

News flash

Human Rights – The Floodgates Close! Marcic -v- Thames Water Utilities Limited

In this issue, Iain Corbett looks at a Property case that we have been following through the Courts for some time. It was finally decided at the end of last year. It raises important issues for Insurers including the application of the Human Rights Act, in particular the Right to Protection of Property, as an alternative claim to nuisance. The House of Lords held that where an adequate statutory scheme is in place for complaints from the public, and where adequate redress can be found, this overrode any interference with human rights. It was also held that in the circumstances of this case, utility companies are not to be treated as ordinary occupiers of land, which consequently takes them outside the “*neighbour*” principle of the individual landowner.

By way of brief background, Mr Marcic’s house had suffered from very serious flooding from overloaded sewers for a number of years. Since 1992, the sewers had, on occasion, discharged surface water and foul water into Mr Marcic’s front and back garden and had damaged the fabric of his house. Mr Marcic had spent £16,000 installing an extra manhole and drainage system in an effort to alleviate the damage to his back garden, and to prevent any damage to the inside of his house. However, the flooding had caused subsidence, which threatened the value and prospects of selling the house in the future.

Mr Marcic first complained about the flooding to his Local Authority in 1992 who, by 1995, referred him to Thames

Water. The letter to the managing director resulted in him being sent a cheque for £40, which he returned.

In October 1997, Mr Marcic wrote to the Secretary of State for the Environment and was referred to the Customer Services Committee of the Office of Water Services – the independent economic regulator for the water industry. However, Mr Marcic made no approach to the Office of Water Services – something Thames Water contended should have been done.

Consequently, Mr Marcic brought an action for nuisance against Thames Water and, further claimed that Thames Water had infringed his convention rights under Article 8 (Respectful Family Life and Home) and Article 1 of the first protocol (Protection of Property) of the Human Rights Act 1998. ▶

► The House of Lords agreed with Thames Water, allowing an appeal from the Court of Appeal. It held that Mr Marcic should have brought a complaint under the Comprehensive Statutory Scheme implemented by the Water Industry Act 1991. The Act sets out the duties of water undertakers, which are subject to the control of the Director General of Water Services. Under the Act, Thames Water was responsible for providing an adequate system of public sewers. This duty is enforceable by the Director General by means of Enforcement Orders. The system makes provision for the Director General to make an Enforcement Order if a complaint is made by a customer of a contravention of a sewerage undertaker's obligation.

In reaching its decision, the House of Lords relied on nineteenth century case law, which rejected individual claims for damages where statute provided a system for complaints to be dealt with (*Glossop v. Heston and Isleworth Local Board (1879)*, *Attorney General v. Dorking Union Guardians (1882)*). The Court of Appeal had sought to distinguish the Marcic case from this line of authority by bringing it within the landowner cases which encapsulated the "neighbour" principle (*Goldman v. Hargrave 1967*, *Leakey v. National Trust for Places of Historical Interest of Natural Beauty (1980)*). The Court of Appeal held that the earlier case law had been overtaken by developments in the concept of "adopting" and/or "continuing" a nuisance and, in certain circumstances it could be argued that a sewerage undertaker was under a common law duty to provide new sewers in order to prevent overloading from an increased number of customers which would result in flooding.

The House of Lords disagreed with the reliance the Court of Appeal had placed on the landowner cases, as they were only concerned with disputes between neighbouring landowners in their capacity as individual landowners. The House of Lords held that Thames Water was not an ordinary occupier and "if one customer is given a certain level of service, everyone in the same circumstances should receive the same level of services." The economic implication of the Court of Appeal's approach could have been overwhelming. By way of example, if Thames Water were responsible for remedying the flooding problems of all the customers in its area who suffered from the same problem as Mr Marcic, the cost could run into billions of pounds.

In respect of the claim under the Human Rights Act 1998, the House of Lords considered the decision of the European Court of Human Rights in *Hatton v. United Kingdom Application No. 36022/97, 8 July 2003* which makes it clear that the convention does not give absolute protection to property or even to residential premises and requires a fair balance to be struck between the interests of persons whose homes and property are affected and

the interests of other people such as customers and the general public. Further to this, the House of Lords held that the Statutory Scheme under the Act adequately safeguarded Mr Marcic's convention rights to the privacy of his home and the protection of his property.

This is obviously an important decision for Insurers and should assist Insurers in defending future flood claims, which are predicted to be on the increase due to the potential effects of global warming.

Should you have any questions arising out of this case or any Property Insurance related issues please do not hesitate to contact Iain Corbett.

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