Neutral Citation Number: [2025] EWCA Civ 676

Case No: CA-2023-000132

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
MRS JUSTICE THORNTON
[2022] EWHC 3282 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/05/2025

Before :

LORD JUSTICE MALES
LORD JUSTICE DINGEMANS
and
LADY JUSTICE ELISABETH LAING

- -

Between :

THE MANCHESTER SHIP CANAL COMPANY LIMITED	**Appellant**
- and -	
(1) SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS	**First Respondent**
(2) UNITED UTILITIES WATER LIMITED	**Second Respondent**

- -

Tom de la Mare KC, Charles Morgan and **George Molyneaux** (instructed by **Broadfield Law UK LLP**) for the **Appellant**
Guy Williams KC and **Sasha Blackmore KC** (instructed by **Government Legal Department**) for the **First Respondent**
James Strachan KC and **Jonathan Darby** (instructed by **Pinsent Masons LLP**) for the **Second Respondent**

Hearing date: 1 May 2025

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Approved Judgment

This judgment was handed down remotely at 14.00 hrs on 23.05.2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Dingemans:

Introduction

1. This is the hearing of an appeal by the appellant Manchester Ship Canal Company Limited (MSC) against the order and judgment of Thornton J (the judge) dated 19 December 2022. The judge had dismissed a challenge by MSC which had been brought pursuant to section 23 of the Acquisition of Land Act 1981 (the 1981 Act).

2. The challenge was to a decision dated 14 October 2021 made by the respondent Secretary of State for Environment, Food and Rural Affairs (the Secretary of State) to confirm the United Utilities Water Limited (Eccles Wastewater Treatment Works) Compulsory Purchase Order 2016 (the CPO). Clive Sproule, an inspector (the inspector) appointed by the Secretary of State, had recommended that the CPO be confirmed with amendments, in a report dated 20 February 2020 (the report) which had been produced following a local public inquiry (the inquiry). The CPO was required to permit United Utilities Water Limited (United Utilities) to discharge "water, soil and effluent" from a new 1.16 kilometre pipe (the new pipe) into the Manchester Ship Canal. Such a right had to be obtained either by agreement with MSC, which was not forthcoming, or by means of a CPO pursuant to section 155 of the Water Industry Act 1991 (the Water Industry Act).

3. By the end of the inquiry it was common ground that United Utilities should have the right to discharge "water, soil and effluent" by the new pipe, under a permit system regulated by the Environment Agency. This was because the evidence showed that the water quality in the Manchester Ship Canal would be improved by the scheme of works of which the new pipe was a part. The inspector had not recommended, and the Secretary of State did not require, that "the discharge proviso" be added to qualify the right to discharge into the Manchester Ship Canal provided by the CPO to United Utilities. The discharge proviso had been proposed on behalf of MSC and mirrors statutory provisions contained in the Water Industry Act which apply to discharges from pre-1991 pipes and outfalls into the Manchester Ship Canal. These provide that the sewerage undertaker is not authorised to use the outfall in breach of any environmental regulation or so as to 'affect prejudicially the purity and quality of the water' or so as to 'injuriously affect' the receiving water.

4. Discharge into a private watercourse is an entry on the owner of the watercourse's land, and is an unlawful trespass unless expressly or impliedly authorised by statute or by the grant of an easement. Discharge of foul water on to private land or a private watercourse by a statutory water and sewerage undertaker amounts to a private nuisance, depending on the circumstances. MSC and United Utilities have been involved in litigation for over 15 years about whether United Utilities can discharge into the Manchester Ship Canal from pre-existing pipes and outfalls.

5. In *Manchester Ship Canal Co Ltd v United Utilities Water plc* [2014] UKSC 40; [2014] 1 WLR 2576 (*MSC (No.1)*), the Supreme Court held that United Utilities, in common with other privatised undertakers, had a continuing implied entitlement to discharge into the Manchester Ship Canal from outfalls constructed prior to the coming into force of the Water Act 1989, which implied right was preserved by the Water Industry Act. Those discharges are also regulated by the Environment Agency.

6. In *United Utilities Water Ltd v Manchester Ship Canal Co Ltd* [2024] UKSC 22; [2024] 3 WLR 356 (*MSC (No.2)*), the Supreme Court held that the Water Industry Act did not oust, either expressly or impliedly, common law causes of action and remedies to protect the enjoyment of property to which sections 117(5) and 186(3) of the Water Industry Act referred. *Marcic v Thames Water Utilities Ltd* [2003] UKHL 66; [2004] 2 AC 42 (*Marcic*), an earlier decision of the House of Lords on nuisance and sewerage undertakers on which the judge had relied in the judgment, was distinguished on grounds including that it involved an escape from a system rather than a discharge, see *MSC (No.2)* at paragraphs 49 and 86.

7. MSC contends that the absence of the discharge proviso means that the CPO as confirmed by the Secretary of State is an impermissible infringement of MSC's property rights, protected by article 1 of the first protocol (A1P1) of the European Convention on Human Rights (ECHR) to which domestic effect has been given by the Human Rights Act 1998. The Secretary of State and United Utilities deny that there is any requirement for the discharge proviso and point to compensation provisions for MSC in the scheme for the CPO to vindicate MSC's property rights.

Factual background

8. MSC is the owner, statutory undertaker and navigation authority for the Manchester Ship Canal. United Utilities is the statutory sewerage undertaker for the North West of England. It serves about 7 million customers and 200,000 businesses. United Utilities operates Eccles Wastewater Treatment Works (the Eccles treatment works).

9. The Eccles treatment works is a biological filtration plant. There are "ever expanding drainage needs of the Eccles area in Greater Manchester" (paragraph 16 of the report). The new pipe will replace four pipes and outfalls, which had been constructed before 1991 (the date of the commencement of the Water Industry Act), and which discharge into Salteye Brook. One of the four pipes discharges treated wastewater from the Eccles treatment works into Salteye Brook. Another of the four pipes is an outflow pipe from the combined sewer outfall at the inlet of the Eccles treatment works. It appears that when the sewerage system is operating within its hydraulic capacity, the discharges are of surface water or treated effluent. At times when the hydraulic capacity of the system is exceeded, some of the discharges are of foul water, see *MSC (No.2)* at paragraph 3.

10. Salteye Brook itself drains into the Manchester Ship Canal near Barton Locks. The Manchester Ship Canal had itself incorporated, or "canalised", various rivers.

11. Discharges from the existing pipes into Salteye Brook are carried out pursuant to permits granted by the Environment Agency. The evidence at the inquiry showed that the Environment Agency were regulating the position correctly, and that MSC's case that the permits were "relaxed", was not supported by the evidence, see paragraphs 44 and 45 of the report. The discharge from the new pipe will also be subject to permits from the Environment Agency.

12. The evidence at the inquiry also showed that, despite claims on behalf of MSC that the Eccles treatment works was in some way failing, the Eccles treatment works were working well.

13. The scheme to improve the position at the Eccles treatment works including the construction of the new pipe was required by the Environment Agency. This was to deliver the Environmental Agency's standards for water quality, and to address flooding issues for a group of residents near to the Eccles treatment works. The Environment Agency required the new pipe to improve water quality in Salteye Brook by removing all but greater than 1 in 5 year discharges from the sewerage infrastructure into the water, by reducing the number of Unsatisfactory Intermittent Discharges (UIDs) arising from the sewer infrastructure, to reduce the overall volume of water in UIDs, and by removing a significant part of the pollutant load and debris entering the water by providing storage and screening flows.

14. There had been various objections to the CPO including from Port Salford Land Limited, the City of Salford Community Stadium Limited and MSC. The CPO had been the subject of a public local inquiry before an inspector appointed by the Secretary of State. The inquiry was held pursuant to the Compulsory Purchase (Inquiries Procedure) Rules 2007 and evidence and submissions were heard over the period from 12 June to 6 December 2018. Although MSC had contended at the inquiry that the CPO and new pipe and outfall "perpetuates, rather than minimises, unacceptable pollution" (see paragraph 456 of the report), it became common ground at the inquiry that the new pipe and outfall would lead to an improvement in water quality from the existing arrangements of four pipes discharging into Salteye Brook.

15. By the end of the inquiry all of the "in principle" objections to the CPO had been withdrawn, leaving (so far as is material) only the issue about the discharge proviso proposed by MSC to qualify United Utilities' right to discharge "water, soil and effluent" into the Manchester Ship Canal. The wording of the discharge proviso has narrowed on appeal from that sought from the inspector at the inquiry.

The discharge proviso

16. The discharge proviso, as amended so that the parts which are no longer pursued by MSC on this appeal are struck through, reads:

> "Any right to discharge "water soil and effluent" under this Order shall be subject to the following provisions of the Water Industry Act 1991 (or any re-enactment, replacement or amendment of those provisions), which shall apply as conditions to which the right to discharge is subject in the like manner as if the right arose impliedly under section 116 of the Water Industry Act 1991:
>
> a. Section 117(5)(a) and (b)
>
> ~~b. Section 117(6)~~
>
> c. Section 186~~(1),~~ (3), ~~(6) and (7)~~
>
> ~~d. Schedule 12 paragraph 4~~".

17. Sections 102 to 109, and sections 111 to 116, of the Water Industry Act make provision for connection with public sewers and the construction and use of drains and sewers. Section 117(5) provides:

> "(5) Nothing in sections 102 to 109 above or in sections 111 to 116 above shall be construed as authorising a sewerage undertaker to construct or use any public or other sewer, or any drain or outfall—
>
> (a) in contravention of any applicable provision of the Water Resources Act 1991[or [the Environmental Permitting (England and Wales) Regulations 2016 (S.I. 2016/1154); or
>
> (b) for the purpose of conveying foul water into any natural or artificial stream, watercourse, canal, pond or lake, without the water having been so treated as not to affect prejudicially the purity and quality of the water in the stream, watercourse, canal, pond or lake."

18. Section 186(3) of the Water Industry Act is headed "protective provisions in respect of flood defence works and watercourses etc." and provides:

> "(3) Nothing in the relevant sewerage provisions shall authorise a sewerage undertaker injuriously to affect—
>
> (a) any reservoir, canal, watercourse, river or stream, or any feeder thereof; or
>
> (b) the supply, quality or fall of water contained in, or in any feeder of, any reservoir, canal, watercourse, river or stream,
>
> without the consent of any person who would, apart from this Act, have been entitled by law to prevent, or be relieved against, the injurious affection of, or of the supply, quality or fall of water contained in, that reservoir, canal, watercourse, river, stream or feeder."

19. It was apparent that MSC intends, by the means of the discharge proviso, to preserve common law rights, as examined by the Supreme Court in *MSC (No.2),* to bring an action for any nuisance caused by discharge from the new pipe.

20. It should be recorded that it was also apparent, from the written and oral submissions made by Mr de la Mare KC on behalf of MSC to this court, that MSC will contend in future litigation that it might be able to bring a common law claim against United Utilities for nuisance or negligence caused by discharge from the new pipe regardless of the presence or absence of the discharge proviso. Reference was made in the course of submissions to *Barr v Biffa Waste Services Ltd* [2012] EWCA Civ 312; [2013] QB 455 as approved in *MSC (No.2)* at paragraph 14 and the proposition that "short of express or implied statutory authority to commit a nuisance … there is no basis, in principle or authority, for using … a statutory scheme to cut down private rights".

21. It was also apparent from the submissions made by Mr Strachan KC on behalf of United Utilities that United Utilities did not accept that MSC would be able to bring any common law action for nuisance or negligence arising from the discharge from any pipes, and reference was made to the legal effect of permits from the Environment Agency.

22. Mr de la Mare accepted that the question of whether the discharge proviso was necessary to permit MSC to bring a common law claim for nuisance or negligence against United Utilities was a logically prior question to the issue whether the discharge proviso should be required. Mr de la Mare said that the point had not been spotted before, and noted that neither the Secretary of State nor United Utilities had sought to defend the claim on the basis that it had not been shown that the discharge proviso was unnecessary.

23. In the event, none of the parties invited this court to say anything more about whether, absent the discharge proviso, MSC would be able to bring a common law claim for nuisance or negligence against United Utilities in respect of any discharge of effluent into the Manchester Ship Canal. As the court did not hear full argument on this point, I will not decide the issue of whether, absent the discharge proviso, MSC would be able to bring a common law claim for nuisance or negligence. This leaves that issue to be resolved, if necessary, in the future. I should record, however, that I agree with Mr de La Mare that this point should, logically, have been addressed and decided before any decision was made about whether the discharge proviso was required. If the point had been decided in favour of MSC, it would have meant that the appeal to the judge below, and this appeal, were unnecessary because there was no need for the discharge proviso as MSC would be able to bring its common law claim for nuisance or negligence in any event.

The report

24. After addressing the evidence and submissions, and so far as is material, the inspector recorded the arguments made on behalf of MSC and United Utilities in respect of the discharge proviso. The inspector recorded that MSC had stated that the justification for the discharge proviso was independent from the evidence that had been heard during the inquiry because the protections in the discharge proviso were a matter of general law. There did not appear to have been any discussion before the inspector about how the statutory provisions contained in the discharge proviso would operate alongside the right to discharge conferred by the CPO. MSC made the point that, without the discharge proviso, this would be the only outfall which did not include protective provisions for the benefit of the landowner, being MSC.

25. United Utilities submitted that the discharge proviso was an unnecessary addition to the order, not least as any discharge would be regulated, and the reference to section 186 of the Water Industry Act in the discharge provision would duplicate regulation, and, so far as section 117 was concerned, the inquiry provided the independent scrutiny of potential interference with private rights. The inspector recorded that he found United Utilities' arguments on the matter to be convincing (paragraph 910 of the report). The inspector also addressed the reference to paragraph 4 of schedule 12 of the Water Industry Act and recorded that discharges would be regulated by the Environment Agency and compensation would be payable for any damage sustained from the order scheme.

26. The inspector addressed ECHR rights in paragraphs 944 to 946 of the report, and concluded that any interference with such rights was justified. There was no specific reference to the discharge proviso in that respect. In the final event the inspector recommended that the order be confirmed with amendments. The discharge proviso was not added.

The decision

27. By letter dated 3 December 2020 Kirstin Green, Deputy Director for Water Quality, signing with the authority of the Secretary of State, set out the history of the inquiry and recorded that the Secretary of State was minded to accept the inspector's recommendation to confirm the CPO with modifications.

28. By a decision set out in a letter dated 14 October 2021 the Secretary of State confirmed the CPO made pursuant to section 155 of the Water Industry Act. The letter recorded that United Utilities and MSC had reached agreement on asset protection. The Secretary of State did not require the provision of the discharge proviso because the discharge would be regulated by the Environment Agency and compensation would be payable for damage caused by the CPO. The Secretary of State considered that there was a compelling case in the public interest for the CPO to be made.

The issues on the appeal

29. Stuart-Smith LJ granted limited permission to appeal. There are now three (albeit renumbered) grounds of appeal before the court being: (1) "the judge misunderstood the position adopted by MSC at the Inquiry concerning the existence and scope of private law remedies for breach of the Discharge Proviso. The judge regarded MSCCL as having disavowed the relevance of such remedies. In fact, such remedies are the entire raison d'être of the Discharge Proviso and its statutory counterparts. The point which MSCCL was making at the Inquiry was simply that current legal issues as to the scope of those private law remedies would be equally applicable to the Discharge Proviso and its statutory counterparts"; (2) the judge's approach to the application of A1P1 was therefore also flawed. The judge's formulation of the fair balance approach meant that there was no proper consideration of whether a less intrusive measure (being the CPO with the Discharge Proviso) could have been used. As appears from the wording, this second ground of appeal is contingent on the first ground succeeding; and (3) in the light of the judgment of the Supreme Court in *MSC (No.2)* the judge erred in: her assessment of the extent to which the omission of the Discharge Proviso has an adverse impact on MSC's rights; the impact which inclusion of the Discharge Proviso would have on the objectives of the CPO; and the overall proportionality of the CPO in the form that it has been made.

30. Mr de La Mare, on behalf of MSC, submitted that the Secretary of State was wrong to grant, by the CPO, the easement permitting discharge into the Manchester Ship Canal without the discharge proviso. The discharge proviso simply had the effect of mirroring the protections given to MSC by the Water Industry Act in relation to the discharge from the four pipes into Salteye Brook. The statutory scheme for construction of pipes on land automatically provided for pre-existing protections to be continued, and the Secretary of State should have done the same in relation to the discharge from the new pipe. The judge had been in error when she said that MSC

had disavowed the relevance of private law remedies for polluting discharges in its closing submissions at the inquiry, which had been a simple misreading of paragraph 253 of MSC's closing submissions to the inspector so that the first ground of appeal should succeed. The consequence of that was that the second ground should succeed, because the interference with MSC's property rights by the CPO did not comply with the principle of lawfulness. In any event, in respect of the last ground, it was apparent from the decision of the Supreme Court in *MSC (No.2)* that the judge had erred in her assessment of the adverse impact of the absence of the discharge proviso on MSC's rights, and that there was an unlawful interference with MSC's rights protected by A1P1 of the ECHR and the Human Rights Act. This was because compensation payable under the CPO could not match the common law rights to recovery which were, potentially, removed by the CPO if it were made without the discharge proviso.

31. Mr Williams KC, on behalf of the Secretary of State, submitted that the judge had properly dismissed MSC's appeal, and there was no material error in the judgment, because MSC had taken a sentence in the judgment out of context. This meant that the second ground did not arise, and as to the third ground the judge's analysis had not been dependent on an analysis of the law as it was understood before the decision of the Supreme Court in *MSC (No.2)*. Ms Blackmore KC, also on behalf of the Secretary of State, addressed the second ground to the extent that it did arise, and the third ground, and submitted on the basis of 10 key facts that there was no impermissible infringement of MSC's property rights. This was because there had been a full inquiry and examination of the merits of the CPO, the CPO would lead to an improvement in water quality, the discharges would be in conformity with permits provided by the Environment Agency, and MSC would be paid compensation under the CPO scheme.

32. Mr Strachan, on behalf of United Utilities, adopted the submissions made on behalf of the Secretary of State, and submitted that there were a number of fallacies in MSC's case. These included the proposition that there was a need for equivalence between the scheme for pre-1991 discharges which took place under implied rights for the reasons explained in *MSC (No.1)* and the discharges under the CPO which followed a full local public inquiry. It was also wrong to suggest that United Utilities were gaining an unfettered right in perpetuity to discharge untreated sewage into the Manchester Ship Canal. This was because it would be a criminal offence to discharge in breach of the Environment Agency permits.

33. I am very grateful to Mr de La Mare, Mr Williams, Ms Blackmore and Mr Strachan, and their respective legal teams, for their helpful written and oral submissions. It was apparent that, by the conclusion of the submissions, the following matters were in issue: (1) whether the judge misunderstood MSC's closing submissions to the inspector, meaning that the judge wrongly dismissed MSC's complaints about an infringement of its A1P1 property rights; (2) whether as a result the judge's formulation of the fair balance was flawed, and there was no compliance with the principle of lawfulness so that there has been an infringement of MSC's A1P1 property rights; and (3) whether, because of the decision in *MSC (No.2)*, the judge was wrong in finding that the absence of the discharge proviso did not infringe MSC's A1P1 property rights.

The judgment below

34. As the first ground of appeal involves what was said to be a misunderstanding by the judge of MSC's case to the inspector, it is necessary to set out some details from the judgment. There was a hearing before Thornton J on 19 and 20 October 2022. Judgment was reserved and delivered on 19 December 2022.

35. In the judgment, the judge first identified the grounds of challenge. These were that: (1) the inspector and Secretary of State wrongly concluded that the test was whether the discharge proviso was "necessary"; and (2) the interference with MSC's A1P1 property rights was not justified. The judge then analysed the legal framework before setting out the inspector's report and the Secretary of State's minded to and decision letters.

36. As to ground 1 and what was described as an erroneous test of necessity, the judge recorded that MSC alleged seven errors in the decision making. At paragraph 38 of the judgment the judge recorded that "in closing submissions to the inquiry, MSCC made its case in relation to the inclusion of the provisions as follows". The judge then summarised the submissions made on behalf of MSC. The judge summarised at paragraph 43 the reasons why the inspector had found the discharge proviso to be unnecessary. These included: the discharge would be regulated by the Environment Agency; the public inquiry had provided an opportunity for an independent scrutiny of the potential interference with MSC's rights; the legal provisions do not apply to a right granted under section 155 of the Water Industry Act; and the water quality evidence demonstrated a beneficial impact on water quality of the canal.

37. The judge then turned to the statutory context underpinning the provision of sewerage services, and referred to the decision of the House of Lords in *Marcic*. (As already noted in paragraph 6 above, the decision in *Marcic* has now been distinguished by the Supreme Court in *MSC (No.2)*). Reference was then made to compulsory purchase and section 155 of the Water Industry Act, before the judge turned to the economic regulation of United Utilities, carried out by Ofwat, and the environmental regulation of United Utilities, carried out by the Environment Agency.

38. In paragraphs 55 to 57 of the judgment the judge referred again to MSC's case before the inspector about inclusion of the discharge proviso, recalling that the case was based "… on a point of general principle, namely that it should have parity of protection with the protection available to a landowner under an implied right to discharge" under the Water Industry Act.

39. The judge then addressed the other errors before turning to error 4, which was related to compensation. The judge said "before the inspector MSCC sought the inclusion of schedule 12, paragraph 4" of the Water Industry Act, recording that the point was "a repeat of MSCC's broader case, considered above, that it should have parity of protection as between rights implicitly and explicitly authorised" under the Water Industry Act.

40. In paragraph 67 the judge addressed complaints that the inspector had "treated inclusion of the discharge proviso as an issue on which MSCC bore a persuasive burden".

41. In paragraphs 72 and 73 the judge, under a heading "drawing the strands together", recorded that "the inspector reaches an assessment that inclusion of the protective

provisions sought by MSCC in the CPO is unnecessary", finding that was a judgment reached in the public interest, based on a lengthy examination of the evidence, over the twenty nine days of the inquiry. The judge found that "the inspector's decision discloses no error of law. Given the nature of the legal provisions sought by MSCC, there is an obvious rationale to the inspector taking account of the availability of a detailed and precise environmental regulatory regime …".

42. Having rejected all of the alleged errors, the judge in paragraphs 74 to 91, under the heading "raising new points on appeal" stated that "before the court, MSCC developed its case in in ways that were not put to the inspector (or the Secretary of State)". In paragraph 75 the judge noted that "before the inspector MSCC sought to include sections 177(5)(a) and (b); 117(6); 186(1), (3) (6) and Schedule 12 para 4 of the WIA to the terms of the order. Before the court, the company confined the scope of its challenge to sections 117(5) and 186(3) WIA …".

43. The judge recorded that the inspector was informed that private law remedies were irrelevant to the current inquiry, and quoted from paragraph 253 of MSC's closing submissions to the inspector to the effect that "any disputes about these matters were said to be 'for another day and another forum' (closing submissions at para 253)". The judge went on to state that "before the court, counsel for MSCC sought to downplay the submission but it appears in MSCC's closing submissions and it is difficult to see how it can be read in any other way than a disavowal of the relevance of private law remedies to the issues before the inquiry".

44. In paragraph 79 of the judgment the judge recorded that MSC continued to refine its case further during the hearing, narrowing its focus to the value of the discharge proviso being to protect MSC's right to bring a claim based on negligence or deliberate wrongdoing by United Utilities in breach of its environmental permit. The judge recorded that in reply counsel then appearing for MSC produced for the first time a copy of the order of Fancourt J which had declared that MSC could not bring an action against United Utilities in trespass or nuisance "absent an allegation of negligence or deliberate wrongdoing". (Although the judgment of Fancourt J was upheld by the Court of Appeal, the declaration that he made was subsequently set aside by the Supreme Court in *MSC (No.2)*).

45. The judge stated that she had permitted the parties to make written submissions on the point. The judge summarised those submissions, which included what the judge considered were new points about the inadequacy of the compensation regime, which had not been addressed in evidence at the inquiry. In paragraph 88 the judge recorded that there had been a limited opportunity to explore the complexities raised by the case, in particular in relation to the availability of compensation, when considering the assessment of the interference with MSC's property rights. The judge referred to section 23 of the 1981 Act and said it did not entitle a disappointed party to have a second go at its case, and that the Inspector and Secretary of State could not be criticised for not dealing with a case that was not put to them, and the judge declined to do so. The judge concluded that "I am satisfied that there is no error of law in their assessment of the matters put before them" and dismissed ground 1.

46. The judge then turned to the claim that there had been an infringement of MSC's rights protected by A1P1 of the ECHR, and set out the relevant legal principles. The judge recorded that the discharge proviso went to the issue of whether there was a less

intrusive measure that could have been used without compromising the objectives of the CPO, and there was a dispute about the margin of appreciation to be given to the inspector.

47. The judge referred to relevant authorities and the test of proportionality. The judge held that the decision-maker had a margin of judgment which was highly fact and context-specific, and it was not for the court to take over the role of the decision-maker. The judge considered some authorities and their effect on the least intrusive means possible in a planning context in paragraphs 102 to 109 of the judgment.

48. The judge considered whether the discharge proviso would have been a less intrusive measure that should have been ordered. The judge concluded that the inspector came to a judgment that the protection was unnecessary for reasons that were not tainted by legal error, and said, at paragraph 118 that MSC "had made clear that its case for inclusion of the proviso was not based on its right to be able to bring a private law claim against UU".

49. In paragraph 118 of the judgment, the judge recorded her concern that the protection sought by MSC could undermine the objective of the CPO, which was that the sections set out in the discharge proviso might be said "to form their own complex interlocking scheme of regulation to sit alongside the grant of authority to UU to discharge effluent into the canal as part of the order. This would appear to give rise to the potential for conflict" which the judge explained might include seeking an injunction, and that MSC had suggested a role for itself as a second regulator of United Utilities' operations.

50. The judge stepped back to consider the question of a fair balance, recorded that the inspector had found a compelling public interest in the making of the CPO, and afforded the inspector a considerable margin of judgment in that assessment because the inspector had heard evidence over the 29 days of the inquiry.

51. The judge then turned to MSC's case that the CPO without the discharge proviso amounted to a disproportionate interference with its property rights. The judge said in paragraph 123 "However, the evidence in relation to the interference generated by the order without the discharge proviso, as compared with the proviso, remains theoretical." The judge then addressed the reasons why the inspector did not consider the proviso to be necessary.

52. The judge recorded that before the Administrative Court MSC advanced a case that the value of the discharge proviso was the private law protection in the event of future polluting incidents, before referring to *Marcic* and *Manchester Ship Canal Co Ltd v United Utilities Water Ltd* [2022] EWCA Civ 852, which was the Court of Appeal decision later overturned by the Supreme Court in *MSC (No.2)*. The judge stated that she was bound by the decisions and that their effect was that MSC did not have a private law claim in nuisance against United Utilities. The judge recorded that there might be claims for negligence or deliberate misconduct by United Utilities "with or without the discharge proviso" stating "there may be said to be limited value in the protection provided by the discharge proviso. The interference is, evidentially, theoretical. The tortious remedy of a nuisance claim is ousted. The tortious remedy of a negligence claim remains available."

53. As to MSC's case that its right to compensation under the CPO was inadequate the judge said that the case was not developed at the inquiry despite the availability of witnesses with considerable experience in compensation, so that the judge was reluctant to entertain allegations that the compensation code was inadequate. The judge set out the explanation provided about the once and for all nature of the compensation payable under section 7 of the Compulsory Purchase Act 1965, as modified by the Water Industry Act, and the need to consider the diminution in value of MSC's property interests caused by the CPO. The judge accepted that it was arguable that it would be difficult to value a once and for all capital figure, but it was all theoretical because there was no estimate of how likely a breach of the permit would be, or how much loss would be caused. The judge referred again to *Marcic* considering that it might be said that the balance struck by considering the landowner's interests, alongside the wider interest, by section 155 of the Water Industry Act and the inquiry process was a fair balance. Ground 2 of the challenge was therefore dismissed.

Relevant statutory provisions and provisions of law

54. Section 155 of the Water Industry Act provides:

> "(1) A relevant undertaker may be authorised by the Secretary of State to purchase compulsorily any land anywhere in England and Wales which is required by the undertaker for the purposes of, or in connection with, the carrying out of its functions.
>
> (2) The power of the Secretary of State under subsection (1) above shall include power–
>
> (a) to authorise the acquisition of interests in and rights over land by the creation of new interests and rights…
>
> …
>
> (4) Subject to section 188 below, the Acquisition of Land Act 1981 shall apply to any compulsory purchase under subsection (1) above of any land by a relevant undertaker; and Schedule 3 to the said Act of 1981 shall apply to the compulsory acquisition under that subsection of rights by the creation of new rights."

55. The procedure for making compulsory purchase orders is provided for in the 1981 Act. Appeals from compulsory purchase orders are brought pursuant to section 23 of the 1981 Act. Section 23(1) and (2) of the 1981 Act provide:

> "(1) If any person aggrieved by a compulsory purchase order desires to question the validity thereof, or of any provision contained therein, on the ground that the authorisation of a compulsory purchase thereby granted is not empowered to be granted under this Act or any such enactment as is mentioned

> in section 1(1) of this Act, he may make an application to the High Court.
>
> (2) If any person aggrieved by—
>
> (a) a compulsory purchase order, or
>
> (b) a certificate under Part III of, or Schedule 3 to, this Act,
>
> desires to question the validity thereof on the ground that any relevant requirement has not been complied with in relation to the order or certificate he may make an application to the High Court."

56. The role of the High Court is to consider whether there is any legal or procedural error in the confirmation of the CPO, see *Margate Town Centre Regeneration Ltd v Secretary of State for Communities and Local Government* [2013] EWCA Civ 1178 at paragraph 15.

57. Other relevant provisions of the Water Industry Act, in addition to those set out in paragraphs 17 and 18 above, include section 94 which sets out the duty of every sewerage undertaker to "provide, improve and extend" a system of public sewers. These duties may be enforced by Ofwat pursuant to section 18 of the Water Industry Act, and any such enforcement orders may be enforced by any affected person pursuant to section 22 of the Water Industry Act.

58. Section 116 of the Water Industry Act limits when a sewage undertaker may close a public sewer. It was this provision which was held by the Supreme Court in *MSC (No.1)* to give rise to an implied right to discharge from pre-privatisation (namely pre-1991) outfalls, such as the four outfalls into Salteye Brook.

59. The environmental permit regime is set out in the Environmental Permitting (England and Wales) Regulations 2016 which cover regulated facilities, including waste operations and water discharge activities. Provision is made in regulation 36 for service of enforcement notices, where the regulator considers that an environmental permit condition has been contravened by an operator or is likely to be contravened. Regulation 37 provides for suspension of environmental permits. Regulation 38 creates offences, and there is an offence "for a person to fail to comply with or to contravene an environmental permit condition". Defences are set out in regulation 40.

60. A1P1 provides

> "1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general

> interest or to secure the payment of taxes or other contributions or penalties."

61. A1P1 protects the right to property. There is a general principle that every natural or legal person is entitled to the peaceful enjoyment of his possessions, there should be no deprivation of possessions except in the public interest and by lawful means, and states are entitled to control the use of property in accordance with the general interest.

62. Assessing whether there has been a violation of A1P1 involves consideration of whether a "possession" exists, whether there has been an interference with the possession, and the nature of any such interference. There is a need to determine whether a fair balance has been struck between the demands of the general interest of the community and the protection of the individual's fundamental rights. This gives rise to issues of proportionality.

63. The test was described by Lord Sumption in *Bank Mellat v Her Majesty's Treasury (No.2)* [2013] UKSC 39; [2014] AC 700 at paragraph 20 as involving an exacting analysis of the factual case advanced in defence of the measure, in order to determine: "i) whether its objective is sufficiently important to justify the limitation of a fundamental right; ii) whether it is rationally connected to the objective; iii) whether a less intrusive measure could have been used; and iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community."

64. In *Dalston Projects Ltd v Secretary of State for Transport* [2024] EWCA Civ 172; [2024] 1 WLR 3327 it was confirmed that the court had to decide whether the decision was proportionate, but the court might afford a measure of respect to the balance of rights and interests struck by the public authority which had made the decision. It might be noted that there is an outstanding appeal to the Supreme Court in *Dalston* about the proportionality of the decision to sanction in that case.

Whether the judge misunderstood MSC's closing submissions to the inspector, meaning that the judge wrongly dismissed MSC's complaints about an infringement of its A1P1 property rights – issue one

65. The judge did not misunderstand MSC's closing submissions to the inspector. The judge had made it clear, in the paragraphs from her judgment quoted above, that MSC was seeking the discharge proviso from the inspector. For example in paragraphs 55 to 57 of the judgment, the judge referred to MSC's case before the inspector about inclusion of the discharge proviso, recalling that the case was based "… on a point of general principle, namely that it should have parity of protection with the protection available to a landowner under an implied right to discharge" under the Water Industry Act.

66. When dealing with what MSC alleged was error 4 of the decision, the judge said "before the inspector MSCC sought the inclusion of schedule 12, paragraph 4" of the Water Industry Act, recording that the point was "a repeat of MSCC's broader case, considered above, that it should have parity of protection as between implicitly and explicitly authorised" under the Water Industry Act. This was completely inconsistent with the judge misunderstanding MSC's case before the inspector that the

discharge provision should be included in the CPO, and that it was not necessary for the CPO to be confirmed without the discharge proviso.

67. In paragraphs 72 and 73 the judge, under a heading "drawing the strands together", recorded that "the inspector reaches an assessment that inclusion of the protective provisions sought by MSCC in the CPO is unnecessary", finding that was a judgment reached in the public interest, based on a lengthy examination of the evidence, over 29 days of the inquiry. This was an answer to the point that it was not necessary to confirm the CPO without the discharge proviso.

68. It is right to record that, having rejected all of the alleged errors in the decision, the judge then turned in paragraphs 74 to 91 under the heading "raising new points on appeal" stating that "before the court, MSCC developed its case in in ways that were not put to the inspector (or the Secretary of State)". In paragraph 75 the judge noted that "before the inspector MSCC sought to include sections 117(5)(a) and (b); 117(6); 186(1), (3) (6) and Schedule 12 para 4 of the WIA to the terms of the order. Before the court, the company confined the scope of its challenge to sections 117(5) and 186(3) WIA …". This statement is inconsistent with a misunderstanding by the judge to the effect that the inspector did not need to adjudicate on the effect of the necessity of confirming the CPO without the discharge proviso.

69. In one of the passages in the judgment about which complaint is made in this ground of appeal, the judge recorded that the inspector was informed that private law remedies were irrelevant to the current inquiry, and quoted from paragraph 253 of MSC's closing submissions to the inspector to the effect that "any disputes about these matters were said to be 'for another day and another forum' (closing submissions at para 253)". The judge went on to state that "before the court, counsel for MSCC sought to downplay the submission but it appears in MSCC's closing submissions and it is difficult to see how it can be read in any other way than a disavowal of the relevance of private law remedies to the issues before the inquiry". The judge also stated that the case for inclusion of the discharge proviso was not based on its right to be able to bring a private law claim against United Utilities.

70. It appears that, in context, all that the judge was saying was that MSC had disavowed the relevance of private law remedies to the issues before the inquiry, so that the inspector did not need to determine what was the legal effect of the discharge proviso before determining that there was no necessity to confirm the CPO in the absence of the discharge proviso. It was appropriate for the judge to make the point that MSC had not developed any case before the inspector about private law remedies. It is part of an answer to the point, set out in paragraph 32 of the Appellant's Replacement Appeal Skeleton Argument before this court, that the inspector did not grapple with the significance of the point that "in the absence of the Discharge Proviso, there would be a curtailment of MSCC's right to pursue the private law remedies in nuisance and/or trespass" because there had been no development of what it was said were those private law remedies before the inspector. The judge was not saying that MSC had disavowed its reliance on its case for the discharge proviso.

71. MSC's case on the necessity for the CPO without the discharge proviso did develop before the judge from the position which MSC had taken before the inspector. This was because the case on the discharge proviso before the inspector was based only on submissions, and followed the time at which it had become clear that the evidence,

and in particular the expert evidence, on which MSC had relied before the inspector to oppose the making of the CPO in principle, did not prevent the confirmation of the CPO. There was no evidence about the effect of the discharge proviso called before the inspector. The statutory provisions relied on before the inspector as part of the discharge proviso were narrowed (as they have been further narrowed before this court – and there is now a suggestion that the wording of the rider to the CPO might need to be modified for the discharge proviso to have any effect, see footnote 5 to paragraph 25 of the Appellant's Replacement Appeal Skeleton Argument). The case to the inspector appeared to be put on the basis that the discharge proviso mirrored protections available to landowners for discharges from pre-1991 outfalls, and it was therefore not "necessary" to grant an unconditional CPO without the discharge proviso to United Utilities. Before the judge there was more analysis of the remedies available to MSC at common law, and reference to the order made by Fancourt J. At the end of these paragraphs, the judge concluded that she would not entertain new points on the appeal. In coming to that conclusion, the judge was effectively mirroring the position taken on behalf of MSC before this court, namely that in considering whether it was necessary to make the CPO without the discharge proviso, it was not necessary to decide the logically prior question of what common law remedies for nuisance and negligence would be available to MSC if the CPO was confirmed without the discharge proviso.

72. In my judgment the inspector was, on the evidence, entitled to find that the grant of the CPO was necessary, and, because there was no clarity about what would be gained from adding the discharge proviso as sought before the inspector, or any clarity about whether it would achieve MSC's objectives, the grant of the CPO without the discharge proviso was also necessary. For all of these reasons, I would dismiss the first ground of the appeal.

Whether as a result of the judge's misunderstanding the judge's formulation of the fair balance was flawed, and there was no compliance with the principle of lawfulness so that there has been an infringement of MSC's A1P1 property rights – issue two

73. This ground was dependent on the answer to the first issue being that the judge had misunderstood MSC's case to the inspector. In the light of my answer to ground one above, this ground of appeal does not arise.

Whether, because of the decision in *MSC (No.2)*, the judge was wrong in finding that the absence of the discharge proviso did not infringe MSC's A1P1 property rights – issue three

74. The judge did expressly refer to the House of Lords judgment in *Marcic,* which was distinguished by the Supreme Court in *MSC (No.2)* and also referred to the judgment of the Court of Appeal in *Manchester Ship Canal Co Ltd v United Utilities Water Ltd* [2022] EWCA Civ 852, which was overturned by the Supreme Court in *MSC (No.2)*. The judge recorded that she was bound by the decisions and that their effect was that MSC did not have a private law claim in nuisance against United Utilities. The judge then said that there might be claims for negligence or deliberate misconduct by United Utilities "with or without the discharge proviso" stating "there may be said to be limited value in the protection provided by the discharge proviso. The interference is,

evidentially, theoretical. The tortious remedy of a nuisance claim is ousted. The tortious remedy of a negligence claim remains available."

75. It is inevitable that, in the light of the later decision of the Supreme Court in *MSC (No.2)* the judge's statements about nuisance and negligence were not an accurate summary of the legal position. As Mr de La Mare pointed out, under the declaratory theory of the common law, the law as it was found to be in *MSC (No.2)* is the law as it has always been understood to be.

76. The first question is whether the judge's view of MSC's common law remedies for nuisance and negligence in relation to discharges governed by the Water Industry Act, affected the judge's approach to A1P1 and the finding that there was no infringement of MSC's A1P1 property rights. There is, in my judgment, force in the point made on behalf of the Secretary of State and United Utilities to the effect that the judge had made it clear that she was not going to analyse the effect of the discharge proviso on the common law position, because that had not been done before the inspector. As noted in paragraphs 22 and 23 above, even now no party has developed submissions about whether, with the CPO being confirmed without the discharge proviso, MSC would be able to bring a common law claim for nuisance or negligence against United Utilities for any discharge. In these circumstances it is apparent that the judge's determination that there was no infringement of MSC's property rights could not have been affected by the judge's inaccurate summary of the law before the decision in *MSC (No.2)*.

77. In case I were to be wrong in the analysis that the judge's inaccurate statement of the law did not affect her finding in relation to an absence of infringement, I have revisited the exercise to consider whether confirming the CPO without the discharge proviso impermissibly infringed MSC's property rights.

78. It is common ground that MSC has ownership of property, being the Manchester Ship Canal, and it is also common ground that the making of the CPO constitutes an interference with the possession of the Manchester Ship Canal by permitting United Utilities to discharge from the new pipe into the Manchester Ship Canal. It was, however, also common ground that the CPO should be confirmed, and the only issue was whether it should be confirmed with the discharge proviso.

79. The interference with MSC's property rights in permitting the discharge into the Manchester Ship Canal complies with the principle of lawfulness, because the CPO without the discharge proviso was made under the relevant legislation set out in the Water Industry Act. The making of the CPO without the discharge proviso pursues the legitimate aim of improving environmental standards generally and the water quality in particular in the Salteye Brook and the Manchester Ship Canal.

80. This leaves the question whether confirming the CPO without the discharge proviso is proportionate. In my judgment it was, and remains, proportionate to confirm the CPO without the discharge proviso, so that there is no impermissible infringement of MSC's A1P1 property rights protected by the ECHR. This is for a number of reasons. First, this is because the CPO had to be confirmed to improve the water quality in Salteye Brook and the Manchester Ship canal, for all the reasons found at the inquiry. There is no need for equivalent protections that exist in relation to pre-1991 outfalls under sections 117(5) and 186(3) of the Water Industry Act, because discharges from

those pre-1991 outfalls have not been subjected to rigorous expert examination in the course of an inquiry to determine whether they are necessary and will improve water quality.

81. Secondly the discharge into the Manchester Ship Canal will be regulated and monitored by the Environment Agency. This is an answer to Mr de La Mare's point that United Utilities has an easement in perpetuity to discharge effluent into the Manchester Ship Canal. If United Utilities discharge in breach of the Environment Agency permit, a criminal offence will have been committed, and United Utilities have no more right than any other person to act in breach of the criminal law.

82. Thirdly, it is because there is a fair compensation scheme, established by the compulsory purchase legislation as modified by the Water Industry Act, providing for the payment of compensation to MSC, see section 155 and schedule 9 of the Water Industry Act, section 4 of the 1981 Act and sections 1 and 5 of the Land Compensation Act 1961. I accept that there may be difficulties in calculating whether there may be a catastrophic failure at the Eccles treatment works which affects MSC's use of the Manchester Ship Canal, but estimates can be made on the basis of expert evidence about risks of discharges causing damage to the Manchester Ship Canal. Courts are regularly involved in estimating what would have happened to make a lump sum valuation of damages. There are procedures to ensure payment of fair compensation. The compensation is determined, in the absence of agreement in the Upper Tribunal.

83. The CPO was confirmed without the discharge proviso. There was no need to attempt to recreate existing statutory wording in section 117(5) and 186(3) of the Water Industry Act to avoid an impermissible interference with MSC's property rights.

Conclusion

84. For the detailed reasons set out above: (1) The judge did not misunderstand MSC's closing submissions to the inspector; (2) the second issue therefore does not arise; and (3) the judge's determination that there was no infringement of MSC's property rights under A1P1 was not affected by the judge's application of the law before the decision in *MSC (No.2)*, and in any event it was, and remains, proportionate to confirm the CPO without the discharge proviso, so that there is no impermissible infringement of MSC's A1P1 property rights protected by the ECHR. I would dismiss the appeal.

Lady Justice Elisabeth Laing:

85. I agree with both judgments.

Lord Justice Males:

86. I agree that this appeal must be dismissed. I wish to add something on one aspect of the case.

87. The purpose of the discharge proviso sought by MSC is to preserve its private law right to bring a claim in nuisance and thereby to put it in the same position as regards the proposed new outfall into the Manchester Ship Canal as applies to outfalls which existed before the coming into force of the Water Industry Act 1991. The effect of the

litigation about pre-existing outfalls which culminated in the decision of the Supreme Court in *United Utilities Water Ltd v Manchester Ship Canal Co Ltd* [2024] UKSC 22, [2024] 3 WLR 356 is that the 1991 Act did not oust common law causes of action and remedies preserved by sections 117(5) and 186(3) of the Act. In short, the rationale for this conclusion was that (1) a right to discharge surface water and treated effluent into a private watercourse without the owner's consent could be implied from provisions found in pre-1991 legislation; and (2) equivalent provisions had been re-enacted in the 1991 Act, so that the same implied right was carried over to the 1991 Act regime, in particular as a result of section 116; but (3) this did not extend to a right to discharge foul water, which was an actionable nuisance at common law. The effect of sections 117(5) and 186(3) was therefore to preserve existing common law remedies in relation to pre-existing outfalls.

88. However, as recognised by the Supreme Court, the statutory regime applicable to new outfalls is different. As Lord Reed and Lord Hodge observed:

> '64. Part VI of the Act is concerned with undertakers' powers and works. The powers conferred include powers of compulsory acquisition of rights over land (which could include the right to discharge foul water into a watercourse). …'

89. Section 155 of the Act, which provides for the compulsory purchase of land required by an undertaker for the purposes of, or in connection with, the carrying out of its functions, enables the Secretary of State not only to authorise the acquisition of interests in and rights over land by the creation of new interests and rights, but also to provide for the 'extinguishment' of the rights of the landowner whose land is to be compulsorily acquired.

90. This statutory scheme provides for a public inquiry in which the advantages and disadvantages of the proposed compulsory purchase can be thoroughly investigated and the various public and private interests affected can be taken into account, as can the availability and practicability of alternative proposals. Measures can be considered to minimise or avoid the risk of discharge of foul water. Compensation is payable to the landowner concerned.

91. That is what happened in this case. By the conclusion of the public inquiry it was common ground (essentially because MSC had to recognise that its factual and expert case had collapsed) that the new pipe was not only necessary to avoid pollution of Salteye Brook, but would improve the water quality in the canal, while provision was made to avoid or minimise the discharge of foul water by the provision of additional storage capacity.

92. It is apparent that the reasoning of the Supreme Court relating to pre-existing outfalls has no application to this regime. There is no need to search for a continuing implied right to discharge into a private watercourse without the owner's consent because the compulsory purchase order will provide an express right to do so, extinguishing any contrary right of the owner. There is no need to preserve existing common law rights because the statutory scheme ensures that a new outfall will only be created when that is necessary in the public interest in specific circumstances, while the discharge of foul water will be regulated by the system of environmental permits. This means that it will be prohibited unless it is necessary in order to avoid worse consequences, such as sewage backing up.

93. None of the protections implicit in this statutory scheme applies to pre-existing outfalls. These are not the subject of any public inquiry in which alternative proposals or mitigating measures can be scrutinised. Nor are they the subject of any order specifically tailored to the circumstances of the particular outfall.

94. The main thrust of MSC's case, that the same preservation of private law rights as applies to pre-existing outfalls ought to be replicated in the case of new outfalls which are the result of compulsory acquisition under section 155 of the 1991 Act, is therefore fallacious.

95. In my judgment, therefore, the compulsory purchase order in this case does give United Utilities the right to discharge water, soil and effluent into the canal, but it does so against a regulatory background that the discharge of foul water will be a criminal offence if it occurs in circumstances not permitted by the Environment Agency, and it provides for compensation to be payable to MSC. While it may be that the compensation would not be equivalent to the damages which would be payable in a claim for nuisance, it is well established that compensation for the loss of property rights under A1P1 need not equate to common law damages. Moreover, this detailed scheme has been specifically endorsed by Parliament in primary legislation as an adequate protection for A1P1 rights, which is a factor to which courts should give great weight.

96. In these circumstances there is no question of any breach of A1P1.