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Case Commentary

Failures in regulating discharges of untreated sewage into rivers

R (Wild Justice) v Water Services Regulation Authority
[2023] EWCA Civ 28
Court of Appeal (Civil Division) Bean LJ,
17 January 2023

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Introduction

The appeal against the decision not to permit a judicial review was at its heart concerned with a challenge to the respondent Office for the Water Regulator (Ofwat) for its alleged shortcomings in regulating sewage discharges. The appellant (WJ) is a not-for-profit company, which advocates to promote better conservation of wildlife in the UK, to encourage greater public participation in issues related to nature conservation, and to provide a means to forward the interests of wildlife in UK law, policy and practice via the legal system.² Of late there has been significant controversy around the way in which discharges of untreated sewage have been undertaken by the numerous water utilities, which are sewerage undertakers, as well as the regulatory response from responsible agencies. The case considers the interplay between the obligations imposed via UK specific legislation in the Water Industry Act 1991 (WIA) and the Regulations adopted for England and Wales consequent upon the Urban Waste Water Treatment Directive 1991.³

Facts and decision at first instance

Before Bourne J, WJ's basic contention was that Ofwat was not carrying out its environmental regulatory duties related to planned and unplanned discharges of untreated sewage into rivers and other bodies of water. The WIA imposes, in section 2, obligations on the Secretary of State (Defra) and Ofwat as to when and how they should exercise powers and duties conferred up on them.⁴ Either body, according to section 2(2A), is required to exercise

such powers and duties in a way considered best to secure that both water and sewerage undertakers perform their functions properly.⁵ Allied to this, section 94(1) WIA imposes duties to provide and maintain a system of public sewers and to make provision emptying them and to deal effectively with the contents (such as treatment).⁶ In that connection, section 18 WIA empowers the Secretary of State and Ofwat to make enforcement orders to secure compliance with those, and other, statutory requirements. Specifically, section 94(3) provides that the duty in 94(1) is enforceable under section 18.

Linked to the above are the Urban Waste Water Treatment Regulations (UWWT Regs), which remain in force as retained EU law.⁷ In accordance with Schedule 2 of the UWWT Regs there is a basic obligation for sewerage undertakers to provide collecting systems (sewers). The Schedule provides that their construction and maintenance must be undertaken in accordance with the best technical knowledge not entailing excessive cost, and should consider the volume and characteristics of urban waste water; prevention of leaks, and the limitation of pollution of receiving water due to storm water overflows.⁸ Regulation 4(4) imposes a duty to treat water entering sewers in accordance with Regulation 5 before it is discharged;⁹ and that treatment plants designed to comply with it should be built, operated and maintained to ensure sufficient performance under normal, local climatic conditions; treated water and sludge are reused when appropriate; and that disposal routes for treated water/sludge minimise adverse environmental effects. Finally in this connection, Regulation 4(1) states that it is a supplement to the duty to provide sewers in section 94(1) WIA and that breaches of the UWWT Regulation should be treated under the WIA as breaches of that duty. The effect of this is that Ofwat's enforcement powers in section 94(3) also apply to water company obligations under Regulations 4(2), 4(4) and, in effect, 5.

WJ's allegation was that Ofwat was failing to police the requirements under Regulation 4 by not extending the enforcement of the requirements arising under section 94 WIA. An additional obligation for Ofwat arises under section 27(2) of the WIA. This requires that Ofwat collects information in respect of the activities of water and sewerage undertakers. WJ also alleged that Ofwat was failing to perform that duty in so far as it related to the water companies' Regulation 4 obligations. The accusation that Ofwat was failing to act was framed generally in that WJ had not identified a specific action that Ofwat should have taken

¹ The first author is a final year LLB student supervised as part of the University's pilot Environmental Law Clinic, which has run in partnership with the Environmental Law Foundation continuing its work on Reviving UK Waterways; details at <https://elflaw.org/news/reviving-uk-waterways-conference/#:~:text=On%20Tuesday%2022nd%20March,problems%20that%20they%20are%20experiencing>.

² Wild Justice has a web presence at: <https://wildjustice.org.uk/> (accessed April 2023).

³ Council Directive 91/271/EEC, concerning urban waste-water treatment (OJ 1991, L 135/40), as amended.

⁴ WIA s 2(1).

⁵ *ibid* s 2(2A)(b).

⁶ *ibid* ss 94(1)(a) and (b), respectively.

⁷ The Urban Waste Water Treatment (England and Wales) Regulations 1994 (SI 1994/2841).

⁸ UWWT Regs, Schedule 2 para 2.

⁹ Regulation 5 sets out a number of requirements as to the provision and quality of treatment.

and had not. Instead, the accusation was framed on the basis that there was a general failure to act, evidenced by the fact that there had been no activity.

Alongside Ofwat's obligations, the Environment Agency has related regulatory functions regarding waste water, contained in the Environmental Permitting Regulations 2016 (EPRs).¹⁰ In addition, under the UWWT Regs the Environment Agency has certain obligations in respect of the sampling and monitoring of waters subject to discharges.¹¹ Bourne J then set out a request for information made by the claimant under the Environmental Information Regulations 2004,¹² seeking clarification of Ofwat's monitoring and enforcement function in respect of sewerage undertakers with respect to section 94(1) WIA and Regulation 4 of the UWWT Regs. Related requests were also sent to Defra, the Environment Agency and all English water companies. The responses were mixed – prompting the claimant to point out that if Ofwat was performing its duties, not all water companies were aware of it. Ofwat itself responded in early March 2022 as to how it fulfilled its monitoring and compliance obligations; and also referred to an ongoing investigation into non-compliance with permit conditions by English water companies, which would potentially result in enforcement action under section 94 WIA. Later that month it commenced enforcement measures against five water companies, referring to breaches under section 94 WIA.

In April, WJ issued a pre-action protocol letter, which referred to both a lack of action and an unlawfully passive stance in Ofwat's approach to unplanned discharges of untreated sewage.¹³ Ofwat responded in May and rebutted the allegations, suggesting WJ instead point to specifics in terms of how it might improve monitoring and enforcement rather than pursue a claim. That claim was issued later in May with a challenge against 'the Defendant's failure to discharge its obligations under section 94 of the Water Industry Act 1991, as articulated in its Environmental Information Regulations 2004 response of 3 March 2022 and its pre-action protocol response letter of 17 May 2022'.¹⁴ The issue, then, for determination was whether there were arguable grounds for a judicial review that had a realistic prospect of success.

There were four grounds put forward for the claimant. The first was that the defendant had unlawfully taken a passive stance to its obligations in respect of the enforcement of the UWWT Regs. This included not seeking information relating to compliance with them from sewerage undertakers with obligations related to their treatment works. Ofwat's response pointed to the fact that it undertakes various monitoring activities which could reveal non-compliance. One related to pricing

controls, in that processes for price-setting are relational to the 'best technical knowledge not entailing excessive cost' imperative. These would then contain performance commitments, which are monitored and assist in identifying maintenance issues. In addition, Ofwat relies on data from the Environment Agency in respect of treatment and discharge permit compliance. Non-compliance might trigger an Ofwat investigation, as might any other form of monitoring. Investigation may then precipitate enforcement action, which is what had happened in the cases previously mentioned, triggered by Environment Agency information.

In addition, the claimant contended that Ofwat had not considered monitoring or enforcing compliance of Regulations 4 and 5 of the UWWT Regs, and no material was disclosed in that regard. A comparison was drawn with a 2012 Environment Agency position statement requiring specific action by water companies and quarterly reporting. It was suggested this demonstrated Ofwat's lack of a considered regulatory strategy. This, however, had to be understood in the context of a 2021 letter by Ofwat to the water companies where it expressed concern about non-compliance with 'full to flow' (FTF) conditions in environmental permits and the unpermitted storm overflow spills which may result. It concluded by noting that, if true, it would mean companies were not meeting their general section 94 WIA duty. The omission of any reference to Regulation 4 duties – subsequently amended to include them – was claimed by counsel for the claimant to suggest water companies would not have understood the letter as applying to those duties. There was no evidence that the enforcement cases Ofwat had undertaken related to Regulation 4 duties, as opposed to the more general section 94 WIA obligations. The respondent countered that the enforcement action specifically required information on compliance with section 94 WIA and to include breaches of Regulations 4 and 5.

Bourne J observed that there was substantial overlap between the provisions of section 94 WIA and Regulation 4, although the latter was more specific in terms of the requirements for the operational dimension of waste water treatment plants than the general obligation in section 94 WIA to provide maintain sewers in an area. He noted that the FTF issue was directly relational to Regulation 4, as the system must be able to work in normal climactic conditions. It is correct, as counsel for the claimant put forward, that compliance with an Environmental Permit is not evidence of complying with the Regulation 4 duty, but it was noted, 'that does not prevent non-compliance with the one from providing evidence of non-compliance with the other'.¹⁵ To Bourne J this provided clarity on the issue that Ofwat's 2021 letter related at least in part to Regulation 4, and not just the general section 94 WIA duty. This meant that the claimant's allegation of a passive stance and failure to obtain information was not supportable. It did not mean that Ofwat's investigation and enforcement

10 Environmental Permitting (England and Wales) Regulations 2016 (SI 2016/1154).

11 UWWT Regs, 6(2) and 11.

12 Environmental Information Regulations 2004 (SI 2004/3391).

13 *R (Wild Justice) v Water Services Regulation Authority* [2022] EWHC 2608 (Admin) at para 27.

14 *ibid* cited at para 29.

15 At para 48.

duties had been discharged satisfactorily, or not, but there was no specific allegation of failure made by the claimant in this regard.

Taken together, grounds 2 and 3 related to Ofwat's failure to collect information and to ensure that it discharged its functions to secure proper performance of the water companies' obligations, respectively breaches of section 27(2) and 2(2A) WIA. These were given short shrift as essentially being more generalised formulations of the components of ground 1. Concluding the point, Bourne J stated that 'Ofwat has collected information and has taken enforcement action. However well or badly it has done those things, it is not arguable that it has simply failed to do them'.¹⁶ The final ground, relating to the fact that Ofwat had misdirected itself in law that its regulatory obligations were discharged merely by referring to Environment Agency data and steps to deal with breaches of Environmental Permits, was also rejected. It was clear from the evidence that Ofwat considered a range of sources of information to determine the existence of a trigger for enforcement action.

The appeal

Lord Justice Bean considered each of the four grounds dismissed by Bourne J. In respect of the first, he noted that counsel for the claimant had drawn a distinction between the enforcement powers of the Environment Agency and Ofwat. In response to a hypothetical question, which asked what remedy would be available to an individual or group concerned that a local watercourse was being polluted as a result of water company failures, counsel had responded that the Environment Agency could point to breaches of permit conditions, whereas Ofwat could state it was a breach of the company's section 94 WIA and Regulation 4 and 5 obligations. The claimant's complaint in essence was that Ofwat had not satisfied itself that the Environment Agency had imposed conditions which would enforce Regulations 4 and 5. In short, had that been done, there would be no complaint. Instead, despite acknowledging Ofwat's discretion in performance of statutory duties, the allegation was that Ofwat had failed to consider enforcement of the more specific obligations as opposed to the general section 94 WIA duty. Counsel for the respondent's view was that it was artificial to draw a distinction between section 94 WIA and the Regulation 4 and 5 duties. This was because the duty under section 94 WIA includes the substantive content of Regulations 4 and 5: Ofwat's enforcement powers under section 94(3) applied to the UWWT Regs duties as well. There had also been sufficient information disclosed and the evidence of the actions taken by Ofwat was such that it was not merely passive.

The second, third and fourth grounds were equally swiftly dealt with, Bean LJ noting (at paragraph 34) that he considered the argument in the fourth ground 'extraordinarily technical'. He concluded the point by stating,

¹⁶ *ibid* para 60.

'Like the judge, I consider it plain and obvious that the data collected by the EA, and by the Ofwat enforcement action set in train by its circular of November 2021 and the subsequent section 203 notices, were and remain relevant to the obligations of water companies under the 1994 Regulations'.

Decision

Ultimately, Bean LJ refused permission to appeal, stating that 'I agree with the judge that no arguable case of unlawful action or inaction on the part of Ofwat has been shown. I do not consider that an appeal from his decision would have any real prospect of success or that there is any other compelling reason for such an appeal to proceed'.¹⁷

Commentary

Discharge of untreated sewage by sewerage undertakers into rivers and other watercourses has rightly generated numerous headlines and column inches of late. There is a sense that the water environment is in crisis and that an effective regulatory and enforcement response is lacking.

The framing of a general claim here seemed unfortunately to work against the claimant. Being able to point to a specific failure would perhaps have provided more for the courts to work with. Given that Ofwat did follow through with enforcement action in some cases and was able to point to that, in the absence of detailed disclosure in respect of its focus on the UWWT Regs, it was sufficient to demonstrate that the approach was not passive – even though, as noted by Bourne J, there may be some space to assess the scope of how well or badly that had been done.

It is of course noteworthy that the UK has been on the wrong end of several Court of Justice decisions in respect of UWW treatment over the years.¹⁸ The perception, rightly or wrongly, is that the level and frequency of pollution incidents is getting worse; and that this situation is a significant failure of both the privatised water companies and of the regulators. Significant fines imposed on water companies do not seem to have improved the picture.¹⁹ At the time of writing Defra has just launched a new policy document *Plan for Water: our integrated plan for delivering clean and plentiful water*.²⁰ The Ministerial Foreword makes direct reference to the issues in the instant case when it notes: '[w]e know that people across

¹⁷ *ibid* para 35.

¹⁸ Most recently, for example, C-502/15 *Commission v UK* [2017] ECLI:EU:C:2017:334, on UWWT and CSOs.

¹⁹ Southern Water was ordered to pay £126 million by Ofwat in 2019 and, separately, fined £90 million in 2021: <https://www.gov.uk/government/news/record-90m-fine-for-southern-water-following-ea-prosecution>; and Thames subject to £32.4 million in fines since 2017: <https://www.gov.uk/government/news/thames-water-fined-4-million-after-30-hour-waterfall-of-sewage-discharge> (accessed April 2023).

²⁰ Available at: <https://www.gov.uk/government/publications/plan-for-water-our-integrated-plan-for-delivering-clean-and-plentiful-water/plan-for-water-our-integrated-plan-for-delivering-clean-and-plentiful-water>.

the country want to see more progress in tackling pollution. We agree. That is why reducing the use of storm overflows is a top priority for the government'. For the time being we will have to observe in order to evaluate its success or otherwise.

It was noted as an aside in the High Court that reference was made to a complaint to the Office for

Environmental Protection (OEP) by the NGO Wildfish. It is investigating in respect of the Secretary of State, the EA and Ofwat, in order to assess whether those bodies have failed to comply with their respective duties in relation to the regulation, including the monitoring and enforcement of water companies' duties to manage sewage.²¹ Again, something else to watch.

²¹ Available at: <https://wildfish.org/latest-news/2021-09-14-oep-complaint/>.