Neutral Citation Number: [2024] EWCA Civ 220

Case No: CA-2023-000333

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
BUSINESS LIST
His Honour Judge Cadwallader
[2022] EWHC 3321 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 8 March 2024

Before :

LORD JUSTICE BAKER
LORD JUSTICE SNOWDEN
and
LADY JUSTICE FALK

- -

Between :

BRENDON INTERNATIONAL LIMITED	**Claimant/ Respondent**
- and –	
(1) WATER PLUS LIMITED **(2) UNITED UTILITIES WATER LIMITED**	**Defendants/ Appellants**

- -

James McCreath (instructed by **JMW Solicitors LLP**) for the **Appellants**
Victor Steinmetz (instructed by **DLA Piper UK LLP**) for the **Respondent**

Hearing date : 30 November 2023

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Approved Judgment

This judgment was handed down remotely at 10 a.m. on Friday 8 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Snowden :

1. This appeal concerns a restitutionary claim ("the Claim") by the Respondent ("Brendon") for repayment of over £150,000 in fees that it had paid for sewerage services dating back to 2000. Between September 2000 and June 2016, about £120,000 was paid to the Second Appellant ("United Utilities"), and from June 2016 until September 2019, about £30,000 was paid to the First Appellant ("Water Plus"). United Utilities has at all material times been the relevant "sewerage undertaker" with responsibility for the system of public sewers. However, in June 2016 it transferred its non-household business to Water Plus, which thereafter became its "sewerage licensee" and was entitled to charge for the provision of sewerage services to commercial entities.

2. The basis for the charging of such fees was that surface water from Brendon's commercial premises (the "Premises") on the Sankey Valley Industrial Estate in Newton-Le-Willows (the "Estate") flowed into a sewer that was a "public sewer" as defined in the Water Industry Act 1991 ("the WIA 1991"). The central issue between the parties in the Claim was whether the sewer in question was indeed a public sewer or not.

3. In a reserved judgment delivered after a three-day trial, [2022] EWHC 3321 (Ch), (the "Judgment"), HHJ Cadwallader (the "Judge") held (i) that United Utilities and Water Plus had not discharged the burden of showing that the sewer into which the surface water from the Premises drained was a public sewer; (ii) that they had not been entitled to charge fees for surface water drainage services, and that the payment of such fees by Brendon had been made under a mistake, giving rise to a restitutionary remedy; and (iii) that no part of Brendon's claim was barred by limitation.

4. United Utilities and Water Plus appeal against the first and third parts of the Judge's analysis pursuant to permission granted by Arnold LJ. In essence they contend that the Judge was wrong to place the burden of proving that the sewer in question was a public sewer on them, and that he applied the wrong test for limitation. They also contend that the Judge was wrong to exclude some of the evidence of one of their witnesses at the trial.

The legislative framework in outline

5. Every sewerage undertaker appointed to a particular area under the WIA 1991 has a general duty under section 94 to provide, improve, cleanse and maintain a system of public sewers so as to ensure that its area is effectively drained.

6. Section 219(1) of the WIA 1991 contains a definition of a public sewer. It provides,

> "In this Act, except so far as the context otherwise requires –
>
> "*public sewer*" means … a sewer for the time being vested in a sewerage undertaker in its capacity as such, whether vested in that undertaker by virtue of a scheme under Schedule 2 to the Water Act 1989 or Schedule 2 to this Act or under section 179 above or otherwise, and "*private sewer*" shall be construed accordingly;"

7. There are a variety of means by which, over the years, and under successive Acts, a sewer might have become vested in a sewerage undertaker. The Judge set these out in his Judgment at [31]-[39]. They can be summarised as follows:

   i) From the commencement of the Public Health Act 1875 to the commencement of the Public Health Act 1936, save for certain statutory exceptions, all existing and future sewers vested in local authorities, which performed the functions of sewerage undertakers.

   ii) Under the Public Health Act 1936, sewers previously vested continued to vest in the local authorities, and new sewers vested if either the local authority constructed them or adopted them. Adoption was a new procedure which allowed an undertaker to declare that a previously private sewer was now public (either by agreement with the relevant landowner or following an appeal by the landowner to what is now Ofwat); or which allowed an undertaker to agree to adopt a sewer on completion of its construction by a developer.

   iii) Under the Water Act 1973 the responsibilities of undertakers were transferred from local authorities to new regional water authorities, in whom sewers vested. The water authorities were, however, required to put in place arrangements for their sewerage functions (including constructing and adopting sewers) to be carried out by the new district councils established under the Local Government Act 1972.

   iv) The Water Act 1989 privatised the water industry. All sewers previously vested in the regional water authorities transferred to the new sewerage undertakers, which were private companies, who also had the right to construct or adopt new sewers.

   v) The regime established under the Water Act 1989 continued under the WIA 1991. In particular, section 179(1) WIA 1991 provided (subject to certain exceptions and extensions) that every sewer or lateral drain laid by a sewerage undertaker in exercise of any power conferred under the relevant Part of the Act, or otherwise, should vest in the undertaker that laid it. In addition, the WIA 1991 also contained provision for local authorities to act as delegates of an undertaker, and provided that if they constructed or adopted a sewer as a delegate of a sewerage undertaker, the sewer would vest in the undertaker.

8. Under section 106 WIA 1991, members of the public (companies and individuals) have a right to connect drains that carry surface water away from their premises into a public sewer (whether directly or through intermediate drains or sewers).

9. Under section 142 WIA 1991, the sewerage undertaker in which the relevant public sewer is vested, or its sewerage licensee, is given power to fix charges for services provided in accordance with a charges scheme under section 143 WIA 1991 or in accordance with an agreement with the person to be charged. As regards sewerage charges, section 144(1)(b) WIA 1991 provides,

> "(b) sewerage services provided by a sewerage undertaker shall be treated for the purposes of this Chapter as provided to the occupiers for the time being of any premises which -

> (i) are drained by a sewer or drain connecting, either directly or through an intermediate sewer or drain, with such a public sewer of the undertaker as is provided for foul water or surface water or both; or
>
> (ii) are premises the occupiers of which have, in respect of the premises, the benefit of facilities which drain to a sewer or drain so connecting."

10. A sewerage undertaker is obliged by section 199 WIA 1991 to maintain a record of the location and other relevant particulars of every public sewer vested in the undertaker, and to make available that information to the public in the form of a map. The sewerage undertaker does not, however, have to keep records of a sewer laid before 1 September 1989 if it has no reasonable grounds for suspecting the existence of the sewer, or if it is not reasonably practicable for it to discover the course of the sewer and it has not done so.

The facts in outline

11. For present purposes, the outline of undisputed facts can be shortly stated.

12. The Estate was constructed at some time between 1990 and 2000, and Brendon's Premises were constructed on the Estate between about 1998 and 2000.

13. After it moved into the Premises, Brendon was initially charged for both foul sewerage and surface water drainage services by United Utilities which was the sewerage undertaker for the area. In about 2004 Brendon complained to United Utilities that its foul sewerage was in fact connected to a septic tank and did not flow into any public sewer, and it was refunded the charges for foul sewerage.

14. Thereafter, Brendon continued to be charged and to pay charges for surface water drainage services. At this time, the map record maintained by United Utilities in accordance with the WIA 1991 did not show any public sewers on or serving the Estate. Various statements were also made by United Utilities to St. Helens Council and other entities over the next decade to the effect that there were no public sewers serving the properties on the Estate.

15. From about 2013 United Utilities made various entries and alterations to its internal records to show a surface water drainage pipe on the Estate. From time to time that pipe was variously designated in those internal records as a private sewer or a public sewer, but no change was made to the map recording the public sewer system maintained by United Utilities.

16. In 2014 and 2015, a firm of consultants ("Cadantis") pursued refunds of surface water drainage charges from United Utilities on behalf of a number of occupants of the Estate (not including Brendon). In February 2016 United Utilities accepted that Cadantis' clients on the Estate were not connected to a public sewer and made refunds to them.

17. Water Plus took over the provision of retail services to Brendon from United Utilities on 1 June 2016 and continued to charge Brendon for surface water drainage services.

18. In January and February 2018 a survey conducted by a contractor on behalf of United Utilities concluded that Brendon's Premises were not connected to a public sewer. However, at the end of March 2018 an employee of United Utilities, Mr. Robert O'Riordan, carried out a survey on site and concluded that the surface water from the Premises did pass into a sewer which he thought was a public sewer. United Utilities notified Brendon of that finding shortly afterwards, and at some point between March 2018 and January 2019 United Utilities amended its publicly available sewer map to designate the sewer on the Estate as a public sewer.

19. In September 2018 Cadantis made a claim on behalf of Brendon for a refund of charges paid by Brendon on the basis that Brendon's surface water drained into a private sewer and that United Utilities and Water Plus were not entitled to charge Brendon for surface water drainage services. That claim was rejected by United Utilities and Water Plus in June 2019.

20. Brendon ceased paying the charges levied by Water Plus on 16 September 2019. The parties entered into a standstill agreement for the purposes of limitation between 10 February 2020 and 2 October 2020.

The Claim

21. The Claim was issued by Brendon on the expiry of the standstill agreement on 2 October 2020. The defendants were Water Plus and United Utilities. Brendon claimed restitution on the basis of mistake and unjust enrichment, together with a declaration that it was not liable to the defendants for surface water and highway drainage services. In the Claim, Brendon alleged that surface and highway water from its Premises drained into a private sewer, and then flowed into a culverted watercourse and into a brook. Brendon contended that it had made payment of the charges under the mistaken belief that the sewer was vested in United Utilities and that it and Water Plus had been providing sewerage services for which they were entitled to render a charge under the WIA 1991.

22. United Utilities and Water Plus denied liability and contended that the surface water from the Premises drained into a public sewer. The case pleaded by United Utilities was that the sewer had been reconstructed in or around 2004 when a pre-existing 225mm diameter pipe had been replaced with a 525mm diameter concrete sewer, and that because none of the occupants of the Estate had any record of having paid for that reconstruction work, it was to be inferred that it had been carried out by the local authority as agent for United Utilities. It was also alleged (i) that the inference was that the smaller diameter sewer which was in use prior to 2004 was a public sewer, as otherwise the local authority would not have carried out the works, and (ii) that from its alleged reconstruction, the larger sewer was a public sewer that vested in United Utilities by virtue of the provisions of section 179 WIA 1991.

23. United Utilities pleaded that its failure to show the sewer as a public sewer on its sewer map was probably due to the local authority failing to pass on details of the alleged reconstruction work in 2004. No explanation was offered as to why the sewer had not been shown as a public sewer prior to that date.

24. United Utilities also pleaded in the alternative, if it was wrong on the nature of the sewer serving the Premises, that Brendon's claim for repayment of any payments made

prior to 10 February 2014 was statute barred on the grounds of limitation. It was said that Brendon could not rely on section 32 of the Limitation Act 1980 because it could, with reasonable diligence, have discovered that the sewer was not a public sewer and hence could have deduced that it should not have been paying for surface water drainage services prior to that date.

The evidence

25. Shortly before the start of the trial, objection was taken by Brendon to passages in four of the witness statements that had been served on behalf of United Utilities and Water Plus on the basis that they contained statements of matters not within the personal knowledge of the witness or which amounted to inadmissible opinion evidence which did not comply with the CPR, or were evidence on matters that went beyond the pleaded statements of case.

26. One of the main witness statements to which such objection was taken was that of Mr. Tony Griffiths, who was United Utilities' wastewater network technical manager. Mr. Griffiths had almost 39 years' experience in the industry. His evidence was to the effect that (i) the standard of construction of a sewer, and in particular its size or material, is generally a good guide to whether it is a public or a private sewer, because public sewers tend to be of a higher standard of construction, (ii) that the size and standard of construction of the drainage scheme of which the sewer in issue in this case formed part, and the fact that it served more than one property, was more in line with what would be expected from a large scale civil engineering project rather than a private system, which suggested that the sewer in question was a public sewer, and (iii) that the sewer had been built to a standard that suggested it had been built with the intention that it would be adopted by the undertaker under the WIA 1991.

27. The other witness statement to which substantial objection was taken was that of Mr. Keith Ashcroft, who was United Utilities' drainage area manager. He had become involved in the case in 2018 when Brendon had raised the issue of a refund of surface water drainage charges, and he had received an internal question about the status of the sewer in question. He had passed the issue on to Mr. O'Riordan to investigate, and had received a report from him at the end of March 2018 suggesting that the sewer was a public sewer. Mr. O'Riordan had sadly died before the trial, and much of Mr. Ashcroft's evidence was based upon his assumptions as to what Mr. O'Riordan had done and what he assumed had been the bases for Mr. O'Riordan's conclusion in his report.

28. The Judge determined that in the interests of efficient use of time he would hear all the evidence *de bene esse* and rule upon its admissibility in his judgment.

The Judgment

29. After setting the scene in general terms, the Judge addressed the issue of the burden of proof. He stated, at [15]-[19],

> "15. A further issue also arose out of the way in which the parties presented their respective cases, each complaining that the other's evidence was inadequate, and that it was the other upon whom the evidential burden of proof lay, while the legal

> burden lay upon the claimant as claimant. Effectively, the claimant said that it was for the defendant to show that it was entitled to charge, therefore to show that the sewer was public; while the defendant said that it was for the claimant to show both that it believed that the defendants were entitled to charge, and that that belief was mistaken because the sewer was private - so that the burden lay on the claimant to show that the sewer was private, or at least not public. I was told that there is no authority on how to approach these questions in the context of a claim over the status of a sewer.
>
> 16. In considering this, the place to start, it seems to me, is the statutory framework. A public sewer is a sewer for the time being vested in a sewerage undertaker in its capacity as such: section 219(1) of the WIA 1991. The vesting may have occurred in one of three specific ways, "or otherwise": in other words, it does not matter how the vesting occurred as long as it did. A private sewer is a sewer which is not a public sewer: *ibid*. If all sewers are private sewers unless they are public sewers, the burden of showing that any particular sewer is public, rather than private, must fall upon the person asserting that it is public. A person asserting that a sewer is private, or denying that it is public, is not mounting a positive case, since all sewers are private unless they are public.
>
> 17. It follows that a sewerage undertaker asserting, for example, a right to charge for sewerage services, ought to be ready if challenged to prove its title to do so. It is not for the person challenging it to prove that it is not entitled to do so.
>
> 18. But, it is said on behalf of the defendants, it is for the claimant to prove its case; and part of its case is a positive assertion that it made payments for sewerage services under a mistake, so that the burden of proof that there was a mistake lies upon the claimant: and it follows from that, that the burden of proving that the sewer is not public but private lies upon the claimant after all, and not the defendants.
>
> 19. I agree that the legal burden of proof of payment for sewerage services under a mistake does indeed lie upon the claimant. But since the question involves a sewer, which is private unless it is public, it seems to me that the evidential burden lies on the person asserting it to be public to establish on the balance of probabilities that it is; and if it does not, it will be found to be private."

30. The Judge then set out the statutory framework under the WIA 1991 and in particular explained how a sewer might vest in a sewerage undertaker. He summarised the undisputed facts and the evidence given by the witnesses from both sides. In the case of the witnesses, as he had indicated he would do, the Judge dealt with the objections

to their evidence, concluding that the objections taken by Brendon were substantially justified.

31. In the case of Mr. Griffiths, the Judge admitted his evidence to the extent that it comprised evidence of fact as to the standard of construction of the sewer in issue in this case (i.e. its size and the material from which it was constructed) together with the fact that it served more than one property. However, the Judge held that the remainder of Mr. Griffiths' evidence was inadmissible opinion evidence, presented otherwise than in accordance with Part 35 of the CPR.

32. In support of that conclusion, the Judge stated that there was,

> "… nothing upon the basis of which I can conclude that [Mr. Griffiths] was qualified to give expert evidence, evidence on the point being entirely self-serving for the defendants, and not itself demonstrating expertise."

The Judge thus held that Mr. Griffiths' evidence was not admissible under section 3(1) of the Civil Evidence Act 1972 "quite apart from the procedural requirements of Part 35 of the CPR". The Judge also held that the evidence fell outside the ambit of section 3(2) of the 1972 Act because Mr. Griffiths' expressions of opinion were not intended to convey any relevant facts personally perceived by him.

33. The Judge then dealt with the defendants' pleaded case that the sewer had been reconstructed in about 2004. He considered a variety of pieces of evidence on this point. These included an internal email from Mr. O'Riordan in April 2019 stating that the surface water network had been upgraded before being adopted by United Utilities, as demonstrated by trench markings that he claimed to have seen on the road running the length of the sewer. However, the Judge pointed out that there was no photographic or other independent evidence of trench markings on the road, and there was unchallenged evidence that there were no such markings visible in 2021. The Judge also accepted the evidence of Brendon's witnesses that they could not recall ever having seen any reconstruction works, and noted that there was also no evidence of any sort from the local authority that they had ever carried out such works. The Judge further dismissed as a likely clerical error the fact that an amendment had been made to United Utilities' internal records in 2015 showing that the sewer had been reduced in size from a diameter of 525mm to 225mm.

34. Taking the evidence together, the Judge concluded that the sewer had never been "upsized" and that it had at all material times been 525mm in diameter. Since the entire basis for the defendants' pleaded case that the sewer was vested in United Utilities in its capacity as sewerage undertaker was based upon the sewer having been upgraded by the local authority as agent for United Utilities in 2004, the Judge held at [86] that the defendants had failed to prove their case. In accordance with his earlier approach to the burden of proof, the Judge therefore concluded that the sewer was a private sewer.

35. The Judge then turned to what he described as a "different case" that the defendants had sought to advance in their skeleton argument for trial. He described that case as follows, at [87]

> "… On the basis that it was located entirely on land owned by the council, appears to date from a time when the council undertook sewage functions for the area, was a large sewer, served multiple properties on the estate, and discharged into a watercourse, and that the claimant had provided no evidence of any private rights which it might have in respect of the use of the sewer, it was more likely to be public than private. That was because the council must have been responsible for its construction (although it was a question whether it built it as a statutory delegate for the sewerage undertaker or adopted it, on the one hand, or as a private landowner, on the other), since it ran through its land; the council made no claim to own it; and if the council (or anybody else) had intended it to be private, it would have ensured that there was an appropriately documented scheme regulating the necessary private rights, in particular as to putting material into the sewer, and the costs of maintenance; whereas it made no sense to build a substantial sewer for gratuitous and uncontrolled use by others. This argument does not depend on there having been a reconstruction of the sewer."

36. The Judge held that this argument was not available to the defendants as it had not been pleaded. However, at [89] – [95] he went on to deal with it on the merits, and rejected it.

37. The Judge first recorded, at [89], that it was not in dispute that the sewer in question was located entirely on land owned by the local council, that it served multiple properties on the Estate, and that it discharged into a watercourse. At [90] the Judge concluded that the sewer was likely to have been constructed at the same time as the roads on the Estate under which it lay, and at [91]-[92] he recorded that there was some evidence to suggest that the sewer and roads had been constructed by or at the behest of the local authority on land which it owned at the time. However, since the witness from the local authority had given no evidence on this topic, the Judge held, at [92], that the defendants' argument in this respect was not made out.

38. The Judge further held, at [93]

> "93. Even if the estate roads, and the sewer in question, had been constructed on its land by or at the behest of the local authority, there was no evidence that it built the sewer as a statutory delegate for the sewerage undertaker or adopted it: here again, the absence of evidence is evidence to the contrary; but even if it were not, the defendants have not satisfied the evidential burden. Absent such evidence one would have to conclude that the local authority had built it as a private landowner. The defendants' argument would then fall down at this point, therefore."

39. At [94], the Judge considered whether there was any evidence of a scheme of private rights regulating access to and obligations in relation to the sewer. He concluded that it was at least possible that there was such a scheme of development, incompletely referred to in the evidence, which did grant such rights, and that this was consistent

with the possibility that the local authority constructed the sewer system in its capacity as a private landowner of the Estate before selling the plots on the Estate to companies such as Brendon. He concluded, at [95],

> "95. … I do not accept the proposition that it is inherently unlikely that the sewer was private, regardless of its size and quality and multi-property connection: it seems to me, moreover, that an adoptable sewer might well be built by a local authority developing an industrial site as a private landowner. While I accept that the fact that the sewer did not appear on the original sewer map might simply be an error or gap in the records, on balance it is more likely that it was because the sewer was private."

40. On the basis of his earlier conclusion that the sewer was a private sewer, the Judge then held that the defendants had not been entitled to charge for its use because they had not provided sewerage services to Brendon. He held that this gave rise to a restitutionary claim, either on the basis of a total failure of consideration or on the basis of mistake.

41. In that context, at [101], the Judge referred to authorities such as Marine Trade SA v Pioneer Freight Futures [2010] 1 Lloyd's Rep 631 and Scottish Equitable v Derby [2001] 3 Al ER 818 which he indicated stood for the propositions that the existence of doubt might bar a claim that a payment had been made as a result of a mistake, and that a deliberate waiver of inquiry by a claimant who had been put on notice can preclude recovery. The Judge then went on to consider the evidence of Brendon's owner and director, Mrs. Hazel James, who had joined the company as its finance director in 2000.

42. One part of Mrs. James' evidence related to the repurchase by Brendon in February 2009 of a piece of land on the Estate, which it had previously owned as part of the Premises and had sold to a third party in 2003. As part of the conveyancing process, Brendon's solicitors obtained a report on water supply and drainage of the piece of land to be reacquired dated 11 February 2009 from a third party search agency. That report took the form of questions and answers which included the following,

> "Q1.1 Please provide a copy extract from the public sewer map.
>
> Answer We have viewed the public sewer map for the property on your behalf and have compiled our answers to questions 1.2 to 2.2 based on such. A copy extract is provided.
>
> Q1.2 Does Foul Drainage from the property drain to a Public Sewer?
>
> Answer There are no public sewers shown on the public sewer maps that serve the property
>
> Q1.3 Does surface water from the property drain to a Public Sewer?

> Answer There are no public sewers shown on the public sewer maps that serve the property
>
> Q2.1 Does the public sewer map show any public sewer within the boundary of the property?
>
> Answer The Public Sewer map does not show any public sewers within the boundary of the property. However, historically it has not been a requirement for all public sewers to be recorded on the public sewer map. It is therefore possible for unidentified public sewers to exist.
>
> Q2.2 Does the public sewer map show a public sewer within 30.48 metres (100 feet) of the buildings within the property?
>
> Answer No
>
> …
>
> Q4.1 What is the basis for charging for water supply and sewerage at this property?
>
> Answer Please refer to vendor or pre-contract documentation."

As indicated, the extract of the public sewer map supplied did not show any public sewer in the vicinity of the property to be reacquired. Nor indeed did it show any public sewer near the remainder of the Premises which were also shown on the map.

43. At [107] of his Judgment the Judge referred to that report on drainage and continued,

> "107. … Mrs. James made it clear she was not saying she had not read this document, but she was saying that she did not understand the difference between private and public sewers at the time, and had not understood the significance, and in any case it had not been at the forefront of her mind at the time. She had not been referred to the [pre-contract] documentation mentioned, and never raised a query with her solicitors. She did not agree that she had been put on notice that the sewer might be private: her concern had always been banding."

44. The Judge accepted as truthful Mrs. James's evidence, which he summarised as follows, at [109],

> "109. I … find that she and other officers of the claimant had authorised payment of the drainage bills in the belief, induced by the bills themselves, that the services now in dispute were being provided. I regard that as a wholly normal, reasonable and natural belief to hold upon that basis. One would not expect such bills to be raised if there was no liability. It is not a matter of not knowing whether or not services were being provided, but a

> belief (no doubt quite casual) that they were. That applies equally to her as to any other person involved in the claimant and responsible for authorising these payments. She had been informed by at least February 2009 that there was no connection to a public sewer, but I find she had not realised that meant that none of the services now disputed, and for which the company was paying, was actually being provided. She was a busy person with no particular knowledge of the basis upon which drainage bills ought to be raised, and in effect she did not put two and two together."

45. At [111], the Judge further accepted that Mrs. James's concern was banding and that it was not until she had instructed Cadantis, and Cadantis had reported back to her in 2018, that she understood that the sewer was or might be private and that there was no liability. The Judge concluded, at [112],

> "112. I find that the claimant was not in a state of doubt about whether liability existed at all until it received the report of Cadantis, when it ceased to believe that it could rely on the defendants' invoices. I do not consider that at any point before then it had been put on notice that it might not be liable in a way which required it to make enquiries which it had deliberately chosen not to undertake."

46. The Judge then held that the defendants were enriched at the expense of Brendon by demanding and accepting payments to which they were not entitled, and that this was unjust, especially in circumstances in which the defendants had raised charges to which United Utilities' own records did not indicate they were entitled.

47. The Judge then turned to consider the question of limitation. United Utilities contended that reimbursement was barred in respect of the period before 10 February 2014 (i.e. six years before the parties entered into a standstill agreement on 10 February 2020). In response, Brendon relied upon section 32 of the Limitation Act 1980 which provides that where the action is for relief from the consequences of a mistake, the period of limitation shall not begin to run until the claimant has discovered the mistake or could with reasonable diligence have discovered it.

48. The Judge continued, at [115]-[116]

> "115. The burden of proof is on the claimant to show that it could not have discovered the mistake without exceptional measures which it could not reasonably have been expected to take: Paragon Finance plc v DB Thakerar [1999] 1 All ER 400, 418. The concept of reasonable diligence involves two considerations: first, was the claimant put on inquiry or otherwise given reasonable cause to take the steps which would have led to the discovery of the mistake; second, whether having been put on such inquiry it acted sufficiently diligently to ascertain the existence of the mistake: Davies v Sharples [2006] WTLR 839, para 59.

> 116. I have already found, however, that [Brendon] did not discover the mistake until February 2018, and had not been put on enquiry as to the mistake before that date. Accordingly, no part of the claim for sums paid after time started running is statute-barred."

The Appeal

49. Permission to appeal was given on three grounds,

i) that the Judge erred in relation to the burden of proof when holding that the defendants had the burden of proving that the sewer in question was vested in United Utilities within the meaning of the WIA 1991;

ii) that the Judge erred in excluding the opinion evidence of Mr. Griffiths, who had long experience in the sewerage industry, and who was not subject to the requirements of CPR 35 as he was not instructed as an expert for the purposes of the proceedings; and

iii) that the Judge wrongly applied the findings that he had made as to Mrs. James's subjective state of mind when deciding that Brendon had not deliberately waived making an inquiry for the purposes of the arguments on mistake, to the different question under section 32 of the Limitation Act 1980 of whether Brendon could, with reasonable diligence, have discovered its mistake.

It should be noted that the appellants did not appeal the Judge's rejection of their unpleaded "different" case.

The burden of proof

The law

50. The general rule in civil litigation is that they who assert must prove. So, where a given allegation, whether affirmative or negative, forms an essential part of a party's case, the burden of proving such allegation to the civil standard of proof rests on that party at all times. Accordingly, if, when all the evidence has been adduced, the court does not find the allegation proven on the balance of probabilities, the party upon whom the legal burden rests will lose their claim: see Emmanuel v Avison [2020] EWHC 1696 (Ch) at [54]-[57], referring to *Phipson on Evidence* (now in its 20th ed.) ("*Phipson*") at 6-06.

51. That burden – usually referred to as the "legal burden" or the "persuasive burden" – is to be distinguished from what is commonly referred to as the "evidential burden". The "evidential burden" simply describes the obligation of a party upon whom it rests to adduce sufficient evidence for the matter to be left to the tribunal of fact – in other words, to adduce some credible evidence which, if left uncontradicted and unexplained, could be accepted by the court as proof of the fact in question: see Jayasena v R [1970] AC 618 at 624. As Lord Devlin said in Jayasena, it is confusing and misleading to call the evidential burden a burden *of proof*.

52. Usually the party who bears the legal burden will also bear the evidential burden. However, and relevantly for the instant case, that position can be altered if a statute creates a rebuttable presumption as to a particular matter. In such a case, the party who

would otherwise bear the evidential burden can instead rely on the presumption: see *Phipson* at 6-02 to 6-03 and 6-18. But this does not entail any modification of the legal burden of proof.

53. Although reference is sometimes made to the evidential burden "shifting", this can be misleading. The parties will adduce their own evidence, or obtain evidence by cross-examining the witnesses for the other side. As the case progresses, the weight of evidence may appear to shift from one side to the other as new pieces of evidence emerge. But that is simply a reflection of the provisional state of the evidence at the time, and does not entail the shifting of any burden, whether legal or evidential. In particular, the legal burden of proof will remain throughout on the same party: see e.g. Huyton-with-Roby UDC v Hunter [1955] 1 WLR 603 at 608-609.

54. Once all the evidence is in, the court will evaluate it, weighing each piece of evidence for and against the disputed proposition, and reaching a decision on where the overall balance of probability lies. In very rare (exceptional) cases, the evidence may either be so evenly balanced or so unsatisfactory that the court, notwithstanding its best efforts to do so, simply cannot reasonably form a view that either of the rival contentions has been proven on the balance of probabilities. In such a situation, the legal burden comes back into play, and the party who bears the legal burden of proving the matter in question, but has failed to discharge it, will lose: see Huyton-with-Roby UDC v Hunter (supra), Rhesa Shipping v Edmunds (The Popi M) [1985] 1 WLR 948 at 955-956, and Stephens v Cannon [2005] EWCA Civ 222 at [46].

Analysis

55. In paragraph [15] of his Judgment, the Judge correctly recorded that since the instant case was a claim for recovery of money paid, the legal burden of proving the essential elements of a claim in restitution lay at all times upon Brendon. Brendon therefore had the burden of establishing, on the balance of probabilities, that it had made payment of sewerage charges in the mistaken belief that United Utilities and Water Plus had supplied it with surface water sewerage services, when they had not in fact provided those services.

56. The critical (and disputed) component of this case was whether United Utilities and Water Plus had not in fact provided the sewerage services for which they had been paid. This required proof that the sewer into which surface water from Brendon's Premises flowed was not a public sewer within the meaning of section 219(1) WIA 1991. If the sewer to which the Premises were connected was not vested in United Utilities in its capacity as sewerage undertaker, neither United Utilities nor Water Plus as its licensee would be treated as having provided sewerage services within section 144(1)(b) WIA 1991.

57. However, at [16] of his Judgment, the Judge concluded that the effect of section 219(1) WIA 1991 was that there was a presumption that a sewer was a private sewer. He then stated, at [19],

> "19. I agree that the legal burden of proof of payment for sewerage services under a mistake does indeed lie upon the claimant. But since the question involves a sewer, which is private unless it is public, it seems to me that the evidential

> burden lies on the person asserting it to be public to establish on the balance of probabilities that it is; and if it does not, it will be found to be private."

58. The Judge's statement that "the evidential burden lies on the person asserting it to be public to establish on the balance of probabilities that it is", was wrong. It confused the legal burden of proof (which is to establish a fact on the balance of probabilities), with the evidential burden (which, as Lord Devlin pointed out in Jayasena, is not a burden of proof at all). The legal burden was always on Brendon, as claimant, to establish on the balance of probabilities that the sewer was not a public sewer.

59. I also do not agree with the Judge's holding that the effect of section 219(1) WIA 1991 was to create a legal presumption that a sewer is private unless the contrary is proven.

60. Section 219(1) WIA 1991 is (as its title indicates) a general interpretation section which provides a list of defined terms which are used in the Act. In legislation, such sections serve the primary purpose of providing short linguistic labels for concepts that are used in the body of an Act in order to simplify the drafting. As a general rule, however, substantive provisions of law are not incorporated in such definitions: see *Bennion, Bailey and Norbury on Statutory Interpretation* at section 18.1.

61. Section 219(1) defines the meaning of the expression "public sewer" as it appears in the WIA 1991 by reference to whether the sewer is vested in a sewerage undertaker in its capacity as such. Section 219(1) also indicates that the expression "private sewer" as it appears in the WIA 1991 "shall be construed accordingly". To my mind this plainly indicates that the definition of a "public sewer" in section 219(1) is intended to have a conventionally limited interpretative function, rather than any broader role or wider legal consequences.

62. As such, whilst it is plain that a sewer cannot, for the purposes of the WIA 1991, simultaneously be both a public sewer and a private sewer, I do not consider that section 219(1) was intended to create any presumption as to the status of a sewer either way. Instead, the incidence of the legal burden of establishing the status of a sewer will depend, in the usual way, upon who is asserting that it has a particular status.

63. So, for example, if a sewerage undertaker was bringing a claim for unpaid charges for the provision of sewerage services to a business, the sewerage undertaker would bear the legal burden of proving on the balance of probabilities that water from the defendant's premises flowed into a public sewer vested in the undertaker. In that respect Brendon was right to submit, and the Judge rightly accepted, at [17], that in the ordinary course of business a sewerage undertaker that intends to charge people and businesses for services supplied should be ready, if required to do so, to prove that it is entitled to make such charges.

64. However, if, say, a business was bringing a claim against a sewerage undertaker under one of the specific compensation provisions of the WIA 1991, or more generally for flood damage to its property arising from a failure to maintain a sewer, the legal burden of proving on the balance of probabilities that the sewer was a public sewer would rest on the claimant at all times. We were not given any convincing reason why, as a matter of policy, the normal burden of proof should be reversed in such a case.

65. It is also worth reiterating that in neither scenario would the legal burden of proof shift from one side to the other during the case.

66. Returning to the instant case, it follows that in order to make good the constituent elements of its claim in restitution, Brendon had the legal burden of showing that it had made payments in the mistaken belief that United Utilities and Water Plus had provided sewerage services to the Premises. Brendon therefore had the legal burden of establishing, on the balance of probabilities, that the sewer into which the surface water from its Premises drained was not a public sewer vested in United Utilities.

67. Brendon also bore the burden of adducing sufficient evidence for that matter to be left to the Judge as the tribunal of fact. In that regard, Brendon pleaded the various statements made from time to time by United Utilities that the sewer was a private sewer, together with the fact (which was admitted) that the map of public sewers maintained by United Utilities in accordance with its statutory duty under section 199 WIA 1991 did not show that the sewer was a public sewer until it was amended at some point between March 2018 and January 2019.

68. It seems to me that those facts and matters were sufficient to discharge the evidential burden upon Brendon, in that they were credible evidence that, if not contradicted or explained, could have been accepted by the Judge as establishing on the balance of probabilities that the sewer was not a public sewer. In particular, it is difficult to understand why reliance on the sewer map which United Utilities was required by statute to maintain should not suffice for that purpose.

69. But that does not answer the question of whether, in light of all the admissible evidence adduced by both sides, Brendon had established on the balance of probabilities that the sewer was not a public sewer (i.e. a sewer vested in United Utilities in its capacity as sewerage undertaker). Albeit that the state of the sewer map at the relevant time was a relevant and potentially important piece of evidence, it was open to United Utilities, for example, to adduce evidence to explain why its records were inaccurate and to explain why it had been in breach of its statutory duty under section 199 WIA 1991. If it did so then it would be for the court to evaluate that evidence, together with all the other admissible evidence on the point.

70. In that respect, and notwithstanding that the Judge rejected the defendants' attempt to rely on an unpleaded alternative case, some of the facts that he referred to in dealing with those arguments, which I have summarised above were not disputed. These included the fact that the sewer was located on land owned by the council, that it ran under the roads on the Estate, and that it served multiple properties on the Estate. There is no reason why such matters should not have formed part of the overall assessment of the evidence. The Judge might also have considered, for example, whether any inference should be drawn from the fact that no evidence was adduced by Brendon of any private rights granted to it on its original acquisition of the Premises from the local authority, despite the existence of private law rights being identified as an issue for disclosure.

71. However, because the Judge approached the matter in the wrong way, he never actually answered the correct question. He did not ask whether, in light of all the evidence, Brendon had established, on the balance of probabilities, that at the times when the

charges were paid, the sewer in question was not a public sewer vested in United Utilities.

72. Rather, the Judge rejected the pleaded case advanced by United Utilities and Water Plus based upon the contention that the sewer had been upgraded in 2004, and as a consequence held that the sewer was a private sewer. But since the legal burden of proof was not on United Utilities and Water Plus, they did not have to prove any positive case about how the sewer came to be vested (albeit that providing a credible explanation to that effect would naturally assist their cause). Nor did their failure to make out their contention that the sewer had vested as a consequence of being upgraded in 2004 mean that Brendon's claim necessarily succeeded.

73. I therefore consider that the appeal should be allowed on this ground. I shall consider what consequences flow from that at the end of this judgment.

The evidence of Mr. Griffiths

The law

74. Section 3 of the Civil Evidence Act 1972 provides,

> "(1) Subject to any rules of court made in pursuance of this Act, where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence.
>
> (2) It is hereby declared that where a person is called as a witness in any civil proceedings, a statement of opinion by him on any relevant matter on which he is not qualified to give expert evidence, if made as a way of conveying relevant facts personally perceived by him, is admissible as evidence of what he perceived.
>
> (3) In this section "relevant matter" includes an issue in the proceedings in question."

75. There is no definition of an expert or any specific test in the 1972 Act to determine whether a person is "qualified to give expert evidence" for the purposes of section 3. Some broad assistance might be gleaned from the wording of section 4, which deals with evidence of foreign law, and which refers to a person qualifying as competent to give expert evidence "on account of their knowledge or experience".

76. There are a plethora of authorities that have sought to describe how a court might identify a person qualified to give expert opinion evidence: see e.g. the discussion in *Hodgkinson and James, Expert Evidence: Law and Practice* (5th ed) at 1-011 et seq. A leading case, from the criminal courts and dealing with handwriting, is R v Robb (1991) 93 Cr. App R 161. After referring to Lord Russell's judgment in R v Silverlock [1894] 2 QB 766, Bingham LJ stated, at 165,

> " … the essential questions are whether study and experience will give a witness's opinion an authority which the opinion of one not so qualified will lack, and (if so) whether the witness in question is *peritus* [skilled] in Lord

> Russell's sense. If these conditions are met the evidence of the witness is in law admissible, although the weight to be attached to his opinion must of course be assessed by the tribunal of fact."

77. In the same case, at 166, Bingham LJ memorably contrasted the nature of an expert with that of a non-expert, when remarking that a defendant,

> "… cannot fairly be asked to meet evidence of opinion given by a quack, a charlatan or an enthusiastic amateur."

Analysis

78. As indicated above, the Judge held that there was,

> "… nothing upon the basis of which I can conclude that [Mr. Griffiths] was qualified to give expert evidence, evidence on the point being entirely self-serving for the defendants, and not itself demonstrating expertise."

79. Whilst a trial judge must be given considerable latitude in deciding whether he will be assisted to decide a case by what is proffered as expert opinion evidence, I do not consider that this was an adequate explanation for concluding that Mr. Griffiths was not "qualified to give expert evidence" within the meaning of section 3 of the 1972 Act.

80. Mr. Griffiths' witness statement, which he confirmed in his evidence in chief, set out his career history, which included working for Trafford Borough Council "in a drains, sewers and watercourse environment" for 20 years, and then working for United Utilities since 2004 in a series of managerial roles in wastewater and drainage. When Mr. Griffiths gave evidence, there was no challenge to that evidence.

81. With respect to the Judge, whilst it may fairly be observed that Mr. Griffiths did not descend into detail as to what the various jobs and managerial positions that he had occupied actually entailed, I do not consider that his evidence could simply be dismissed as amounting to "nothing". At very least the Judge ought to have explained why he thought that a person who had worked for 39 years in drains and sewers, both in an operational and a managerial capacity, did not have sufficient knowledge or experience of the common characteristics of public sewers.

82. The Judge's further reliance upon his view that Mr. Griffiths' evidence was "self-serving for the defendants" was also an irrelevant factor so far as his determination as to whether Mr. Griffiths was qualified as an expert for the purposes of section 3. Questions of the independence of a person giving expert opinion evidence and whether their evidence is unbiased go to weight and not admissibility under section 3. Similarly, whilst a lack of detail to support Mr. Griffith's opinions might cast doubt upon its accuracy or reliability, that goes to weight and not admissibility.

83. I therefore conclude that the Judge's decision to exclude Mr. Griffith's evidence on the basis that he was not adequately qualified to give expert opinion evidence within section 3(1) of the Civil Evidence Act 1972 cannot stand.

84. The Judge did not, in terms, indicate that he was also excluding Mr. Griffiths' evidence for failure to comply with CPR 35, although he strongly hinted at that with his comment that the evidence was inadmissible under section 3 "quite apart from the procedural

requirements of Part 35 of the CPR". If that was a further factor in the Judge's decision to exclude Mr. Griffith's evidence, then it would have been wrong.

85. Section 3(1) of the 1972 Act has effect "subject to any rules of court" and there is no doubt that CPR 35 is such a rule of court. However, the restrictions and procedural requirements imposed by CPR 35 on the use of "expert evidence" are limited by CPR 35.2 which defines an "expert" for the purposes of Part 35 as "a person who has been instructed to give or prepare expert evidence for the purpose of proceedings". Such restrictions and requirements would therefore not apply to Mr. Griffiths, who had not been so instructed. As such, if it was otherwise admissible under section 3 of the 1972 Act, the fact that Mr. Griffiths' opinion evidence was not given in accord with the requirements of CPR 35 would not mean that it was inadmissible.

86. The position of witnesses who give both evidence of fact and evidence of opinion in a field in which they have particular expertise was considered in Multiplex Constructions (UK) Limited v Cleveland Bridge UK Limited (No.6) [2008] EWHC 2220 (TCC). At [667]-[672], Jackson J stated,

> "667. The question then arises as to whether [the witness] is confined to giving evidence of fact, without including his expert opinion on matters. Alternatively, can he include statements of professional opinion bearing upon facts within his personal knowledge?
>
> 668. This question arises in many fields of litigation, for example professional negligence actions where the defendant is a witness of fact but also wishes to justify his actions by drawing upon his professional experience. This question arises with particular frequency in litigation in the Technology and Construction Court. Most factual witnesses called are possessed of technical knowledge and expertise. In relation to major engineering projects … those factual witnesses are likely to have very considerable expertise. Otherwise they would not have been engaged upon such projects in positions of responsibility.
>
> 669. Despite the diligent researches of counsel, there is relatively little authority on the extent to which witnesses, who are possessed of special expertise, can gloss their factual evidence with expert comment.
>
> 670. In Lusty v Finsbury Securites Ltd (1991) 58 BLR 66 the Court of Appeal held that an architect suing for fees could give opinion evidence as to the value of his work. In DN v LB Greenwich [2004] EWCA Civ 1659 the Court of Appeal dismissed an appeal against the trial judge's finding that an educational psychologist had been negligent. One of the issues in the appeal concerned the admissibility of opinion evidence given by the psychologist. Brooke LJ said this:
>
> > "25. It very often happens in professional negligence cases that a defendant will give evidence to a judge

> which constitutes the reason why he considers that his conduct did not fall below the standard of care reasonably to be expected of him. He may do this by reference to the professional literature that was reasonably available to him as a busy practitioner or be reference to reasonable limits of his professional experience; or he may seek to rebut, as one professional man against another, the criticisms made of him by the claimant's expert(s). Such evidence is common, and it is certainly admissible…
>
> 26. Of course a defendant's evidence on matters of this kind may lack the objectivity to be accorded to the evidence of an independent expert, but this consideration goes to the cogency of the evidence, not to its admissibility…"

671. As a matter of practice in the TCC, technical and expert opinions are frequently expressed by factual witnesses in the course of their narrative evidence without objection being taken. Such opinion evidence does not have the same standing as the evidence of independent experts who are called pursuant to CPR rule 35. However, such evidence is usually valuable and it often leads to considerable saving of costs.

672. Having regard to the guidance of the Court of Appeal and the established practice in TCC cases, I conclude that in construction litigation an engineer who is giving factual evidence may also proffer (a) statements of opinion which are reasonably related to the facts within his knowledge and (b) relevant comments based upon his own experience. For example, an engineer after describing the foundation system which he designed may (and in practice frequently does) go on to explain why he believes that this was appropriate to the known ground conditions. Or an engineer brought in by a claimant to design remedial works (which are subsequently challenged as excessive) may refer to his experience of rectifying comparable building failures in the past…."

87. That decision was referred to without any adverse comment in Rogers v Hoyle [2015] QB 265. That case concerned the slightly different issue of the admissibility in civil proceedings of a published report prepared for different purposes by a third party expert air crash investigator. In the Court of Appeal, at [62]-[64], Christopher Clarke LJ stated,

> "62. … Section 3 of the 1972 Act does not purport to be all embracing or to restrict or alter the position at common law. The expert with whom CPR 35 is concerned is a person "who has been instructed to give or prepare expert evidence for the purpose of proceedings". The expert evidence referred to in CPR 35.1 and 35.5 and the expert's report referred to in CPR 35.4 and

> 35.10 are the evidence and report of such a person. The purpose of CPR 35 is to regulate the evidence of experts instructed by the parties, to ensure that they act as experts, and to regulate the use and content of their reports….
>
> 63. CPR 35 is not a comprehensive and exclusive code regulating the admission of expert evidence. It regulates the use of a particular category of expert evidence …
>
> 64. The courts have in practice received expert evidence outside the confines of CPR 35. Thus in DN v Greenwich London Borough Council [2005] LGR 597 this court held that the trial judge was wrong to decline to allow the defendants to a professional negligence claim to rely on the opinion evidence contained in the witness statement of a school educational psychologist who was said to have been negligent. That decision was applied by Jackson J in Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd [2008] EWHC 2220 (TCC) where he ruled that an engineer giving factual evidence could also proffer statements of opinion reasonably related to facts within his knowledge and relevant comments based on his own experience…"

88. On this basis, the Judge would not have been justified in thinking (if he did) that Mr. Griffiths' opinion evidence was rendered inadmissible because it was not given in accordance with CPR 35.

89. By a Respondent's Notice, Brendon contended that even if the Judge was wrong to exclude Mr. Griffiths' opinion evidence for the reasons that he gave, his decision to exclude it could be upheld, either because the evidence should have been excluded pursuant to CPR 32.1 by reason of Mr. Griffiths' lack of qualifications, his lack of independence and his lack of impartiality, or because his opinions were in any event irrelevant to the determination of the issues that remained after rejection of the defendants' alternative case.

90. As regards matters relating to Mr. Griffiths' qualifications, independence and impartiality, Brooke LJ indicated in Lusty v Finsbury that if expert opinion evidence is admissible under section 3 of the 1972 Act, it is for the trial judge to assess what weight (if any) to give to the opinions of someone who is not an independent expert instructed in accordance with the strictures and safeguards of CPR 35.

91. It is true that at first instance in Rogers v Hoyle, Leggatt J referred, at [121], to the court's inherent power to control its own procedure and specifically to the provisions of CPR 32.1 that give the court power to control the evidence that it receives, and, in particular, to exclude evidence that would otherwise be admissible. In that regard, I quite accept that CPR 32.1 or the inherent power of the court to control its own proceedings would enable a court to exclude evidence which it considered was designed to circumvent or undermine CPR 35. This might be the case, for example, if the court had given specific directions under CPR 35 for the production of a limited number of independent expert reports, but one party chose, in addition, to invite a factual witness who had some expertise, to volunteer his opinions on the very issues that the court had

directed to be addressed by the experts under CPR 35. However, I am not aware of any such directions having been given in the instant case, the Judge made no adverse findings as regards the reasons for Mr. Griffiths' statement containing opinion evidence, and I do not consider that this court is in any position to do so.

92. As regards the alleged irrelevance of Mr. Griffiths' opinion evidence, I see potential force in Brendon's submission. However, the Judge did not express a view on whether the evidence was in any event irrelevant to the pleaded cases upon which he gave his judgment, and again I do not think that it would be appropriate for us to attempt to do so.

93. I shall return to consider the consequences of my conclusions in these respects at the end of this judgment.

Limitation

The law

94. Section 32 of the Limitation Act 1980 applies to cases of fraud, concealment or mistake. In respect of mistake, it provides that in the case of an action for relief from the consequences of a mistake, the period of limitation shall not begin to run until the claimant has discovered the mistake, or could with reasonable diligence have discovered it.

95. As indicated above, the Judge summarised the law in this respect by reference to Paragon Finance plc v Thakarar [1999] 1 All ER 400 at 418 and Davies v Sharples [2006] EWHC 362 (Ch) at [59]. We were also referred to OTC Computers v Infineon Technologies [2021] QB 1183 (a case not cited to the Judge).

96. OTC Computers was a case of concealment, but as Males LJ noted, at [46], the same approach to discoverability with reasonable diligence under section 32 must be capable of application to cases of mistake. Having referred (among other cases) to Paragon Finance, Males LJ stated, at [47]-[48],

> "47. … although the question what reasonable diligence requires may have to be asked at two distinct stages, (1) whether there is anything to put the claimant on notice of a need to investigate and (2) what a reasonably diligent investigation would then reveal, there is a single statutory issue, which is whether the claimant could with reasonable diligence have discovered (in this case) the concealment. Although some of the cases have spoken in terms of reasonable diligence only being required once the claimant is on notice that there is something to investigate (the "trigger"), it is more accurate to say that the requirement of reasonable diligence applies throughout. At the first stage the claimant must be reasonably attentive so that he becomes aware (or is treated as becoming aware) of the things which a reasonably attentive person in his position would learn. At the second stage, he is taken to know those things which a reasonably diligent investigation would then reveal. Both questions are questions of fact and will depend on the evidence.

> To that extent, an element of uncertainty is inherent in the section.
>
> 48. Third, while the use of the words "could with reasonable diligence" make clear that the question is objective, in the sense that the section is concerned with what the claimant could have learned and not merely with what he did in fact learn, the question remains what the claimant … could have learned if he had exercised such reasonable diligence. That must refer to the actual claimant … and not to some hypothetical claimant."

Analysis

97. The appellants' criticism of the Judge is not that he should have answered the question under section 32 by reference to some hypothetical claimant rather than Brendon. It is clear from OTC at [48] that the Judge was right to ask the question posed by section 32 by reference to Brendon in the form of its owner and controller, Mrs. James.

98. The appellants' criticism relates to the Judge's finding at [116], that

> "116. I have already found, however, that [Brendon] did not discover the mistake until February 2018, and had not been put on enquiry as to the mistake before that date. Accordingly, no part of the claim for sums paid after time started running is statute-barred."

99. The only basis for the Judge's remark that he had already found that Brendon had not been put on enquiry before 2018 was in the earlier passages at [109]-[112] to which I have referred above. In those paragraphs, the Judge found that although Mrs. James had been informed in 2009 that the public records did not show any public sewer in the vicinity of the piece of property to be reacquired, due to the fact that she was busy and her lack of any particular knowledge of drainage bills, Mrs. James did not actually "put two and two together" and hence did not actually realise that Brendon was not receiving the sewerage services for which it was being charged. The Judge then concluded, at [112],

> "112. … I do not consider that at any point before [receiving the report of Cadantis in 2018, Brendon] had been put on notice that it might not be liable in a way which required it to make enquiries which it had deliberately chosen not to undertake."

100. The appellants contend that these findings were addressed to the subjective question of mistake and waiver of enquiry, and did not address the different question for limitation purposes, which was whether, given Mrs. James's actual knowledge that the searchable records showed no public sewer in the vicinity, if Mrs. James had (objectively) exercised reasonable diligence she *could* have "put two and two together" and discovered that Brendon had not received the sewerage services for which it had paid.

101. In that respect, the appellants contend that in circumstances in which Mrs. James had read the 2009 report on drainage stating that the sewer map did not show any public

sewers serving the piece of property to be acquired, and containing the question and answer,

> "Q4.1 What is the basis for charging for water supply and sewerage at this property?
>
> Answer Please refer to vendor or pre-contract documentation."

it would not have required any "exceptional measures" which Mrs. James could not reasonably have been expected to take (per Millett LJ in Paragon Finance plc v DB Thakerar) for her to have followed up on that issue with Brendon's solicitors.

102. I agree with the appellants that the Judge does not appear to have asked himself the right question in relation to limitation. The fact that Mrs. James did not realise the possible significance of the contents of the drainage report was sufficient to resolve the issue of mistake and the deliberate waiver of enquiry, but it was not sufficient to answer the test under section 32 of the 1980 Act.

103. By its Respondent's Notice, Brendon advanced a number of points on the evidence which it contended would have led the Judge to the same conclusion if he had applied the correct test under section 32. These very much focussed upon the overall context of the transaction in which Mrs. James saw the 2009 drainage report. Brendon suggested, for example, that question 4.1 and its answer was a point at the tail end of a report in dealing with both water supply and drainage in relation to the reacquisition of a parcel of land adjoining what was then the Premises, but which itself had no drainage.

104. It also submitted that the appellants had not alleged, and there was no evidence to suggest, that if Brendon had followed up and referred to the vendor or to the pre-contractual documentation in relation to the parcel of land being reacquired, this would have revealed anything in relation to the sewerage charges for the main part of the Premises. Brendon further pointed out that at no point did anyone (including its own solicitors) think to raise the issue of whether it was being properly charged for sewerage services in relation to the main part of the Premises.

105. These may, or may not, be good points on the evidence, but they are highly fact-sensitive and I do not consider that this court is in the best position to resolve them and to reach a decision on whether Brendon can satisfy the requirements of section 32 of the 1980 Act.

Disposal and remittal

106. It follows from the above that in my view the appeal should be allowed and the Judge's order set aside.

107. I have considered whether, having read the materials and the transcripts, this court could simply substitute its own determination of the issues for that of the Judge, but I have come to the conclusion that this would not be possible or appropriate. The Judge heard all the evidence over several days, which was an advantage that this court does not have. Although the Judge made errors of law, there is no reason to believe that his ability fairly to re-evaluate the evidence would be compromised. I therefore consider

that the matter should be remitted to the Judge to remake his decision in light of this judgment.

108. The precise scope of the remittal hearing should be a matter for the Judge having regard to the overriding objective, including proportionality and the saving of costs. Primarily, I envisage that the Judge should re-evaluate the evidence heard at trial, applying the correct burden of proof and the correct test under section 32 of the 1980 Act. The evidence may also include the opinion evidence of Mr. Griffiths if the Judge, having reconsidered the matter, finds that he is qualified to give expert evidence and if his evidence is relevant.

109. For the avoidance of doubt, the Judge will also be able, if he thinks it appropriate, to have regard to some of the matters to which he referred when considering and rejecting the appellants' unpleaded alternative case. However, for my part I do not intend the remittal to be taken by the parties as an encouragement to seek to expand their pleaded cases in any material respect or introduce any substantial new evidence. I certainly do not envisage that it should be necessary or appropriate for there to be anything resembling a re-trial.

Lady Justice Falk:

110. I agree.

Lord Justice Baker:

111. I also agree.