation to the alleged failure to comply promptly with its statutory duty under section 106 of the 1991 Act”. The judge refused DCC permission to appeal on that and other grounds. During the hearing before this court it was not suggested that the concession prevented consideration of the possibility of a private law right of action based on the statute. In considering the central point in this appeal the concession can in my judgment be ignored; for whatever reason it was made it does not prevent the court from considering, as did the judge, whether a private law right of action in nuisance exists for breach of duty under section 106. I respectfully disagree with Arden LJ on this issue.

D 96 Subject to that, I agree with the analysis of Lloyd Jones LJ on all issues. I agree with Lloyd Jones and Arden LJJ that for present purposes the ingredients of nuisance are established if it is first established that there can be a private law cause of action. The claim is then appropriately put as a claim in nuisance, following the effect on the use of Barratt’s land of DCC’s conduct in refusing connection on its own land. Albeit in good faith DCC has misconstrued its powers, as has authoritatively been held. As a result Barratt incurred considerable expense in dealing with sewage on its site as a result of the wrongful refusal of DCC to permit a connection with its sewer. I do not accept Mr Weir QC’s submission for DCC that a genuine but wrongful belief in a right to refuse a connection can itself be a defence to any action.

E F 97 I am not able to find on the present facts that a claim in nuisance arises independently of the breach of statutory duty. The nuisance alleged stems from the breach of statutory duty in refusing to permit a connection, as the judge appears to me to have recognised in para 64 of his judgment cited by Arden LJ which puts the “nub” of the claim in nuisance on “an entitlement to connect”.

### Remedy

H 98 There has been no case deciding whether a private law right of action for damages follows from a breach by a sewerage undertaker of its statutory duty under section 106 of the 1991 Act. In *Marcic v Thames Water Utilities Ltd* [2004] 2 AC 42 reliance was placed on the duty of a sewerage undertaker under section 94 of the 1991 Act to provide, improve and extend a system of public sewers. The claimant’s premises were flooded because the sewerage system was overloaded. Claims were brought in nuisance and under the Human Rights Act 1998, but it was held that there was no room

for a common law cause of action: see per Lord Nicholls of Birkenhead at paras 35, 36 and Lord Hoffman at para 70. A

99 Is there a private law cause of action? The principles to be applied were stated by Lord Browne-Wilkinson in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633. Lord Browne-Wilkinson stated, at p 719:

“The question whether there is such a common law duty and if so its ambit, must be profoundly influenced by the statutory framework within which the acts complained of were done.” B

100 Lord Browne-Wilkinson added, at p 731:

“The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty.” C

Lord Browne-Wilkinson added, at p 732:

“The cases where a private right of action for breach of statutory duty have been held to arise are all cases in which the statutory duty has been very limited and specific as opposed to general administrative functions imposed on public bodies and involving the exercise of administrative discretions.” D

101 No breach of a Directive is alleged in this case but the approach of the Court of Justice of the European Union to the question whether a member state can be held liable in damages for failure to implement the Directive is illustrative. It was held in *Francovich v Italian Republic* (Joined Cases C-6/90 and C-9/90) [1995] ICR 722 cited by Carnwath J in *Bowden's* case [1998] 3 CMLR 330 that there would be a right to money reparation if three conditions were fulfilled: E

“(1) the result prescribed by the Directive entailed the grant of rights to individuals; (2) it was possible to identify the content of those rights on the basis of the provisions of the Directive; (3) there was a causal link between the breach of the state’s obligation and the loss and damage suffered by the injured parties.” F

102 In *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173 one of the issues was the effect of a statutory prohibition of an act where the statute provides a means of enforcing the prohibition by criminal sanction. The point does not arise in this case because no criminal sanction is imposed on DCC for a breach of section 106, though there is a criminal sanction against an owner or occupier who makes a connection in contravention of the provisions of section 106 or 108. Lord Diplock’s comments are, however, material. He stated that there were exceptions to the general rule that if there is a criminal sanction there is no civil remedy. He stated one of them, at p 185: G

“upon the true construction of the Act it is apparent that the obligation or prohibition was imposed for the benefit or protection of a particular class of individual, as in the case of the Factories Act and similar legislation.” H

- A Lord Diplock cited the speech of Lord Kinnear in *Butler (or Black) v Fife Coal Co Ltd* [1912] AC 149, 165:

“But when a duty of this kind is imposed for the benefit of particular persons there arises at common law a correlative right in those persons who may be injured by its contravention.”

B *The statutory scheme*

103 In *Bowden's* case [1998] 3 CMLR 330 Carnwath J conducted a comprehensive review of a statutory scheme where a mussel fisherman was driven out of trade because of the polluted state of water off the Devon coast. While striking out other causes of action Carnwath J declined to strike out a claim against Southwest Water Services Ltd (“SWWS”) based on a breach of the Sea Fisheries Byelaws. Article 11 of the byelaws provided:

“Deposit of refuse. No person shall deposit or discharge any solid or liquid substance detrimental to sea fish or sea fishing except in such places and at such times and in such quantities, and subject to such conditions as may from time to time be prescribed by the board in writing, under the hand of their clerk.”

- D The statutory immunity granted elsewhere in the statute to SWWS was held not to be conclusive.

104 Carnwath J’s general conclusion however, having considered the contents of the statutes involved, was:

E “Generally, the provisions of the WIA [Water Industry Act 1991] and WRA [Water Resources Act 1991] constitute an elaborate ‘regulatory code’ analogous to the social welfare legislation reviewed in *X (Minors) v Bedfordshire County Council* (supra). The expectation, in the absence of any indication to the contrary, is that such a code is enforceable in public not private law.”

F 105 Lloyd Jones LJ has set out at paras 27–29 those provisions of the 1991 Act which may throw light on the issue. There is no provision in the Act expressly preventing or expressly permitting a private law right of action for breach of section 106. Section 180 and Schedule 12 do specify circumstances in which compensation is payable in respect of the exercise of statutory powers. These include provision for compensation under paragraph 4 where any person has sustained damage “by reason of the exercise by the [sewerage] undertaker, in relation to a matter as to which that person has not himself been in default, of any of its powers under the relevant sewerage provisions”.

G 106 Section 41 imposes a duty on a water undertaker “to provide a water main to be used for providing such supplies of water to premises in a particular locality in its area as (so far as those premises are concerned) are sufficient for domestic purposes” where certain notices have been served. Section 41 goes on to provide:

- H “(3) The duty of a water undertaker under this section to provide a water main shall be owed to the person who requires the provision of the main or, as the case may be, to each of the persons who joins in doing so.

“(4) Where a duty is owed by virtue of subsection (3) above to any person, any breach of that duty which causes that person to sustain loss or

damage shall be actionable at the suit of that person; but, in any proceedings brought against a water undertaker in pursuance of this subsection, it shall be a defence for the undertaker to show that it took all reasonable steps and exercised all due diligence to avoid the breach.”

107 A civil liability for escapes of water is imposed by section 209:

“(1) Where an escape of water, however caused, from a pipe vested in a water undertaker causes loss or damage, the undertaker shall be liable, except as otherwise provided in this section, for the loss or damage.

“(2) A water undertaker shall not incur any liability under subsection (1) above if the escape was due wholly to the fault of the person who sustained the loss or damage or of any servant, agent or contractor of his.”

Provision is made in subsections (4) and (5) of section 209 for the application of the Law Reform (Contributory Negligence) Act 1945, the Fatal Accidents Act 1976, the Limitation Act 1980 and the Civil Liability (Contribution) Act 1978 to the liability. Thus under provisions of the Act dealing both with sewerage and with water authorities actions for damage are contemplated where the exercise of powers has caused damage (section 180), where the authority is in breach of the duty to provide a water main (section 41) and for escape of water from the undertaker’s pipe (section 209).

#### *Discussion and conclusions*

108 The claim is readily distinguishable from *Marcic’s* case [2004] 2 AC 42 in that section 106 of the 1991 Act creates an “entitlement” on an owner or occupier to have his drains or sewer communicate with the sewerage undertaker’s sewer. If the sewerage undertaker does not exercise its power under section 107 to undertake the making of the connection the owner or occupier, in order to exercise his rights under section 106, is entitled to exercise the powers conferred on a sewerage undertaker. Notices are required but I have put the point starkly to demonstrate that an owner or occupier of premises has an entitlement, an absolute right.

109 The obligation in the present case was imposed for the benefit of a particular class of individuals or, as Lord Browne-Wilkinson put it in *X’s* case [1995] 2 AC 633, 731D “a limited class of the public”. The class may potentially be numerous but is limited to those seeking to exercise a specific right to connect, that is, owners or occupiers of land seeking to discharge sewage from their land. The duty is specific and limited and is not based on a general administrative function involving the exercise of administrative discretions.

110 The right granted is a specific right to be exercised in relation to a specific duty holder, the sewerage authority. Normally when there is such a right/duty relationship and the party with the right is prevented from exercising it by the party under the duty to perform it one would expect the party under the duty to be required to compensate the party whose right is infringed. The expense and inconvenience to an owner, whether of a single residence or a development, resulting from the breach of specific duty to him could be very large. As between them the loss might be expected to fall on the party in breach of duty and not on the party whose right is infringed.

A     111 Another pointer in Barratt's favour is the absence of a criminal sanction for breach. Such a sanction might have been expected if the owner, who may himself be liable to a criminal sanction, is left without a private law right of action.

B     112 What points in the opposite direction is the absence of a specific grant of a right of action based on section 106 when such a right, albeit limited, is granted for breach of other sections. I acknowledge that in each case the breach is of a different kind: section 180 (powers lawfully exercised), section 41 (a less specific duty), section 209 (escapes of water). However, the need for sanctions where considered appropriate was plainly in the minds of the legislators and a right was not specifically conferred for breach of section 106.

C     113 It is the reluctance of the courts to read a private right into a statutory scheme that weighs heavily against Barratt in this case. That was demonstrated in *X's* case and, in particular, in the speech of Lord Hoffman in *Stovin v Wise* [1996] AC 923 cited by Lloyd Jones LJ at para 37 of his judgment. In the context of statutes dealing with water Acts Carnwath J reached the same conclusion in *Bowden's* case [1998] 3 CMLR 330. In the end I am not able to conclude that the policy of the 1991 Act intended to confer a right to compensation for breach of section 106.

D     114 I would allow the appeal and dismiss the cross-appeal.

*Appeal allowed.*  
*Cross-appeal dismissed.*

BERNARD AGYEMAN, Barrister

E

---

F

G

H