

What facts define the cause of action in trespass? (Manchester Ship Canal Company Ltd v United Utilities Water Ltd)

04/07/2019

Environment analysis: According to James McCreath, barrister at Wilberforce Chambers, this case is not only useful for specialist practitioners in environmental and property law, but also provides practitioners more generally with a thorough and learned exposition of the principles applicable to cause of action estoppel, issue estoppel, and *Henderson v Henderson* abuse of process, and emphasises the need for claimants to assert all the claims and arguments they might have the first time around.

Manchester Ship Canal Company Ltd v United Utilities Water Ltd [\[2019\] EWHC 1495 \(Ch\)](#), [\[2019\] All ER \(D\) 83 \(Jun\)](#)

What are the practical implications of this case?

Manchester Ship Canal Company Ltd v United Utilities Water Ltd is practically useful for specialist practitioners in environmental and property law, and for practitioners more generally. For those in the former category, the case confirms that the implied right which the Supreme Court in *The Manchester Ship Canal Company Ltd v United Utilities Water Ltd* [\[2014\] UKSC 40](#), [\[2014\] 4 All ER 40](#) held sewerage undertakers had to discharge from sewer outfalls pre-dating 1 December 1991 is not qualified by the age of the sewers in which the material being discharged originates. The contrary conclusion would have in practical terms been a significant constraint on the exercise of that right, as each time a developer sought to connect a new sewer into a sewerage undertaker's existing sewers upstream of a pre-1991 outfall, the undertaker would have had to acquire (either by consent or compulsory acquisition) the right to discharge material originating in those sewers. In this case, the outfall in question was the outfall from Davyhulme sewerage works, which serves most of Manchester. Requiring the acquisition of a right to discharge each time a new sewer was built upstream would therefore have had very serious practical implications.

For practitioners more generally, the case provides a thorough and learned exposition of the principles applicable to cause of action estoppel, issue estoppel, and *Henderson v Henderson* [1843] 3 Hare 100 abuse of process and emphasises the need for claimants to assert all the claims and arguments they might have the first-time around. In particular, it grapples with the question of what facts define the cause of action in trespass, when defined 'at the highest level of abstraction' as the application of cause of action estoppel requires. The court held that all that a claimant is required to prove to establish a trespass is that he is in possession or entitled to possession, and that the defendant has interfered with that possession or right to possession. The claimant is not required to establish that there is no lawful authority for the action in question—that is a matter for the defendant. That means that cause of action estoppel will apply to prevent a second action in trespass even where the claimant asserts a different factual limitation on the defendant's lawful authority than it asserted in the first action.

What was the background?

This judgment is the latest in a series of judgments between these parties, arising out of discharges from sewers vested in the defendant, the sewerage undertaker for the North-West of England, into the Manchester Ship Canal (the Canal), which is owned by the claimant. The claimant originally brought proceedings in March 2010 (the 2010 claim) alleging that discharges from over one hundred outfalls into the Canal were unlawful. It said that the discharges were therefore trespasses and claimed damages for past trespasses and also damages in lieu of an injunction for future trespasses.

The claim that such discharges were unlawful was based on a proposition of law said to have been established by the decision of the Court of Appeal in *British Waterways Board v Severn Trent Water Ltd* [\[2001\] EWCA Civ 276](#), [\[2001\] 3 All ER 673](#), namely that since 1 December 1991 (the date of commencement of the [Water Industry Act 1991](#) ([WIA 1991](#))), sewerage undertakers have had no statutorily implied right of discharge from sewers vested in them. In a summary judgment application, United Utilities Water Ltd (UU) took aim at the scope, and in the Supreme Court, the correctness of that decision. In 2014, the Supreme Court held that it extended only to sewer outfalls vested in the

undertaker after 1 December 1991. Undertakers still had the right to discharge from outfalls which were vested before that date. That avoided the conclusion that the use of vast swathes of sewerage infrastructure had become unlawful overnight on 1 December 1991.

Following the judgment of the Supreme Court, the claimant sought to amend its claim in the 2010 claim in various respects. One amendment it sought to make was to argue that the Supreme Court's decision only applied to material originating in pre-1 December 1991 sewers. So, material which originated in a sewer vesting after that date could not lawfully be discharged, even through a pre-1 December 1991 outfall, via a connection into the existing system. Newey J dismissed the application for that amendment on the grounds, among other things, of lateness, without reaching a view on the merits of the legal argument. Claims with respect to individual outfalls constructed before 1 December 1991 were dismissed.

In November 2017, the claimant brought fresh proceedings, under [CPR 8](#) procedure. Those proceedings sought a declaration that discharges into the Canal from the outfall serving Davyhulme sewerage works were a trespass to the extent that they discharged water and other materials originating in a sewer in Marshbrook Drive, in North Manchester, which had been constructed or adopted by UU in or around 2007, and which connected into the existing network terminating at Davyhulme. That outfall dated from before 1 December 1991, and the claim in respect of it in the 2010 claim had been dismissed as a result of the Supreme Court's judgment. UU applied to strike the claim out.

What did the court decide?

The court struck the claim out for a number of reasons.

Consequence of the Supreme Court's decision

The first basis on which the court struck the claim out was a claim based on the proposition of law that the discharge from a pre-1 December 1991 outfall was unlawful to the extent that it consisted of materials originating in a post-1 December 1991 outfall had no real prospects of success in light of the Supreme Court's decision in the earlier litigation between the parties.

Barling J recognised that no side in the Supreme Court had taken any point by reference to the age of the sewer in which material originated. However, he noted that the Supreme Court had been 'very much alive' to the possibility of new connections, as [WIA 1991, s 106](#) requires them to be accepted, featured heavily in its reasoning. Had they intended a distinction based on the age of the sewer in which material originated, they would have said so. Further, such a distinction would lead to exactly the same 'legal incoherence' between an undertaker's duties and the existence of a cause of action in trespass which underlay the decision as a whole. Undertakers are obliged under [WIA 1991, s 106](#) to accept connections and precluded under [WIA 1991, s 116](#) from blocking up the ultimate outfall until satisfactory alternative arrangements are put in place, and it would be incoherent to say that a discharge which these sections together require to be made could be at the same time unlawful. Barling J recognised that one sentence in Lord Neuberger's judgment could be interpreted otherwise but did consider that in the context of the judgment as a whole that could not be the correct interpretation.

Cause of action estoppel

Barling J held in any event that the dismissal of the claim relating to the Davyhulme outfall in the 2010 claim meant that the new claim was statute-barred. Barling J reasoned as follows:

- the waste water and other material alleged to be a trespass in the new claim, namely that from the Marshbrook Drive sewer, was all within the scope of the 2010 claim
- the 2010 claim had sought not just past damages, but also damages in lieu of an injunction with respect to future trespasses and was therefore prospective. Even though each trespass can constitute a fresh cause of action, the causes of action embraced by the 2010 claim included future trespasses
- because at the highest level all a trespass requires a claimant to assert is that he is in possession or entitled to possession, and that the defendant has interfered with that possession or right to possession, the cause of action being asserted here was identical to that already held not to exist in the 2010 claim. The fact that the claimant was arguing for a different limitation on the lawful authority which the

defendant could set up in defence did not prevent the principle of cause of action applying, as the lack of a defence is no part of the cause of action in trespass at this level

- the defendant was therefore able to establish a cause of action estoppel, which operates as an absolute bar to the bringing of a claim

Issue estoppel

The defendant also argued that the claimant was issue estopped, as the court had already determined in the 2010 claim that the element of the discharge from Davyhulme attributable to Marshbrook Drive was not a trespass. The court however did not deal with this issue separately, as it was advanced by the defendant as an alternative to cause of action estoppel, while the claimant put its submissions on the point alongside its submissions on *Henderson v Henderson* abuse.

Henderson v Henderson abuse of process

Barling J further held that the new claim was an abuse of process. Barling J reasoned as follows:

- Barling J held that the limitation on the statutory right to discharge which the claimant now sought to establish was one which it could have raised in the 2010 claim, including in the Supreme Court. The defendant had raised the scope of the *British Waterways Board* decision clearly in its defence, and it was open to the claimant to argue that any statutory implied right of discharge was limited by reference to the age of the sewer in which the material in question originated
- Barling J further held that it should have been raised, and that it would be oppressive to the defendant for it now to be raised, as:
 - the new case was avowedly a ‘test case’, which if successful would lead to multiple new claims of trespass. Barling J accepted the evidence advanced by the defendant’s solicitor as to the extensive and onerous nature of the factual investigations that would place on the defendant, and ultimately on the defendant’s customers whose water and sewerage bills pay its costs. He considered it significant that those costs were in addition to substantial costs already incurred in fighting the 2010 claim
 - a considerable amount of court and judicial resources had been absorbed by the 2010 claim, and if this case was permitted to proceed much of the same ground would need to be trodden again
- there were no exceptional features to justify the residual discretion not to strike out a claim which would otherwise amount to an abuse

The claimant’s proposed amendment

The claimant shortly before the hearing had sought to amend its claim to allow it to rely on [WIA 1991, s 186\(1\)](#) as requiring its consent to discharges into the Canal, including the discharge of material originating in Marshbrook Drive. As the claimant accepted, this would have rendered the Supreme Court’s decision otiose, as the implied statutory right of discharge into the Canal would have been trumped by the requirement of consent.

Barling J held that cause of action estoppel would not preclude a claim based on this amendment. He thought that a claim arising out of a lack of consent under [WIA 1991, s 186](#) involved asserting different facts than a claim in trespass, and therefore there would be no identity of cause of action. However, he held that issue estoppel did operate, as did the *Henderson v Henderson* abuse of process.

James McCreath has a growing reputation as an up-and-coming junior in chambers’ core areas, with a practice focusing on commercial disputes, property, pensions, trusts, and associated professional liability.

In Manchester Ship Canal Company Ltd v United Utilities Water Ltd, Jonathan Karas QC, Julian Greenhill QC and James McCreath were counsel for the defendant.

Interviewed by Kate Beaumont.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.

FREE TRIAL

The Future of Law. Since 1818.