

Neutral Citation Number: [2008] EWHC 1763 (Admin)

Case No: CO/6423/2004

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/07/2008

Before :

LORD JUSTICE CARNWATH
and
MR JUSTICE BEAN

Between :

	THE QUEEN on the application of THAMES WATER UTILITIES LIMITED	Claimant
	- v -	
	BROMLEY MAGISTRATES' COURT	Respondent
	- and -	
	THE ENVIRONMENT AGENCY	Interested Party
	- and -	
	WATER SERVICES REGULATION AUTHORITY	Intervener

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

**Robert McCracken QC & Gregory Jones (instructed by Thames Water Utilities Limited) for
the Claimant**

Bromley Magistrates' Court were not represented in Court (Respondent)

David Hart QC & Mark Harris (instructed by **The Environment Agency**) for the **Interested Party**

Mark Beard (instructed by **Water Services Regulation Authority**) for the **Intervener**

Hearing dates: Monday 14th July, 2008

Judgment

Lord Justice Carnwath :

Introduction

1. The short point in this case is whether escapes of waste water from a public sewerage system are “Directive waste” within the scope of the Waste Framework Directive, and thus subject to the enforcement authority of the Environment Agency (“the Agency”) under section 33 of the Environmental Protection Act 1990 “EPA”.
2. In form the hearing is the renewed hearing of an application for judicial review which first came before the court in May 2005. Thames Water Utilities Limited “TWUL” had been prosecuted by the Agency in the Havering Magistrates' Court, for alleged offences under section 33 of the EPA, arising out of deposits of untreated sewage on land in the area of Elmers End, Kent, in February to April 2003. Section 33 makes it an offence to “deposit controlled waste on any land” without a waste management licence. It is a defence to show that “all reasonable precautions” were taken and “all due diligence” exercised to avoid commission of an offence (s 33(7)). By regulation 7A of the Controlled Waste Regulations 1992, waste which is not “Directive waste” for the purpose of the European Waste Framework Directive is excluded from the definition of “controlled waste”.
3. A preliminary issue was raised by TWUL whether, as a matter of law, sewage escaping from pipes maintained by a statutory undertaker was “controlled waste” as so defined. District Judge Carr decided on 16th September 2004 that he had no jurisdiction to determine that issue. TWUL applied for judicial review. On 18th May 2005, the Divisional Court held, in agreement with all parties, that the District Judge had had jurisdiction to decide the issue. However, rather than remit it, it agreed to decide the matter itself, but first to make a reference to the European Court of Justice “ECJ” for that purpose.
4. The questions referred to the ECJ were:
 - “1. Whether sewage which escapes from a sewage network maintained by a statutory sewerage undertaker pursuant to the Urban Waste Water Treatment Directive 91/271/EEC ('UWWTD') and/or the Water Industry Act 1991 ('WIA 1991'), amounts to 'directive waste,' for the purposes of the Directive 75/442/EEC (as

amended by Directive 91/156/EEC) ('the Waste Framework Directive' hereinafter, the 'WFD').

2. If the answer to (1) is in the affirmative, whether the aforesaid sewage:

(a) is excluded from the scope of 'directive waste' under the WFD by virtue of article 2(1)(b)(iv) of the WFD, in particular, by virtue of the UWWTD and/or the WIA 1991; or

(b) comes within article 2(2) of the WFD and is excluded from the scope of 'directive waste' under the WFD, in particular, by virtue of the UWWTD.”

5. On 10th May 2007, the ECJ gave its answers. Under (1), it decided that escaping waste water from a statutory sewerage system was within the definition of “waste”, and (under 2 (b)) that it was not excluded by virtue of the UWWTD. The only remaining issue, which now falls to this court for determination, arises under 2(a), which the ECJ answered as follows:

“(The UWWTD) is not 'other legislation' within the meaning of Article 2(1)(b) of (the WFD). It *falls to the national court to ascertain* whether, in accordance with the criteria set out in the present judgment, the national rules may be regarded as being 'other legislation' within the meaning of that provision. Such is the case if those national rules contain *precise provisions organising the management of the waste in question* and if they are such as to ensure a level of protection of the environment equivalent to that guaranteed by (the WFD), and, more particularly, by Articles 4, 8 and 15.” (emphasis added)

The Waste Framework Directive

6. To understand that answer it is necessary to refer to the relevant provisions of the WFD. Article 1 contains relevant definitions:

“For the purposes of this Directive:

(a)'Waste' shall mean any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard;

(b) 'producer' shall mean anyone whose activities produce waste ('original producer') and/or anyone who carries out pre-processing, mixing or other operations resulting in a change in the

nature or composition of this waste;

(c)'holder' shall mean the producer of the waste or the natural or legal person who is in possession of it;

(d) 'management' shall mean the collection, transport, recovery and disposal of waste, including the supervision of such operations and after-care of disposal sites."

7. Article 2 of the WFD contains certain exclusions, including:

“(1) The following shall be excluded from the scope of this Directive:...

(b) Where they are already covered by other legislation: ...

(iv) waste waters, with the exception of waste in liquid form;”

8. The ECJ's decision makes clear that escaping waste-water is in principle “waste” within article 1, but leaves open the issue whether it is “covered by” other domestic legislation so as to be excluded under article 2. For that to be so, the domestic legislation must contain “precise provisions organising the management of the waste in question”, and must ensure a level of protection of the environment equivalent to that guaranteed by the WFD, in particular Articles 4, 8 and 15.

9. Those articles provide as follows:

i) *Article 4*

“1. Member States shall take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment, and in particular:

(a) without risk to water, air or soil, or to plants or animals;

(b) without causing a nuisance through noise or odours;

(c) without adversely affecting the countryside or places of special interest.

2. Member States shall take the necessary measures to prohibit the abandonment, dumping or uncontrolled disposal of waste.”

ii) *Article 8*

“Member States shall take the necessary measures to ensure that any holder of waste:

(a) has it handled by a private or public waste collector or by an undertaking which carries out the operations listed in Annex II A or II B; or

(b) recovers or disposes of it himself in accordance with the provisions of this Directive.”

iii) *Article 15*

“In accordance with the ‘polluter pays’ principle, the cost of disposing of waste must be borne by:

(a) the holder who has waste handled by a waste collector or by an undertaking as referred to in Article 9; and/or

(b) the previous holders or the producer of the product from which the waste came.”

10. It is useful to set out in full the ECJ’s reasons for holding that the UWWTD did not satisfy the relevant test, and its comments on the approach to be adopted in assessing the domestic legislation:

“34. It follows that, for Community or national legislation to be regarded as 'other legislation', it must contain precise provisions organising the management of waste and ensure a level of protection which is at least equivalent to that resulting from (the WFD), and, more particularly, Articles 4, 8 and 15.

35. (The UWWTD) does not ensure such a level of protection. Although it regulates the collection, treatment and discharge of waste water, it does no more than lay down, as regards leakage of waste water, a duty to prevent the risk of such leaks when designing, constructing and maintaining collecting systems. (It) does not lay down any objective in relation to the disposal of waste or decontamination of contaminated soil. It cannot therefore be regarded as relating to the management of waste water which escapes from sewerage networks and ensuring a level of protection which is at least equivalent to that resulting from (the WFD).

36. As regards the national rules applicable to the case in the main proceedings, it has not been possible, either on the basis of

the written pleadings submitted to the Court or of the observations made at the hearing, to determine the exact scope of the powers conferred on the competent authorities of the United Kingdom. It will be for the national court to determine, in the light of the criteria set out in paragraphs 34 and 35 above, whether the Water Industry Act 1991 or the Urban Waste Water (England and Wales) Regulations 1994 contain precise provisions organising the management of the waste in question and whether they are such as to ensure a level of protection of the environment equivalent to that guaranteed by (the WFD) and, more particularly, by Articles 4, 8 and 15.”

TWUL’s case

11. Although the ECJ referred in that passage to the particular domestic legislation on which it understood TWUL to be relying, that may not have reflected precisely its oral argument before the court. In any event, Mr McCracken QC for TWUL now relies on a combination of statutory provisions, the most important of which, as I understand his skeleton argument, are:
 - i) EPA Part III (statutory nuisances)
 - ii) EPA Part IIA (contaminated land)
 - iii) Water Industry Act 1991 (“WIA”) and Urban Waste Water Treatment Regulations 1994 (“UWWTR).
12. He also mentioned the Water Resources Act 1991. However that is relevant, if at all, mainly in the context of sewage leaks into water, which are not the subject of the current charges.
13. I also find it difficult to see what assistance he gains from the WIA or the UWWTR. Section 94 of the WIA imposes general duties in relation to the maintenance of the sewerage system, including provision for “effectually dealing, by means of sewage disposal works or otherwise” with the contents of the sewers. The UWWTR supplements that duty by certain specific requirements derived from the UWWTD. As has been seen, that Directive was held by the ECJ not to meet the test for “other legislation”. It would be surprising therefore if a different conclusion were reached in respect of regulations designed to simply to transpose those requirements into domestic law.

14. Mr McCracken relies on the duty (under reg 4(4) -

“...to *ensure* that urban waste water entering collecting systems is, before discharge, subject to treatment provided in accordance with regulation 5”(his emphasis)

Regulation 5 lays down specific requirements for the provision of treatment plants. I find it difficult to see the relevance of these provisions. As Mr Hart QC, for the Agency, points out, they deal with the handling and treatment of waste water within the system, including requirements designed to prevent escape. They contain no provision for its management after it has escaped, which is the issue in the present case.

15. The Parts of the EPA dealing respectively with statutory nuisance and contaminated land need to be considered together. Under Part III, a statutory nuisance is defined by section 79 as including various “matters”, which include, for example “(a) any premises in such a state as to be prejudicial to health or a nuisance” and (e) “any accumulation or deposit which is prejudicial to health or a nuisance”. However, the section excludes land “in a contaminated state”, which is defined as land –

“...in such a condition, by reason of substances in, on or under the land, that... harm is being caused or there is a possibility of harm being caused” (s 79(1B)).

The authority is under a duty to inspect its area for statutory nuisances, and, where one is found, to deal with it by issuing an “abatement notice”, giving rise to possible criminal proceedings if not complied with. It may also take steps to abate the nuisance itself, and recover the costs from the person responsible.

16. Part IIA contains a parallel scheme for dealing with “contaminated land”, defined so far as relevant as –

“... any land which appears to the local authority in whose area it is situated to be in such a condition, by reason of substances in, on or under the land, that... significant harm is being caused or there is a significant possibility of such harm being caused....” (s 78A (2))

Where land is identified as contaminated land the authority must serve a remediation notice specifying what is to be done by way of “remediation” (s 78E(1)), a term which includes assessing the condition of the land, and carrying out works to remedy the harm and restore the land to its former state (s 78A(7)). The notice is served on the “appropriate person”, in summary a person who “caused or knowingly permitted” the problem, or otherwise the owner or occupier of the land.

Discussion

17. It is not in dispute that the escape of untreated sewage on to land may bring into play one or other of these provisions, and result in the relevant authority becoming under a duty to take action in respect of it. However what is much more difficult is to understand how, individually or together, they can be categorised as “precise provisions organising the management of the waste”. As Mr Hart puts it in his skeleton:

“... the remediation regime is concerned with preventing remedying or minimising harm to the land which is contaminated and returning that land to an uncontaminated state, or as close to that state as possible (as defined in s.78A (7), above). It is not concerned with the waste / escaped sewage and the management and disposal of it, and no remediation notice served under section 78E could properly impose conditions regarding the transport, storage, treatment and disposal of the waste once it was removed from the land; no Remediation Notice could require the full ‘management’ of waste as defined in Art 1(d) WFD.”

Similar points could be made of the statutory nuisance regime. Neither regime does more than address the harmful effects of an escape of untreated sewage. They are not directed to the “management” of the waste in any sense comparable to the objectives of the WFD.

18. Mr McCracken seeks to overcome this problem, as I understand his oral argument, by what he calls a “3-stage analysis”: (i) while the waste-water is in the sewer; (ii) after it has escaped, and while a decision is being made how to deal with the problem; (iii) once a decision has been made, the removal and disposal of contaminated material. The WIA controls stage (i). The contaminated land regime comes into play at stage (ii), to ensure that the practical effects of the escape are effectively addressed. Thereafter what is removed will itself be controlled waste, and the person responsible will be subject to the waste management regime, including the duties relating thereto under section 34 of the EPA (“Duty of care etc as respects waste”). Therefore it is unnecessary to look for some separate scheme for management at that stage. In this connection he refers to the ECJ decision in *Case C 103/01 Van de Walle Texaco* [2005] Env LR 24, which established that land contaminated (in that case) by oil may itself be waste. He points out that there was no suggestion that there was in Belgium any equivalent regime governing leaks of hydrocarbons.
19. I hope I have understood the argument correctly, since it was not clearly articulated in the skeleton argument. However, it seems to me that on any view it fails to overcome the problem. As I have said, the ECJ judgment requires “precise provisions organising the management of waste” so as to ensure a level of protection equivalent to the WFD. I do not think that requirement is met by piecing together a patchwork of miscellaneous provisions, which taken together and depending on how they are operated in particular

cases, may achieve similar practical effects to that of the WFD.

20. The fact of the matter is that there are no “precise provisions” governing the management of waste which escapes unintentionally from the sewerage system. Accordingly they are not “covered by other legislation” in the sense explained by the ECJ. That may not be surprising, since the escapes are by definition unplanned, and therefore outside the scope of the ordinary management regime. However, that is no reason for them not being subject to the criminal sanctions otherwise thought appropriate for deposit of controlled waste. There is nothing unfair in this. If TWUL can show that it took all reasonable precautions and exercised all due diligence, it will have a defence.
21. Accordingly, I conclude that the alleged escapes of untreated sewage were within the scope of section 33, and that the cases should be remitted to the magistrates’ court to determine on the merits. It is unfortunate that the legal process has resulted in the resolution of the matter being delayed for over five years since the events in issue. However, we were assured that the particular problem was remedied at the time, and that the only outstanding issue is therefore potential criminal liability.
22. For completeness I should note that Mr Beard appeared with the court’s permission on behalf of the Water Services Regulation Authority (“Ofwat”). He generally supported Mr Hart’s submissions, and also drew attention to the practical difficulties which would be caused for his authority by a finding that the escape was not controlled waste, and not therefore within the enforcement regime of the Agency. I do not find it necessary to consider these submissions in detail. I would comment, however, that I find it hard to see how they can affect the issue of statutory construction. If on a correct view of the provisions, Ofwat were found to have a more extensive enforcement role than it has hitherto undertaken, then appropriate steps would have to be taken to fit it for that task.

Conclusion

23. As I understand the judgment of this court dated 18th May 2005, it has already quashed the District Judge’s order declining jurisdiction to determine preliminary point. I would therefore answer the preliminary question by holding that sewage escaping from pipes maintained by a statutory undertaker is “controlled waste” within the meaning of section 33 of the EPA, and remit the matter to the magistrates’ court.

Mr Justice Bean :

24. I agree.