



# PUMP COURT

## CHAMBERS

# **Total Nuisance: 2024 Case Law Update**

## **Rebekah Batt**



## Overview

- Manchester Ship Canal Company Ltd v United Utilities Water Ltd (No. 2) [2024] UKSC 22
  - Sewage and Statutory interpretation.
- Davies v Brigend County Borough Council [2024] UKSC 15
  - Japanese knotweed and Causation.

# Manchester Ship Canal Company Ltd v United Utilities Water Ltd

- The question:

*Can the owners of watercourses or bodies of water bring actions in nuisance and/or trespass if that water is polluted by discharges of foul water from the infrastructure of statutory sewerage undertakers, in the absence of negligence or deliberate misconduct? Or are such actions barred on the basis that they are inconsistent with the Water Industry Act 1991?*

# Manchester Ship Canal Company Ltd v United Utilities Water Ltd (1)

- The Parties:
  - Manchester Ship Canal is from Manchester to the Mersey Estuary;
  - Manchester Ship Canal Company owns the beds and banks;
  - United Utilities Water Ltd (“UU”) was appointed under the Water Act 1989 as the sewerage undertaker.

# Manchester Ship Canal Company Ltd v United Utilities Water Ltd (2)

- The Facts:
  - There are around 100 outfalls from the sewerage network into the canal;
  - When the hydraulic capacity of the sewerage system is exceeded, at least some of the discharge is foul water – this is part of the design **however** if improved the foul water discharge could be avoided;
  - No suggestion of negligence or deliberate wrongdoing but could be avoided.

# Manchester Ship Canal Company Ltd v United Utilities Water Ltd (3)

- The dispute:
  - The Canal Company threatened to bring a claim against UU for trespass and nuisance;
  - In response, UU asked the court to make a declaration that the Canal Company had no right of action on the basis that the Canal Company is barred by the Water Industry Act 1991 from bringing such actions (absent an allegation of negligence or wrongdoing);
  - NB: the court was not asked to express a view on the merits of the claim.

# Manchester Ship Canal Company Ltd v United Utilities Water Ltd (4)

- The High Court and Court of Appeal:
  - Agreed with UU;
  - The responsibility for resolving these issues fell to the regulator, Ofwat, not the judiciary;
  - High Court found that the case was indistinguishable from *Marcic v Thames Water Utilities Ltd* [2003] UKHL 66;
  - CoA interpreted *Marcic* as excluding claims where the underlying cause was inadequacy of sewerage infrastructure.

# Manchester Ship Canal Company Ltd v United Utilities Water Ltd (5)

- Decision of the Supreme Court;
  - Unanimously allowed the Canal Company's appeal;
  - The 1991 Act does ***not*** prevent a claim in nuisance or trespass.



# Manchester Ship Canal Company Ltd v United Utilities Water Ltd (6)

- The principles ;
  - A body exercising statutory powers liable in the same way as any other person save as expressed in statute;
  - Right to peaceful enjoyment is a fundamental one, interpretation of statute which is said to authorise interference brings into play ‘principle of legality’, requiring express language or necessary implication;

# Manchester Ship Canal Company Ltd v United Utilities Water Ltd (7)

The principles (2):

- Consideration of the law prior to privatisation vs the law since privatisation including *Marcic*;
- Supreme Court considered that the Court of Appeal had misread *Marcic*.

# Manchester Ship Canal Company Ltd v United Utilities Water Ltd (8)

- The reasons:
  - The Canal Company has a property right in the watercourse, including to preserve the quality of the water, this is protected by common law;
  - Discharging foul water into a privately owned water course is an actionable nuisance at common law.

# Manchester Ship Canal Company Ltd v United Utilities Water Ltd (9)

- The reasons (2):
  - There is no statutory authority to discharge untreated sewage;
  - Section 117(6) prohibits sewerage undertakers from carrying out its functions under the relevant sections so as to cause nuisance;
  - Section 186(7) provides for arbitration, since there is no statutory remedy, what would be the purpose of arbitration?

# Manchester Ship Canal Company Ltd v United Utilities Water Ltd (10)

- The reasons (3):
  - Section 18(8) expressly preserves common law remedies which are available where contravention of the statutory duty is not essential to the cause of action;
  - There is no express ouster of common law causes of action and remedies to protect enjoyment of property in the 1991 Act.

# Davies v Bridgend County Borough Council

- The question:

Was the court correct to decide that loss suffered, in the form of diminution in value of a property as a result of the encroachment of Japanese knotweed, was caused by the breach of duty in failing to treat the knotweed, where the encroachment arose before the breach?

## Davies v Bridgend County Borough Council (1)

- The facts:
  - C owned a terraced house in South Wales, which backed onto an embankment leading to an old railway line;
  - There was JKW at the bottom of the embankment, JKW at the top of the embankment had probably been dumped rather than grown from the bottom;
  - Some time before 2004, when C bought his property, the knotweed had encroached on his land, underground;
  - C became aware that JKW might be a problem in 2017;
  - A letter of claim was sent in 2019;
  - D started treating the JKW in 2018 but produced evidence which suggested it knew about the JKW well before that.



## Davies v Bridgend County Borough Council (2)

- The decision at first instance/ first appeal:
  - There was actionable and continuing nuisance from 2013 to 2018;
  - Claim for general damages was dismissed;
  - A number of claims brought and not pursued/ held irrecoverable, leaving claim for residual diminution in value after treatment;
  - District Judge Fouracre and HHJ Beard, on appeal, found that residual diminution in value was irrecoverable because it was pure economic loss, relying on the case of *Williams v Network Rail* [2018] EWCA Civ 1514.

## Davies v Bridgend County Borough Council (3)

- The Court of Appeal:
  - Overturned the decision on residual diminution;
  - They held that the ratio of *Williams* is that there is no nuisance in the absence of encroachment of rhizomes merely because JKW within a certain proximity of a property reduces the value, **however** if there has been encroachment, there has been physical interference and consequential losses – NB this part of the judgment was not appealed.

## Davies v Bridgend County Borough Council (4)

- The Court of Appeal (on causation):
  - Drew an analogy with *Delaware Mansions* [2002] 1 AC 321 and found for the Claimant on causation on the basis that there was a continuing breach of duty, as a result of persisting encroachment.

## Davies v Bridgend County Borough Council (5)

- The Supreme Court:
  - Unanimously allowed the appeal;
  - The diminution in value was not caused by D's tort and no damages should be awarded;
  - Simple 'but for' test: would the diminution in value claimed for have occurred 'but for' the breach of duty of the defendant between 2013 and 2018?
  - Re *Delaware*, the proper analysis is that C is entitled to recover the reasonable cost of abating a continuing nuisance – diminution in value does not form part of that.