#### Case No: A3/2016/4155; 4168; 4169

Neutral Citation Number: [2018] EWCA Civ 342

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

The Hon Mrs Justice Asplin DBE

[2016] EWHC 1547 (Ch)

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 02/03/2018

**Before :**

LORD JUSTICE MCFARLANE

LORD JUSTICE FLOYD

and

LORD JUSTICE HENDERSON

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**Between :**

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|  | **Canal & River Trust** | Appellant |
|  | **- and -** |  |
|  | **Thames Water Utilities Limited** | Respondent |

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**Stephen Tromans QC** and **Catherine Dobson** (instructed by **Eversheds Sutherland (International**) **LLP**) for the **Appellant**

**Sa’ad Hossain QC** and **Sarah Abram** (instructed by **Berwin Leighton Paisner LLP**) for the **Respondent**

Hearing dates: 23-25 January 2018

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Judgment

**Lord Justice Floyd:**

1. The issue to which this appeal is ultimately directed is the amount of money which the respondent, Thames Water Utilities Limited (“Thames”), must pay to the appellant, Canal & River Trust (“CRT”), under section 5 of the River Lee Water Act 1855 (“the 1855 Act”) or otherwise. It is, however, just a staging post on the road to that ultimate destination. The task of deciding on the correct sum to be paid under the 1855 Act is one which falls to the Secretary of State for the Environment, Food and Rural Affairs (“the Secretary of State”). By these Part 8 proceedings the parties invited the court to make declarations as to the purpose and effect of the statutory regime so as to assist the Secretary of State as to the proper legal basis for his ultimate determination. The proceedings came before Asplin J (as she then was) who duly made declarations with which neither party is wholly satisfied. They both appeal with the judge’s permission. There is also a free-standing appeal by Thames against the costs order which the judge made, with permission granted by Arden LJ on the papers.
2. Both parties are the successors to a number of predecessor bodies into whose shoes they have successively stepped. CRT is a company limited by guarantee with charitable status and with responsibility for preserving, protecting and operating inland waterways, including the River Lee. It took over those functions from the British Waterways Board in 2012. Before 2012 the relevant functions were, in reverse date order, those of the British Transport Commission, the Lee Conservancy Board, the Trustees of the River Lee and, ultimately, the individual “Trustees” appointed under the terms of the River Lee Act 1738.
3. Thames is a private sector water company which is the successor to the Thames Water Authority and before that the Metropolitan Water Board (“MWB”). MWB was the successor to the New River Company (“NRC”) and the East London Waterworks Company (“ELWC”), together referred to in some of the legislation, and by me, as “the Two Companies”.
4. The River Lee is one of the waterways for which CRT is responsible. It rises near Luton and flows through north London into the River Thames near Canning Town. It has a navigable section known as the Lee Navigation from near Hertford to where it flows into the Thames. It has been an important source of water for London for hundreds of years.
5. Thames abstracts water from the River Lee. 16% of the water supplied by Thames to its customers in London is drawn from the River Lee. Under section 5 of the 1855 Act Thames is liable to make annual payments to CRT, known as the Special Payments. The Secretary of State now has a power to fix the amount of the Special Payments by reference to what is “just and reasonable” by making an order under section 52(2) of the British Transport Commission Act 1949. The Secretary of State made such an order in 1995. In 2006 Thames applied to vary the amount of the Special Payments and British Waterways Board objected. In 2010 the Secretary of State indicated that consideration was being given to the process for resolving the dispute, but no determination had been made by 2014. The present proceedings were commenced in 2015 with the objective of enabling the Secretary of State to make his determination on a correct legal basis.

**The factual and legal background**

1. It is common ground that although it is possible to own water contained in a reservoir, there is no right at common law to ownership of or property in water flowing from time to time in a natural watercourse: such rights can only be created by statute. That has been the law since the old case of *The Company of Proprietors of the River Medway v Earl of Romney* (1861) 9 CB (NS) 575. The statutory provision in that case provided that “the said river or streams so to be made navigable … should be and were thereby vested in the said company, their successors, heirs, and assigns for ever”. The company brought an action in trespass against the defendants for abstracting water from the Medway to supply a local gaol and the lunatic asylum at Barming Heath. The defendants are reported to have argued that “Parliament … could never have intended to give these plaintiffs a property in a thing so changeable as the waters of a natural stream”. Willes J disagreed. He held that the rights granted were not to be construed as conveying only the rights which a private grant might have conveyed. The statute created a new species of statutory property and interest in the water, which was interfered with by its abstraction by the defendants.
2. The statutes and orders of relevance to the arguments in the present appeal are set out in the following paragraphs. Statutes from the eighteenth and nineteenth centuries used Roman numerals as section numbers, but in what follows I have substituted the equivalent in the more familiar Hindu-Arabic system.

*The River Lee Act 1738 (“the 1738 Act”)*

1. The 1738 Act recites that disputes had arisen between the town of Hertford and the inhabitants of Ware on the one hand and NRC on the other concerning the water issuing out of the River Lee into the New River, but that an agreement had been reached whereby:

“…the Navigation between *Hertford* and *Ware Bridge* may be fixed and ascertained in the present Channel, and that the Quantity of Water which is to be taken from the River *Lee*, into the said *New River*, may be ascertained in the Manner and upon the Terms and Considerations hereinafter mentioned, which will redound to a general Good; but cannot be established or rendered effectual without the Aid of an Act of Parliament…”

1. The 1738 Act nominated various individuals as Trustees to receive monies for improving the navigation of the River Lee. Section 5 gave NRC certain rights to take water from the river and, in effect, divert it into the New River at a particular point, through a timber gauge of specified dimensions. The water was to be taken to the New River through a course known as the Manifold Ditch. Section 11 contained an early example of a statutory grant of property rights in running water (albeit in a section of the New River, not the River Lee). It enacted that:

“the Course of Water or Ditch, called *Manifold Ditch*, and the Water running through the same to the said *New River*, shall for ever hereafter be deemed and taken to be a Part of the said *New River*; and the Property thereof shall be, and is hereby vested and settled in [NRC] for ever…”,

1. Section 17 required NRC to make regular payments to the Trustees without expressly mentioning what the payments were in respect of. It is plain, however, that they were consideration for the grant of the right to the water.

*The East London Waterworks Act 1829 (“the 1829 Act”)*

1. Section 53 of the 1829 Act provided for payment to be made by ELWC for water which it took from the River Lee “in order to compensate the Trustees of the said Navigation in respect thereof … as a Consideration for the Water to be so taken.” The sums were said to be “applicable and be applied to the general Purposes of the said Navigation*”*.

*The River Lee Navigation Improvement Act 1850 (“the 1850 Act”)*

1. The 1850 Act was a public act of Parliament, enacted in part in order to confer on the Trustees a general power to sell and dispose of the surplus water in the River Lee, a purpose which it was again expressly recognised could not be effected without the authority of Parliament. The recitals referred to the public advantage to be secured by improvements to the Lee Navigation already effected and to be effected. The recitals included the following:

“and whereas the Trustees have from Time to Time effected various Improvements in the Navigation of the River, and it would be a great public Advantage if they were authorized further to improve the same, and to sell and dispose of the surplus water of the River Lee in manner here-after mentioned, and to appropriate the Monies arising from such Sale to the Purposes of this Act, and also to raise a further Sum of Money upon the Security of the Tolls, Rates and Property vested in them, to be appropriated in the same Manner.”

1. The Trustees were made a body corporate by section 3, under the name “The Trustees of the River Lee”. Section 12 authorised the Trustees to make, maintain and improve certain “cuts” in the river, and section 14 gave them powers to improve the Navigation more generally. Section 68 is of particular importance. It provides for the power to sell the water in the following terms:

“And be it enacted, That it shall be lawful for the Trustees from Time to Time to contract and agree, either permanently or for a stated Period, with any Waterworks Company, Corporation, Commissioners, or Persons now or hereafter to be authorized by Act of Parliament, Charter, or otherwise, or pursuant to any Agreement or Contract already entered into by the Trustees, or by any Person authorized by them in that Behalf, to supply with Water the Cities of *London* and *Westminster*, or either of them, or the Suburbs thereof, or any Part thereof respectively, or the Inhabitants of any other Town, District, or Place within the Counties of *Hertford*, *Essex* or *Middlesex*, requiring a Supply of Water for domestic, sanitary, public, trading, business, or any other Purposes whatsoever, for the Purchase and taking by such Waterworks Company, Corporation, Commissioners, or Persons of so much of the Water flowing into or down the River *Lee* as such Waterworks Company, Corporation, Commissioners, or Persons may agree to purchase and take, and to enter into and make such Terms, Stipulations, and Agreements for effecting the Purposes aforesaid, or with reference or incidental thereto, as such Waterworks Company, Corporation, Commissioners, or Persons and the Trustees may mutually agree upon: Provided always, that in every such Contract there shall be inserted such Conditions and Stipulations as the Trustees of the River *Lee* shall in their Discretion think necessary or advisable for insuring such a Supply or Water for the Purposes of the Navigation as shall be necessary for the present or future Traffic thereon, and for effecting and making available the Improvements by this Act authorized to be made in the Navigation, or such Part of the Improvements as the Trustees shall think it advisable from Time to Time to provide for.”

1. Section 32 specified the quantity of surplus water that ELWC could take: an “ordinary supply” of 30 cubic feet per second and an “extraordinary supply” at the same rate. The section recited the arrangement under the 1829 Act in terms which recognised that ELWC’s right to take water was “on payment to the Trustees of” the sums specified in that Act, and went on to say that the new quantities could be taken “subject … to such Payment in respect thereof as by this Act provided”. Section 33 provided that the payments “in respect of such Ordinary Supply to the Waterworks” were not to exceed those set out in the 1829 Act. Section 34 provided for payment “in respect of such Extraordinary Supply to the Waterworks”.

*The 1855 Act*

1. The 1855 Act is the most important piece of legislation relevant to this appeal. It was a private act promoted by NRC and passed following litigation between the Trustees and NRC about the volume of water which could be taken from the River Lee pursuant to the 1738 Act. A number of its provisions have been repealed by the 1965 Order (see below), but it is important to set out the relevant recitals and operative provisions as they were enacted:

Eighth recital

And whereas the *New River* Company and the *East London* Company (in this Act called the Two Companies) derive large Quantities of Water for the Purposes of their respective Waterworks from the River *Lee*, and are executing extensive and important Works for preventing the fouling of such Water, and are expending large Sums in that Behalf:

Ninth recital

And whereas the Trustees have, under the [1850 Act], Section 68, Power to supply Water in Bulk to Water Companies and others authorised to supply Water to the Metropolis:

Tenth recital

And whereas it is of great Importance to the Health of the Inhabitants of such Parts of the Metropolis as are supplied with Water by the Two Companies respectively that the Water supplied to them should be of good Quality, and by reason of the rapid Increase of Population and the more general Use of Water that Provision should be made for Supply of increased Quantities, and by “The Metropolis Water Act, 1852,” Obligations involving a large Outlay were to that end imposed on the Two Companies respectively:

Eleventh and twelfth recitals

And whereas the *New River* Company contend that under the [1738 Act] they have the Right to take from the River *Lee* so much Water as will pass through the Gauge in that Act defined, which Right is denied by the Trustees, and Proceedings at Law and in Equity between that Company and the Trustees with respect to the Right so claimed and denied have been instituted: And whereas the *New River* Company have consented to compromise their Claim by restricting the Quantity which, as against the Trustees and the *East London* Company respectively, they shall take from the River *Lee* through that Gauge, to Two thousand five hundred Cubic Feet a Minute; and it is expedient that such Compromise should be established:

Thirteenth recital

And whereas it would conduce to the Advantage of the Inhabitants of the Metropolis who derive their Water Supply from the Two Companies respectively if the Quantity of the Water of the *River Lee* to which the Trustees and the Two Companies respectively are to be hereafter entitled were defined, and if the whole of the Water from Time to Time flowing into and down the River, except such Quantities thereof as are by this Act reserved to the Trustees for the Purposes of the Navigation, and such of the Powers of the Trustees with respect to such Water as in this Act expressed, were transferred to and vested in the Two Companies respectively, and if Provision were made for the Improvement of the Navigation of the River, and for the Repair of the River, and for husbanding the Water and preserving it from Pollution, and for enabling such further Improvements of the River and the Navigation to be from Time to Time made as may better enable the Two Companies respectively to comply with the Provisions of the “Metropolis Water Act, 1852:”

Fourteenth recital

And whereas the *New River* Company now pay to the Trustees for a Supply of Water the yearly sum of [£1850], and the *East London* Company now pay to the Trustees for a Supply of Water the yearly Sum of [£250], and the last-named yearly Sum is liable to be increased, under the Provisions of the Trustees Act of 1850:

Fifteenth recital

And whereas the Two Companies respectively are willing, in return for such Transfer to them, to pay to the Trustees, as by this Act provided, in lieu of those yearly Sums of [£1850] and [£250] respectively, and of any Sums by way of Increase thereof, the aggregate yearly Sum of [£3500] and the Principal Sum of [£42,000], and the Trustees are willing to accept Payment thereof accordingly, and that such Transfer should be made accordingly; and it is expedient that the Provisions in that Behalf of this Act be made:

1. Consistently with those recitals, section 5 of the Act (which is still in force) provided for the annual and capitalised payments to the Trustees:

“The Two Companies shall pay to the Trustees, as by this Act provided, the aggregate yearly Sum of [£3,500], and the *New River* Company shall pay to the Trustees, as by this Act provided, the gross Sum of [£42,000]: …”

1. Section 7 provided that the Trustees were to have the like remedies against the Two Companies for payment of the yearly sums as the remedies which they had under the previous legislation. By section 8, the capital payment of £42,000 was to be paid as to £12,000 within seven days of the passing of the Act, but as to the remaining £30,000 by instalments as provided for by later sections (see below). The transfer referred to in the thirteenth and fifteenth recitals was provided for by section 9 (now repealed) in the following terms:

“Subject to the Provisions of this Act, all the Water from Time to Time flowing into or down the River *Lee* and the Navigation thereof, which the Trustees have now Power to sell under the Trustees Act of 1850, except such Quantities thereof as are by this Act reserved to the Trustees for the Purposes of the Navigation, is by this Act transferred to and shall be absolutely vested in the Two Companies for ever: Provided always, that nothing herein contained shall be held to give to the Two Companies or either of them any Right to such Water which does not now belong to the Trustees, or which they have not now the Power to sell.”

1. Sections 21 and 22 (which remain in force) dealt with the quantities of water which could be taken at certain points by the Two Companies:

“21. Provided always, That after the passing of this Act the [1738 Act] shall be read as authorising the *New River* Company from Time to Time to take from the River *Lee*, through the Gauge specified in that Act … [2500] Cubic Feet of Water a Minute, and no more.

22. After the passing of this Act the *East London* Company from Time to Time may, subject to the Provisions hereof, take from the River *Lee* [2500] Cubic Feet of Water per Minute at any Point or Points at which the said Company under their said Acts are now authorized to take the same, or could before the passing of this Act have purchased of the Trustees, under the Trustees Act of 1850, the Right of taking such Water.”

1. Section 23 (now repealed) dealt with abstraction of water beyond the quantities specified in sections 21 and 22.
2. Section 30 dealt with priorities of the three parties to take water:

“The several Rights of the Trustees and of the Two Companies respectively with respect to the Water from Time to Time flowing into or down the River *Lee* and the Navigation thereof shall have the following Priorities; to wit,

First, the Right of the Trustees to the upper daily Quantity, the middle daily Quantity, and the lower daily Quantity respectively within the Limits of the Upper Reach, the Middle Reach, and the Lower Reach respectively, and such further Quantity, subject as aforesaid, as shall be necessary to maintain the Water of the Navigation on a Level with the Head Levels aforesaid:

Secondly, the Right of the *New River* Company to take [2,500] Cubic Feet a Minute:

Thirdly, the Right of the *East London* Company to take [2,500] Cubic Feet a Minute:

Fourthly, the Right of each of the Two Companies to take, *pari passu*, [500] Cubic Feet each a Minute:

Fifthly, the Right of each of the Two Companies, after such Notice in that Behalf as by this Act provided, to take, *pari passu*, any additional Quantity of Water:

Sixthly, the Right of the Trustees to surplus Water below *Tottenham* Mill.”

1. The provisions identified by “Fourthly”, “Fifthly” and “Sixthly” were repealed by the 1965 Order.
2. Section 27 provided that the Two Companies were not to draw water from the river so as to reduce the water in the Navigation below the customary “head level”. The section went on to provide that if it were necessary in order to maintain that level for the Two Companies to allow more water to pass down the Navigation, a deduction should be made from the sums to be paid by them to the Trustees “of such an Amount as shall be equal to the Value of the extra Water so required, such Amount, in case of no special Agreement, to be estimated at the Rate of Threepence *per* One thousand Gallons*.*”
3. Sections 40 and following are concerned with obligations placed on the Trustees to keep aspects of the Navigation in good repair. Section 41 gave the Two Companies the right to effect certain repairs if the Trustees did not carry them out and to deduct the cost of doing so from sums payable under the Act. Section 43 identified certain specific works which were required to be carried out within three years of the passing of the Act. It required the Trustees to expend £30,000 out of the £42,000 capital sum to be paid to them by NRC in executing those works; and section 44 provided for a certification mechanism by the Engineer of the Trustees that those sums had been so expended, thereby triggering payment by the Company of those sums.
4. Finally, section 79 provided:

“Except so far as the same are by this Act specially altered, this Act or anything therein shall not take away, alter, abridge, lessen, or prejudicially affect any Property, Right, Remedy, Protection, Power, Authority, Privilege, Toll, Duty, Exemption, or Benefit vested in or now enjoyed or exercised by the Trustees, but, except as aforesaid, all such Property, Rights, Remedies, Protections, Powers, Authorities, Privileges, Tolls, Duties, Exemptions, or Benefit shall be and remain in full Force and Effect, and shall be available for the Benefit of the Trustees in the same Manner to all Intents and Purposes as if this Act were not passed.”

*The British Transport Commission Acts 1949 and 1962*

1. Section 52(1) of the British Transport Commission Act 1949 increased the payment under section 5 of the 1855 Act to £25,500 per year as from January 1 1948. Section 52(2) gave to the Minister of Transport and the Minister of Health acting jointly (upon application to them) a power to increase or reduce the yearly sum payable under section 5 of the 1855 Act “in such manner and subject to such conditions as appear to the said Ministers to be just and reasonable”. Section 52(3) prevented a subsequent application within 5 years. These powers were modified by section 21 of the British Transport Commission Act 1962 in ways which are not material to this appeal. This function is now performed by the Secretary of State.

*The Water Resources Act 1963 (“the 1963 Act”)*

1. The 1963 Act introduced a licensing system for the abstraction of water. Section 3 conferred a power to create river authorities for defined areas, whose duties included, by section 4, re-distributing or otherwise augmenting water resources in their area, and securing the proper use of those resources. Section 23 imposed a general restriction, subject to exceptions, on the abstraction of water from any source of supply in a river authority area except in pursuance of a licence under the Act granted by the river authority and in accordance with the provisions of that licence. By section 26, a person who is the holder of a licence under the Act is taken to have a right to abstract water to the extent authorised by the licence and in accordance with the provisions contained in it. Section 31 provided that it was a defence in any action brought for abstraction of water to prove that the water was extracted under the terms of, and in compliance with, a licence under the Act, but that nothing in the section should exonerate a person from an action for negligence or breach of contract.
2. Section 33 provided for “licences of right” where a person had an entitlement as a result of a statutory provision in force to abstract water from a source of supply in the river authority area. The provisions of such a licence of right, including the limits as to the amount of water which might be abstracted pursuant to the licence, were to be, by section 34(2), such as appear to the river authority to correspond as nearly as may be to those of the relevant statutory provision. Where the prior statutory provision contained no limit on the quantity of water, an application for a licence of right could be based on the quantities in fact abstracted in the previous 5 years: see section 34(3).
3. Section 57 provided for a fee to be paid to the river authority on the granting of the licence and annually, initially set at £5. By section 58, the river authority was required to prepare and submit to the Minister a charging scheme for the levying of charges (in addition to the fees charged under section 57). The charges were to be imposed at such rates “as appear to the river authority to be requisite for balancing their water resources account”: see section 58(2)(b). Such charges are very much more substantial than the fees.

*The Lee Conservancy Catchment Board (New Functions of River Authorities) Order 1965 (“the 1965 Order”)*

1. The 1963 Act did not apply to the River Lee. However, the 1965 Order (in force from 30 March 1965) applied the provisions of the 1963 Act to the River Lee. The water authority for the River Lee is the Lee Conservancy Catchment Board: see article 3. Part III of Schedule 2 to the 1965 Order repealed sections 9, 23 to 25 and section 30(iv)-(vi) of the 1855 Act, but left sections 5, 21 and 22 unaffected. The repeal was effected by article 9(3) of the 1965 Order as from the end of “the initial period”. The initial period was defined (by section 23(1) of the 1963 Act) as three months from “the second appointed day”, which was (by article 3(1)(u)) defined as the date on which river authorities begin to perform their functions under the 1963 Act.

*Water Resources Act 1991 (“the 1991 Act”)*

1. The 1963 Act has now been replaced by the 1991 Act, leaving the licensing regime substantially unchanged. Under section 48 it remains a defence to an action for the abstraction of water to prove that the water was abstracted under the terms of a licence, but that section (see section 48(4)) does not exonerate a person from any action for negligence or breach of contract.
2. Section 48A (inserted by section 24(1) of the Water Act 2003 with effect from April 1 2005) provides as follows:

“(1) ... a person who abstracts water from any inland waters or underground strata (an “abstractor”) shall not by that abstraction cause loss or damage to another person.

(2) A person who suffers such loss or damage (a “relevant person”) may bring a claim against the abstractor.

(3) Such a claim shall be treated as one in tort for breach of statutory duty.

(4) In proceedings in respect of a claim under this section, the court may not grant an injunction against the abstractor if that would risk interrupting the supply of water to the public, or would put public health or safety at risk.

(5) Except as provided in this section, no claim may be made in civil proceedings by a person (whether or not a relevant person) against an abstractor in respect of loss or damage caused by his abstraction of water.

(6) Nothing in this section prevents or affects a claim for negligence or breach of contract.”

1. The charging scheme under the 1991 Act provides for the National Rivers Authority to impose water resources charges under sections 123 -124. In approving charges the Secretary of State is to have regard to “the desirability of ensuring that the amounts recovered by the Authority by way of charges … are the amounts which … are required by the Authority for recovering such amounts as the Secretary of State may consider it appropriate to attribute to the expenses incurred by the authority in carrying out its functions…”. Charges in respect of abstraction licences are now set under the Environment Act 1995.
2. Thames has the benefit of two licences of right to abstract water from the River Lee granted under the regime of the 1963 Act. The first is a licence dated 20 September 1966 granted to the Metropolitan Water Board, number 29/38/9/194, to abstract up to 44,200 million gallons a year (200,933 megalitres) from five locations downstream of Enfield (“the Lower Lee Licence”). The second is a licence also dated 20 September 1966 granted to the Metropolitan Water Board, number 29/38/7/39, to abstract up to 8,180 million gallons a year (37,186 megalitres) from New Gauge Hertford (“the New Gauge Licence”). In total these allow abstraction of 238,199 megalitres per year. By way of comparison, the 5000 cubic feet per minute permitted to the Two Companies in aggregate under sections 21 and 22 of the 1855 Act equates to about one third of this quantity, about 74,000 megalitres a year.
3. Thames continued to make the Special Payments under section 5 of the 1855 Act. Under the River Lee (Increase of Payments) Order 1996 the Special Payment was set at £368,000 per annum for the period 12 December 1995 to 11 December 2000.

**Issues**

1. The two appeals together raise the following issues:
   1. what is the nature of the transfer effected by section 9 of the 1855 Act? (“the transfer issue”);
   2. are the payments under section 5 of the 1855 Act for maintenance and repair only, or do they include payment for water? (“Issue 1”);
   3. if the section 5 payments are for water, what is the quantity of water for which the payments are made? (“Issue 2”);
   4. if the effect of the 1965 Order is that the quantities of water for which payment is made under the 1855 Act are restricted, does CRT have any alternative basis for requiring payment from Thames? (“the contingent issue”).

**The transfer issue**

1. The parties remain divided over the nature of the transfer effected by section 9 of the 1855 Act. Although this was not the order in which the oral argument proceeded, it is convenient to take this issue first, as the conclusion on it has some impact on the arguments on the other issues. The judge concluded that the Act effected a once and for all transfer of the property in the water from time to time flowing into and down the river. Thames accepts that conclusion but CRT appeals against it, and contends that the new regime under the 1855 Act constituted the provision of an ongoing supply of water on the basis of an ongoing vesting of the water pursuant to the statutory power of sale in section 68 of the 1850 Act.
2. The terms of section 9 are set out above. Mr Tromans QC for CRT accepts that the transfer effected by the section had an immediate effect, which was to vest an interest of some description in the Two Companies. Because the water in the River Lee was constantly changing, it was not possible at common law to vest the property in it in the Two Companies at the date of the statutory transfer. The interest transferred did not come into possession, therefore, until the water was in the Lee. Future supplies vested in the Two Companies, as the water came into the Lee. It followed from this that, when section 9 was repealed by the 1965 Order, this continuous process of vesting ceased to occur. The water in the River Lee thereby became available to CRT’s predecessors to sell pursuant to their power under section 68 of the 1850 Act, which had never been expressly repealed. Since 1965, therefore, the payments under section 5 constituted statutory consideration for the supply of water from CRT to Thames under section 68 of the 1850 Act. That view was supported by the fact that the payments were annual payments, and not a one-off payment.
3. Mr Hossain QC for Thames accepted that it was not possible *at common law* to acquire property in the flowing water in a natural watercourse or canalised river such as the River Lee. It was only possible for such rights to be acquired at the point of abstraction, pursuant to a right to abstract. It was, however, possible for Parliament to create a property right in the flowing water in such a watercourse or river. That is what section 9 of the 1855 Act did. Moreover the property interest so created was expressly said to be absolute and to be vested in Thames’ predecessors for ever.
4. Mr Hossain went on to submit that the fact that the water in the watercourse is constantly changing does not affect at all the ability of Parliament to create property in a flowing watercourse on a once and for all, permanent basis. All that was required was for the statute to be able to identify what the property was. There was no difficulty in the present case in identifying what the water was. It was all the water contained within the river from time to time. There was no more difficulty in the present case in identifying the property than there was in the case of ownership of the marine foreshore between high and low tides, a piece of land that was constantly changing on a daily basis and might change further due to coastal erosion. Parliament had nevertheless provided that, subject to superior title being established by others, that land was the property of the Crown Estate.
5. Mr Hossain further submitted that, even if CRT were correct, and vesting of the water occurred continuously as the water flowed into the Lee, section 68 of the 1850 Act did not become available to CRT, after the repeal of section 9 by the 1965 Order, as the basis for the payments under section 5. Section 68 had been impliedly repealed by section 9, or by the 1965 Order, and could not be revived as a basis for payment after the 1965 Order.
6. I think Thames is entitled to succeed on the first limb of its argument. Once it is accepted that the effect of section 9 of the 1855 Act is to vest the statutory property interest in the water in the Two Companies, then it seems to me that section 9 has done its work. Mr Tromans’ point that, in relation to future flows of water, the Two Companies’ interest was not an interest in possession simply means that the interest granted by section 9 does not become an interest in possession until the water flows into the river. The process of converting that interest into an interest in possession does not require anything further from section 9. The interest becomes, so far as any parcel of water is concerned, an interest in possession because the Two Companies have come into possession of that water. To put it another way, after the transfer effected by section 9 of the 1855 Act, the Trustees had no interest in future water flowing into and down the River Lee. It follows that I agree with the judge that the effect of section 9 was to effect a once and for all transfer of all of the water flowing into and down the River Lee. That transfer is not affected by the repeal of section 9 by the 1965 Order.
7. I do not think that the fact that the payments under section 5 of the 1855 Act are regular annual payments affects that conclusion. It is possible to make a payment for an outright transfer of rights by undertaking to make regular payments. To my mind the language of the 1855 Act by which the transfer is affected leads so clearly to the conclusion that the transfer is an outright, once and for all transfer, that it is not easily susceptible to being contradicted by secondary indications of that nature.
8. It is not therefore necessary to answer the further question of whether, after the repeal of section 9, section 68 became available once again as a source of a power to sell interests in the water. On the view which I take of the nature of the transfer effected by section 9, section 68 had nothing to bite on. All the interest in the water which the Trustees had power to sell had been vested in Thames.
9. I turn now to consider the arguments on the two main issues before us on the appeal.

**Issue 1: The purpose of the Special Payments under section 5 of the 1885 Act.**

1. CRT’s case is that the Special Payments under section 5 of the 1885 Act are consideration for Thames having the ongoing right to abstract water. Thames disputes this, and says that the payments are made solely for maintenance and repair of the River Lee. Alternatively Thames submits that if the payments are for water they are not for water by reference to its value. The judge did not accept either party’s case. She concluded that it was clear from the admissible context (including the prior statutes and the recitals to the 1855 Act) that the supply of water had been the subject of contractual arrangements prior to the 1855 Act and that there had been a dispute about NRC’s rights in relation to the water extracted at the New Gauge. She also held that it was clear that one of the purposes of the 1855 Act was to allow the Two Companies to secure control of the full supply of water from the River Lee (but for that required for navigation) and the means for ensuring its quality. Finally she held that, reading the 1855 Act in the light of its predecessors, it was clear that the Trustees took on obligations of maintenance and repair of the watercourse. Given these multiple purposes or objectives, it would be wrong to elevate one of them, the compromise of the dispute with NRC, to be the only or primary purpose.
2. The judge continued at paragraph 35 of her judgment:

“It seems to me that properly construed and when read in its context, the 1855 Act in essence encapsulated a bargain whereby the Trustees gave up once and for all and in perpetuity all rights in relation to the waters flowing in the River Lee from time to time, which vested in the Two Companies (and not merely in the New River Company in relation to which the compromise had been reached) subject to a proviso as to the maintenance of water levels necessary for navigation and remained responsible for maintenance and repair of the waterway, and in return, received what was a very considerable one off payment of £42,000 and an annual sum.”

1. This remained the case even after the amendments effected by the 1965 Order. Thus she said at paragraph 66:

“In my judgment therefore, the nature of the Special Payments remained as before. They related both to the maintenance and repair of the River Lee and to the once and for all transfer of the rights to all of the water in the River which the Trustees had had a right to sell in 1855 (but for that which was necessary for navigation). The Special Payments therefore, were in part, consideration for the transfer of the right to water made in 1855 and not to the supply of water on an ongoing or annual basis, despite the fact that the Two Companies and their successors were required to make annual payments.”

1. The declaration granted by the judge was, so far as it relates to this issue, in the following terms:

“The annual special payment which the Defendant is required to make to the Claimant pursuant to section 5 of the 1855 Act (“the special payment”) relates both to the maintenance and repair of the River Lee and to the once and for all transfer of the rights to all of the water in the River Lee which the Trustees had a right to sell in 1855 (but for that which was necessary for navigation).”

*Submissions on Issue 1*

1. Mr Hossain accepted that, viewed as a commercial transaction, it would be possible to conclude that the payments made by Thames under the 1855 Act were part of a package which included the maintenance obligations undertaken by CRT and the supply of water. However the 1855 Act was an Act of Parliament, albeit a private act. The water in the River Lee was vested in Thames by statutory grant, not by virtue of a sale by CRT. Section 9 of the 1855 Act was not to be viewed as if it was an exercise of the power granted by section 68 of the 1850 Act to make contracts for the sale of water. It was therefore necessary to undertake an examination of what the purpose of the payments was, as a matter of statutory construction, from the position the parties were in, and from the language of the recitals to and operative provisions of the enactment. “Purpose”, he submitted, required more than just the weak relationship created by the grant of rights on the one hand and payment on the other; it required a causal relationship. The fact that the two elements – transfer of water and payment - were juxtaposed in the recitals did not mean that they were causally related.
2. In support of Thames’ case that the payments were for maintenance and repair alone, or alternatively not determined by reference to the value of the water, Mr Hossain drew attention to six pointers, each of which he elaborated as indicated below:
   1. *The absence of any express indication in the payment provisions of the 1855 Act that the payments were for water.* There was nothing to link section 5, which dealt with payment, with section 9 which transfers the relevant rights, such as making the transfer conditional on the continuation of the payments or otherwise.
   2. *The status and powers of CRT*. CRT and its predecessors had defined statutory obligations, in particular to maintain and improve the Navigation. That was consistent with the purpose of the payments being to assist CRT to fulfil those obligations, and inconsistent with the notion that CRT should sell water for the highest price it could get and thereby recover sums which would exceed those necessary for fulfilling its statutory purpose.
   3. *The recitals understood as a totality including the public interests involved.*  Mr Hossain made three points under this heading. Firstly, he submitted that the recitals demonstrate that the 1855 Act is not to be regarded as simply putting into effect a bargain between the Trustees and the Two Companies. There is thus no reason in principle why the Act should be regarded as extracting consideration for the transfer of water. Secondly, the recitals demonstrated that the Special Payments were merely a way of fulfilling the statutory purpose of maintenance and repair. In essence they showed that, because Thames benefited from the water, it needed to contribute to maintenance and repair. Thirdly, in that context, the words “in return for” in recital 15 connote only a weak relationship between payment and transfer.

Fairly understood, there was a hierarchy of purposes identified in the recitals to the 1855 Act. That is why the tenth recital identified it to be of “great importance” that the supply of water to the inhabitants of the Metropolis be of good quality, and why reference is also made to the provision of increased quantities of water. The eleventh and twelfth recitals then go on to deal with the compromise of the dispute between the Trustees and NRC, and say that “it is expedient that such Compromise should be established”. That objective was, as the judge had held, not to be elevated into the primary or only purpose. Recital 13, which refers to the transfer of the water to the two Companies, then explains how Parliament intends, by the operative provisions, to achieve the goals of clean water, plentiful supply and compromise. The payments were a means to the end of securing a clean and plentiful supply of water by maintaining and improving the river. By contrast, the payments were not a means to the end of securing the transfer of water because only Parliament could create the transfer. The water did not belong to CRT before the passing of the Act. Thus, whilst by the use of the words “in return for” the fifteenth recital plainly indicated some kind of connection between transfer and payment, it was only a weak connection.

* 1. *The change in the statutory scheme brought about by section 9 of the 1855 Act.* Under section 32 of the 1850 Act, ELWC’s right to take water from the River Lee was expressly given “on Payment to the Trustees…” of the specified sums and made “subject … to such Payment in respect thereof as by this Act provided…”. By contrast, the drafter of the 1855 Act had omitted any such operative linking between payments and supply.
  2. *The close connection in the operative language in sections 40-44 of the 1855 Act*. Those sections dealt with the Two Companies’ rights to undertake works themselves and deduct the cost, and the carrying out of specific works of repair and improvement by the Trustees within a time limit of three years. It is clear from the latter that the whole of the £30,000 from the capital payment of £42,000 was to be allocated to those works, and that that payment was not required until the certificate was issued. These sections, it was submitted, demonstrated the closest connection between payments and maintenance and repair, and it was to be inferred that this applied to the payments generally.
  3. *Whether a payment for water fits with a once and for all vesting*. On the judge’s finding, which Thames accept, that there has been a once and for all transfer of water, it was incongruous to have annual ongoing payments. That did not mean, as CRT contended on its appeal, that one should conclude that there was not a once and for all transfer. Rather, it was an indication that the purpose of the payments was not connected with the once and for all transfer.

1. Mr Tromans submitted that the key sections of the 1855 Act embodied a transaction between the Trustees and the Two Companies for the transfer and vesting of future flows of water down the River Lee in return for an annual payment and a capital sum. He responded to Thames’ six points in the following way:
   1. Whilst the wording of section 5 of the 1855 Act did not make an express connection between payment and the supply of water when read in isolation, when read in the light of the recitals, and in particular the fifteenth recital, it was plain that such a connection was intended. Further support was to be found in the fact that the payments were expressed to be “in lieu” of the sums payable under the previous legislation which were undoubtedly for the supply of water; that there was continuity from the previous legislation in the way the payments were to be enforced; and that section 27 provided abatement from the provisions by reference to the value of the water the companies were deprived of.
   2. The Trustees did indeed have obligations defined by statute in relation to maintenance and repair of the river. However, it did not follow, given a statutory right to payments, that they should be limited as to the sums which they could recover by reference solely to their maintenance and repair obligations. Trustees in general are under a duty to maximise the returns they can make from their assets. It was to be inferred that that was what they were intending to do by the compromise which was established by the 1855 Act. What a payment was for and how that payment was to be applied were separate issues.
   3. There was no particular hierarchy of purpose which one could discern from the recitals to the 1855 Act. It would be wrong to elevate any one object of the enactment above the others.
   4. There was a high degree of continuity between the 1855 Act and the Acts which preceded it. The 1855 Act was not unique in reciting the public interest. The concept of vesting rights in flows of water had a precedent in section 11 of the 1738 Act.
   5. The obligations imposed by sections 40 to 44 of the 1855 Act were no different to repairing obligations in a lease. No doubt the rent payable under a lease could in part be considered to be in return for the assumption of those repairing obligations. However if one asked what the rent was paid for, one would still conclude that it was paid in the main for the occupation of the premises. The requirement to complete specific works within three years in return for specific payments (analogously with section 43 and 44) would not affect that conclusion.
   6. There was no inherent contradiction between an annual payment and an outright transfer of the water rights on a once and for all basis.
2. Mr Tromans invited our attention to some minutes of meetings of the Trustees before the passing of the 1855 Act. They showed the provenance of various provisions of the Act by recording the authority given to the Trustees’ Parliamentary Committee to conclude agreements to that effect. He submitted that the minutes were admissible context for the interpretation of the 1855 Act, and showed that the Act effectively embodied a commercial transaction between the Two Companies and the Trustees which had been agreed beforehand.

*Discussion and conclusion on Issue 1*

1. Despite Mr Hossain’s able and well-constructed argument, I am unable to accept that the payments which Thames and its predecessors are obliged to make to CRT and its predecessors are solely in respect of maintenance and repair of the River Lee, and contain no element referable to the transfer of all the water (save for that required for navigation). My reasons for reaching that conclusion are as follows.
2. There is no doubt that the admissible context for the purposes of construing the 1855 Act includes (i) the fact that the Act was intended to establish a prior compromise between the Trustees and NRC; (ii) under the 1850 Act the Trustees enjoyed a power under section 68 to sell by private sale to any waterworks company so authorised “so much of the water flowing into or down the River Lee as [such company] may agree to purchase and take”; (iii) the Trustees were receiving monies pursuant to the existing legislation which were undoubtedly in return for the supply of water, and had done so for more than a century beforehand; and (iv) the recitals to the 1855 Act.
3. I agree with Mr Hossain that it is not right to regard section 9 of the 1855 Act as simply an exercise of the power conferred on the Trustees by section 68 of the 1850 Act. It was Parliament which was granting the rights under section 9, and Parliament neither had nor needed the right conferred on the Trustees by section 68 in order to effect that grant. Nevertheless, as the context makes clear, the Act was promoted in order to give effect to a prior agreement between parties who had been in a relationship of buyers and sellers of water for valuable consideration. Thames’ argument presupposes that the Trustees would have been content to give up their rights to all the water for all time in return for a promise to contribute to maintenance and repair of the river. That seems to me to be an uncommercial and unrealistic approach for the Trustees to have taken.
4. Any doubt that the payments were made in part for the transfer of water rights is in my judgment removed by the recitals to the 1855 Act, in particular the thirteenth and fifteenth recitals. The fifteenth recital makes it plain that, whatever else the payments may be for, they are “in return for such Transfer”, the transfer being that referred to in the thirteenth recital, namely the transfer of “the whole of the Water from Time to Time flowing into and down the River” except the quantities required for navigation. Those recitals made it unnecessary for the operative provisions to make a link between the payments and their purpose. The drafter had already made that purpose plain in the recitals and it only remained necessary to give effect to that purpose by enacting its two components, the transfer itself and the obligation to pay.
5. It is, I think, of some significance in this connection that the Act is a private act rather than a public one. A private act is distinguished from a public one by the fact that it is “for the particular interest or benefit of any person or persons” and not “a measure of national import, in which the whole community are interested”: Erskine May, *Treatise upon the Law, Privileges, Proceedings and Usage of Parliament*, 1st Edn. 1844, page 383. In passing private bills into law Parliament undertook not only its usual legislative function watching over public interests, but also a judicial one, in which it “inquires and adjudicates upon the interests of private parties”; *ibid* at 385. As Erskine May goes on to point out at pages 385-386:

“The promoters of a bill may prove, beyond a doubt, that their own interest will be advanced by its success, and no one may complain of injury, or urge any specific objection; yet, if Parliament apprehend that it will be hurtful to the community, it is rejected as if it were a public measure…”

1. Viewed against that background, it is not at all surprising to see a variety of objects referred to in the recitals, some explaining the underlying private interests, and others expounding benefits to the wider public. No doubt these latter benefits would assist the passage of the private bill through Parliament. It would be wrong, however, to place the public advantages ahead of the private interests in the hierarchy of purposes of the measure. The Act remains one which was passed to promote the special interests of the Two Companies and the Trustees, whilst no doubt assisting indirectly in providing the Metropolis with a plentiful supply of clean water.
2. The conclusion that the payments are in part for water is fortified by section 27 of the 1855 Act, which allows for a deduction, where the Two Companies are deprived of water to which they would otherwise be entitled, by reference to its value, or at a set rate per 1000 gallons. Thames says that a deficit in the amount of water could equally reflect a failure by the Trustees to carry out their repairing obligations. I disagree. Had that been the intention of the section I would expect there to be something said in it to attribute the deficit to a breach of those obligations, as opposed, for example, to natural causes.
3. I do not agree that the status and responsibilities of the Trustees are matters which suggest that the payments are solely for maintenance and improvement, and not for water. On the contrary, as it seems to me, the status of the Trustees as trustees would suggest that they would not have given up their right to receive payment for water for no consideration. Trustees in general have a duty to maximise the return on such rights as they have. Consistently with that, the recitals indicate that the payments are in return for the transfer of water to the Two Companies. I reject Mr Hossain’s submission that this only connotes a weak relationship.
4. Likewise, the connections between payments and repair in sections 40-44 do not create such a strong link that it should be inferred that the payments as a whole are for nothing else. I accept Mr Tromans’ analogy with a lease with repairing obligations. A new lease may specify that certain works are to be performed and rent should be withheld and hypothecated to the costs of the works. None of that would be sufficient to alter the character of rent as payment for the occupation of premises. So, in the present case, the payments do not lose their character as payments for water, even though certain sums were hypothecated towards specific works in the 1855 Act.
5. Given that I have concluded that the effect of the 1855 Act was to vest the property in the water in the River Lee in the Two Companies, it is necessary to deal with Mr Hossain’s submission that a conclusion that the payments are for water does not fit comfortably with such an outright transfer of rights to water, but would be more consistent with the conclusion that the payments were for ongoing maintenance and repair. I agree that it is more common for outright, once and for all transfers of property, such real property, to be paid for by a corresponding once and for all payment, but other arrangements are of course perfectly possible, even in that case. I do not find it at all surprising that the special form of property created by the 1855 Act, ownership of a flow of water for ever, is paid for by means of perpetual payments. Mr Hossain’s point comes nowhere near, on its own, displacing the points which indicate that the payments were made for water.
6. I therefore reject Thames’ case that the payments are made exclusively for maintenance and repair.
7. I should nevertheless say something about Thames’ alternative submission that even if the payments are for water, they are not by reference to the value of water. I do not accept it. Once it is accepted that the payments are related to the supply of water, it seems to me to be a logical conclusion that they have some relation to its value. Section 27 is again an obstacle in Thames’ way here. If the Two Companies are paying by reference to the value of water, and are deprived of the minimum entitlement to water which the Act prescribes, they would expect a discount by reference to the value of what they are deprived of. If, on the other hand, the payments are just for maintenance and repair, such a deduction would not be as appropriate. Mr Hossain told us the result of some calculations which he said showed that the rate of *3d* per 1000 gallons was very high compared to what was paid per year even for the minimum quantities, but I do not think that is really an answer. The language of the section makes it clear that there is an intended operative link between the payments and the value of the water.
8. That is not to say, however, that the value of water is the only material consideration in the setting of the level of the Special Payments, far less that the Special Payments should march in some form of lock-step with the market price. It is sufficient to say that it is a factor which the Secretary of State may lawfully take into consideration when arriving at a payment which is just and reasonable. The extent to which he does so is a matter for him.

**Issue 2: For how much water are the payments made?**

1. The judge held (at paragraph 36 of her judgment) that neither the capital payment nor the annual payments in section 5 of the 1855 Act were expressed to be tied to any particular quantity of water, or indeed expressed to be solely for water. The payments were consideration for the whole bargain:

“being both the transfer of the right to all of the flowing water in the River Lee from time to time (but for that required for navigation) which vested in the Two Companies once and for all and for the maintenance and repair obligations placed on the Trustees.”

1. The judge supported her conclusion by reference to the terms of the 1855 Act and the 13th and 15th recitals. Subject to deductions made pursuant to section 27, the Special Payments were fixed without regard to the precise extent of water transferred or taken. She rejected the argument that the provisions of sections 21 to 22 meant that the Special Payments were only in relation to the minimum quantities set out in those sections. Those sections and section 30 were concerned with practicalities, in particular priorities as between the Trustees, NRC and ELWC.
2. After the 1965 Order, the judge’s conclusion was that the payments related to the quantity of water taken by Thames pursuant to its licences of right. Accordingly the judge included in her declaration:

“After the 1965 Order, the special payment related to the amount of water taken under the Defendant’s licences of right.”

*Submissions on Issue 2*

1. Thames’ primary case is that this point does not arise. On Thames’ case the payments are not for water at all, but for maintenance. Its first alternative case is that, if the judge was right that the payments were partly for a once and for all transfer of the right to the water, then the payments are not tied to any specific quantity of water. If, however, that is wrong, and it is necessary to attach the payment to a specific quantity of water, then they submit that the payments are only in respect of the amounts of water specified in sections 21 and 22 of the 1855 Act as amended, and not the much larger quantity which Thames is permitted to extract under the licences of right. That is essentially because those sections are the only place in the 1855 Act where a quantity of water is specified.
2. Mr Tromans submitted that sections 21 and 22 read with section 30 were dealing with regulating the position of the Two Companies and the Trustees between themselves, detailing the amount of water which might be extracted at particular points on the river and by whom, and setting priorities as to the taking of water. They did not set limits on the water for which payment was being made, because all the water had been vested in the Two Companies by section 9. The only overall upper limit, subject to the machinery of those sections, was not to take so much water as to prejudice the water required for navigation.
3. The 1965 Order had not made any significant change. Firstly it had left the section 5 payments unchanged. Secondly there was no inconsistency with requiring Thames’ predecessor to pay annual charges for a licence under the 1963 Act. Those charges were for the entirely different purposes, set out in the 1963 Act, and had no bearing on payment for water. Thirdly, the retention of an unlimited abstraction right under the 1855 Act would have been inconsistent with the new abstraction licensing regime, and it therefore made sense to repeal section 9 and sections 21, 22 and part of section 30, because those sections were based on an unlimited abstraction right. Because of the chronology of events surrounding the repeal of those sections, however, Thames’ predecessor was able to obtain its licence of right based on section 9, and the quantities of water it had been abstracting in the previous 5 years. Accordingly, submitted Mr Tromans, the licences of right should be treated in legal terms as superseding the right under section 9.

*Discussion and conclusion on Issue 2*

1. In the period between the transfer effected by the 1855 Act and the 1965 Order, Thames’ predecessors were making payments under section 5 of the 1855 Act in respect of the once and for all transfer to them of all the water in the River Lee in excess of that required for navigation. It is true that the 1855 Act did not specify a quantity, but it contained a description of, and provided a limit on, the amount to the water that could be taken.
2. Following the 1965 Order section 5 remained in force, requiring the payments to continue to be made. Moreover, I have concluded (a) that the payments are for a once and for all transfer of the property rights in the water, and (b) that the 1965 amendments to the 1855 Act had no impact on Thames’ property rights in the water.
3. On this aspect of the case I think it is very important to keep in mind the distinction between the property rights in the water and the right to abstract it. The 1855 Act was concerned with the former, although it had provisions as to how the property rights were to be exercised as between the Trustees and each of the Two Companies, by regulating such matters as where the water was taken from and who had priority. The licensing scheme introduced by the 1963 Act and applied to the River Lee by the 1965 Order was concerned with the latter. Ownership of water does not dispense with the need to obtain a licence. If Thames had only secured a licence to extract small quantities, it would be limited by the 1963/1965 regime to extracting those quantities, notwithstanding its ownership of the entirety of the surplus water.
4. To my mind it is clear that both before and after the 1965 Order Thames and its predecessors have been paying for all the surplus water in the River Lee. I do not agree with Thames that the effect of the 1965 amendments is that Thames are now only paying for the quantities referred to in sections 21 and 22. Those sections were only ever concerned with the practicalities of abstraction, as the judge held. Thames’ abstraction rights are now governed by the quantities which it is allowed to extract under its licences of right, which, so we were told, have never in fact been exceeded.
5. I also do not follow how it can be said that, following the 1965 Order, Thames are now only making the section 5 payments for the amount of water “taken under [its]… licences of right” as expressed in the declaration granted by the judge. To my mind it is more accurate to say that Thames continue to pay for all the water (save for that required for navigation) but that its right to abstract it is now subject to the limits imposed by its licences of right.
6. I would therefore answer this aspect of the case by saying that both before and after the 1965 Order Thames and its predecessors have been paying for the property in the same quantity of water, namely all the water in the River Lee in excess of the quantity required for navigation. The amendments effected by the 1965 Order coupled with the grant of Thames’ licences of right meant that there was a change in the abstraction regime to which Thames was subject from that set out in sections 21-23 and 25 of the 1855 Act in its unamended form to that governed by the licences of right.
7. Neither side placed much emphasis on section 31 of the 1963 Act, or sections 48 and 48A of the 1991 Act. It will be recalled that section 31 of the 1963 Act (applied to the River Lee by the 1965 Order) and section 48 of the 1991 Act made it a defence to an action for abstraction of water to show that it was abstracted in accordance with a licence. I do not think that these sections have any impact on the issues which we have to decide concerning the section 5 payments. They are payments for the transfer of property rights. If Thames were to cease making the payments, CRT would not make a claim by reference to abstraction of water. Their claim would be for default in relation to the section 5 payments. Similar considerations apply to section 48A which relates to actions for loss or damage caused by abstraction. A claim for section 5 payments is not a claim for loss or damage caused by abstraction.

**The contingent issue**

1. The contingent issue arose in the event we came to the conclusion that Thames was right that, following the 1965 Order, the amount of water to which the Special Payments related was restricted to those specified in sections 21 and 22 of the 1855 Act. As I have not reached that conclusion, the contingent issue does not arise.

**The result on the main appeal**

1. Both parties made submissions as to a revised form of declaration to reflect the way in which they now put their cases. In the light of those submissions I would modify the declaration made by the judge on Issue 1 only in the following way:

“The **purpose of** the annual special payment which the Defendant is required to make to the Claimant pursuant to section 5 of the 1855 Act (“the special payment”) ~~relates~~ **is to pay for** both ~~to~~ the maintenance and repair of the River Lee and ~~to~~ the once and for all transfer of the rights to all of the water in the River Lee which the Trustees had a right to sell in 1855 (but for that which was necessary for navigation).”

1. On Issue 2 I would modify the declaration made by the judge as follows

“After the 1965 Order, (a) the special payment related to ~~the amount of water taken under the Defendant’s licences of right~~  **all of the water in the River Lee (but for that which was necessary for navigation) and (b) the Defendant’s right to abstract water from the River Lee became subject to the limits imposed by its licences of right.**”

**The costs appeal**

1. Thames has an independent appeal in relation to the costs order made by the judge, irrespective of the conclusion we come to on the main appeal.
2. The judge said this in relation to costs:

“No order as to costs. Given the nature of the issues and their interdependence, it is not a case in which it is possible to apply the general rule pursuant to CPR 44.2(2)(a). Neither party is clearly successful; special payments relate both to maintenance and to a once and for all transfer of the right to water, a conclusion which does not accord with either party’s argument in its entirety; neither party was wholly successful as to the quantity of water to which the relevant legislation related; and the remainder of the issues which, in relation to which the claimant lost, did not, in fact, arise/were fall back arguments.”

1. In refusing permission to appeal in relation to her costs order the judge added this:

“The issues were complex and interwoven. Neither side was fully successful.”

1. Ms Abram, who argued this appeal on behalf of Thames, accepted that the judge was entitled to reach the conclusion that neither side had been fully successful. She submitted, however, that the judge had exceeded the bounds of her discretion, or made an error of principle in making such an order. Firstly, Ms Abram submitted that the judge had failed to consider, as she was bound to do, whether it would be right to order CRT to pay a proportion of Thames’ costs pursuant to CPR 44.2(6)(a). If, contrary to that submission, the judge had considered and rejected it, given the great disparity between the issues on which Thames won and those on which CRT won, her decision not to make an order in that form was inadequately reasoned. Secondly, Ms Abram submitted that the only fair conclusion which the judge could have come to was that Thames was the more successful party, and that that success should have been recognised by an award of costs in its favour.
2. Ms Abram submitted that division of the case into three main issues, those that I have called Issue 1, Issue 2 and the contingent issue, does not give a fair picture of the matters in dispute before the judge. It fails to reflect the transfer issue, the issue of whether section 68 was repealed or the issue of the admissibility of Trustees’ minutes. Thames had been successful on these issues below. CRT had raised other issues below, such as the *vires* of the 1965 Order. That was an issue which the parties had had to tackle, but which ultimately did not need to be decided by the judge because of Thames’ success on logically prior issues. More importantly, the contingent issue, which raised alternative grounds of claim in the event that the quantity of water for which the section 5 payments are made was reduced, had resulted in significant costs which Thames had no choice but to expend. The judge had decided these issues against CRT.
3. Ms Abram submitted further that if one excluded the issues on which neither side was successful, Thames was successful on 90% of the issues measured by the pages they took up in pleadings and skeletons.
4. Finally Ms Abram submitted that the judge’s reasoning that the issues were interwoven or interdependent was flawed. It was true that the issues relating to the 1855 Act were interdependent, but the other grounds of claim were independent, in that they followed from prior findings.
5. Ms Dobson, who argued this appeal for CRT, submitted that the judge had been referred by both parties to the provisions of CPR 44.2(6)(a), and would in any event have been well aware of her power to make one party pay a proportion of the costs of the other. Indeed both sides had been expressly asking for a proportion of their costs because they considered that they were the overall winner. The grounds of claim contingent on a finding about a reduced quantity of water had only arisen because Thames did not accept that it was bound to pay for all the water which it took. CRT’s case had always been, at least as one alternative, that the section 5 payments related to all the water taken. The contingent issues as to the other grounds of claim only arose if CRT failed on that issue. They were in that sense properly regarded by the judge as interdependent or fall back issues. Overall Thames had failed to establish that the payments were just for maintenance and had failed to establish that the payments related only to limited quantities of water as a result of the 1965 Order.
6. Despite Ms Abram’s able submissions, I am not persuaded that this is a case where we should interfere with the costs order made by the judge. The court has, as both counsel accept, a wide discretion, and the Court of Appeal should only interfere with the judge's exercise of it if he or she has "exceeded the generous ambit within which a reasonable disagreement is possible", a familiar phrase taken now from the judgment of Brooke LJ in *Tanfern Ltd v Cameron-MacDonald (Practice Note)*, [2000] 1 WLR 13, 11, at paragraph 32, citing Lord Fraser in *G v G (Minors:Custody Appeal)* [1985] 1 WLR 647, 652.
7. The judge’s conclusion that neither party was the overall winner was an inescapable one and is, rightly, not challenged. It is, in my judgment, unrealistic to suppose that the judge did not have the possibility of ordering one side to pay a proportion of the other side’s costs well in mind, given that both sides were urging her to make such an order, and she had been expressly referred to the well known provision in CPR 44.2(6)(a).
8. It is true that the judge’s reasons for not making such an order are not expressly spelled out, but it would have been open to Thames, as Ms Abram accepted, to ask the judge to expand on her reasoning if this was to be made a plank of the appeal: see *English v Emery Reimbold & Strick* [2002] EWCA Civ 605 at [22] to [25]. In that case Lord Philips MR (giving the judgment of the court which included Latham and Arden LJJ) also explained:

“Where no express explanation is given for a costs order, an appellate court will approach the material facts on the assumption that the Judge will have had good reason for the award made. The appellate court will seldom be as well placed as the trial Judge to exercise a discretion in relation to costs. Where it is apparent that there is a perfectly rational explanation for the order made, the Court is likely to draw the inference that this is what motivated the Judge in making the order. … Thus, in practice, it is only in those cases where an order for costs is made with neither reasons nor any obvious explanation for the order that it is likely to be appropriate to give permission to appeal on the ground of lack of reasons against an order that relates only to costs.”

1. Taking that approach here, the obvious explanation for the costs order which the judge made was that both parties had achieved a broadly similar measure of success and experienced a broadly similar measure of failure, and that it would not be just to make either party contribute to the costs of the other. I reject the suggestion that we should at this stage set aside the judge’s order for lack of reasons.
2. As to the remainder of the appeal, it is true that CRT lost on the grounds of claim which formed the contingent issue, and that those grounds must indeed have carried significant costs. However, those grounds would not have arisen if Thames had accepted CRT’s case on the quantity of water. The judge was entitled to take the view that they were a dependent issue, and to look at the matter on the basis of the three broad issues on which she had been required to give her decision. On that basis I am not persuaded that she exceeded the bounds of her discretion by making no order as to costs. I would therefore dismiss the costs appeal.

**Conclusion**

1. Save that I would propose to vary the declarations granted by the judge in the manner which I have indicated in paragraphs 80 and 81 above, I would dismiss all the appeals.

**Lord Justice Henderson**

1. I agree.

**Lord Justice McFarlane**

1. I also agree.