

CA on appeal from Winchester County Court (His Honour Judge Hughes QC) before the Chancellor of the High Court, Sir Andrew Morritt. 24th October 2006.

Judgment : CHANCELLOR OF THE HIGH COURT:

1. This is an application by the second defendant, Southern Water Services Ltd, for permission to appeal the order of His Honour Judge Hughes QC, sitting at Winchester County Court, made on 28 May 2006. The judge was there dealing with a preliminary issue. He determined that in answer to the preliminary issue the relevant culvert, to which I shall refer later, is "a surface water sewer but is not a public sewer within the statutory meaning of the same."
2. The matter was considered by Lord Justice Jonathan Parker on the papers. He refused permission to appeal on 17 August 2006.
3. The facts are as follows. The claimant, Raglan Housing Association Ltd, is a charity and a registered housing corporation. It owns 60 -64 Cobbett Road, Bitterne, Southampton. That property contains a number of residential flats which Raglan lets to its tenant. Outside the southern boundary of No. 64 runs a culvert partly open and partly closed. To the south of that culvert is another development of residential flats in different ownership. The culvert forms part of a channel known as the Bitterne Stream which runs from Humm Hole in the east to the River Itchin in the west. The culvert flooded three times in 1999 and is likely to do so again.
4. The question raised in these proceedings basically is - who, if anyone, is liable to maintain it? That depends on how it is categorised for the purposes of the Water Industry Act 1991 and other purposes. Thus if it is merely a water course then it is liable to be maintained, if at all, by Raglan as one of the riparian owners. If, on the other hand, it is a public sewer then it is maintainable by Southern Water Services Ltd as the local authority with responsibility for sewers and drains. On the other hand, if it is a sewer but not a public sewer then it is maintainable by the City Council, the first defendant, as the local highways authority responsible for roads and drains.
5. The claim form was issued on 10 December 2003. By an order made on 2 February 2005, District Judge Ainsworth directed the trial of the preliminary issue in the following terms: whether the culvert is a sewer and whether Southern Water had a statutory responsibility to maintain the same.
6. The matter came before His Honour Judge Hughes QC on four days between September and November 2005. On 9 March 2006 he handed down a draft judgment to the parties and handed down the final form on 25 May 2006. His conclusions in summary were as follows:
 - first, insufficient time had been allowed for his consideration of the matter; insufficient research into the history of the culvert had been undertaken by the parties and the preliminary issue was inappropriate anyway;
 - second, "sewer" may be a foul sewer or a surface water sewer or a combination of the two;
 - third, in the case of what was a natural stream, it is necessary to consider whether its character has changed to such an extent as to become a sewer in the ordinary non -statutory sense of the word as indicated by Lord Justice Oliver in *British Railways Board v Tonbridge and Malling District Council* [1981] 79 LGR 565;
 - fourth, such a change does not occur merely because the stream is made to carry a quantity of sewage;
 - fifth, a channel cannot be a water course and a sewer at the same time;
 - six, having reviewed the documentary and oral evidence in detail he concluded that the channel had been so changed as to transform it into a surface water sewer;
 - seven, in so concluding, the judge put weight on the physical characteristics of the channel such as its structure, its route and its capacity as well as characteristics of its contents such as the nature of the flow, source of its contents and the occasional presence of bulk sewage;
 - eight, the culvert, though a sewer, was and is not a public sewer for the purposes of Section 219 of the Water Resources Act 1991; and
 - nine, the parties, each of whom is a publicly funded body, should settle their differences.
7. On 15 June 2006 Southern Water Services filed its appellant's notice. The order they seek is for a declaration of the culvert is a water course and that Southern Water Services has no statutory responsibility for its maintenance. Lord Justice Jonathan Parker refused the application on the papers, giving a reasoned decision to that effect. He again invited the parties to reach some accommodation between them rather than continue to spend public money in the courts.
8. On 15 September Southern Water Services requested this formal hearing. No further skeleton argument was submitted indicating respects in which it was suggested Lord Justice Jonathan Parker had misunderstood the nature of the case. The matter has been explained to me by counsel on this oral application. The contentions of counsel for Southern Water Services is that the judge effectively applied the wrong test. He submits by reference to authority, to which I will refer in a moment, that the appropriate test for considering whether what was once a natural water course has become a sewer is not whether the water course has been physically so changed as to change the nature of the beds and banks of the water course itself but whether the flow which is carried in the water course has been so changed by the input of raw sewage as to constitute the flow of something, in

character, quite different from that which it was before. Thus he submits the authorities show that what is relevant is the change in the nature of what is carried by the culvert, not the change in construction of the culvert itself.

9. If that submission is well made then he is entitled to submit that the judge in this case took account of a number of irrelevant matters and failed to make appropriate findings of fact to enable the conclusion that the change in flow had been such so as to transform this water course from a natural water course into a sewer.
10. The authorities to which he refers are, first, the dictum of Lord Maugham in **George Legge & Son Ltd v Wenlock Corporation** [1938] AC 204, 218 -219. I will refer to one passage on page 218: *"It is important at the outset to bear in mind that 'sewer' is the name given to a channel of some kind for sewage and certain liquids, and the proposition that a natural stream has become a sewer can only mean that the bed and banks of what was once a natural stream have become a legal channel for sewage."*

At page 219 Lord Maugham said: *"My Lords to prevent misconception I will add that no doubt there are circumstances in which the bed and banks of what was once a natural stream might prior to the Act of 1875 have become substantially nothing but a channel for sewage."*

In each case counsel submits that the emphasis is on the nature of that which is transported in the channel and not the nature of the channel itself.

11. Such a distinction is also apparent in the judgment of Lord Justice Oliver in **British Railways Board v Tonbridge and Malling District Council**. At page 573 Lord Justice Oliver adopted the statement of Lord Maugham as formulated in submissions made to him by counsel. He said: *"What is clear is that something very much more than the mere discharge of sewage into a stream (and, a fortiori, the mere discharge of pure surface water) is required before its status is changed to that of a sewer Thus, for instance, if circumstances are such that what was originally an agricultural stream comes to carry sewage in such substantial quantities that its character is completely changed (as occurred in [case is mentioned]) it may no doubt become a sewer within the ordinary meaning of the word. Perhaps the best indication of the circumstances which can produce this result is contained in the speech of Lord Maugham in **George Legge** [to which I have referred]."*

At page 574, having finished the quotation from the speech of Lord Maugham, Lord Justice Oliver said: *"In the instant case there has been nothing approaching the situation envisaged by Lord Maugham in the passage I have read. All that has happened is that outfalls have been constructed channelling the surface drainage of the built -up area into the existing streams so as to increase to some extent the flow of surface water which they carry away "*

He then pointed out on page 575: *" the mere fact that the surface drainage of the built -up area has been collected and diverted into them through a number of outfalls so as to produce a significant increase in the volume of water carried off, cannot possibly constitute them, either individually or collectively, sewers or a sewer "*

12. In this case, and in his very careful judgment, the judge directed himself at paragraph 41 by reference to the judgment of Lord Justice Oliver in these terms. He said: *"By the conclusion of the hearing all parties were agreed that whereas here the channel follows a course of what was a natural stream in the past, it was necessary to consider whether the character of the natural stream has changed to such an extent that the channel has become a sewer in the ordinary non -statutory sense of the word."*

He returned to this point at paragraph 46 where he said: *"I proceed on the basis that the correct test is whether there have been substantial changes in the character of the channel as to transform it into a sewer. This is a question of fact and degree in each case taking into account the guidance the test is a high one."*

13. The point made by counsel for the applicant is that at the passage to which I referred at paragraph 46, the judge refers to the change in the channel, namely the physical attributes of the channel by which the liquid is carried and not to the character of the liquid itself. That this is what the judge did is borne out by the subsequent paragraphs in the judgment, in which, as I have already indicated, he considered a number of matters in relation to physical construction of the channel rather than the contents which it carried. The passages dealing with the contents are paragraphs 88, 98 and 99 in which he made it clear that he had not been able to ascertain the nature of the liquid substances (paragraph 88). At paragraph 98 he referred to the nature of the flow by reference to the additional surface water which, of itself, at the time was neutral, and at paragraph 99 concluded that the primary function of the channel is to carry the surface waters directed into it.
14. I am satisfied, based on the submissions of counsel, and in the absence of submissions for the other party, that this appeal for which permission is sought does have a real prospect of success in the sense that there is a serious question to be tried as to whether or not the judge adopted and applied the correct test in terms of whether what was once a natural water course had become, at the time he dealt with it, a sewer.
15. I will accordingly give permission to appeal.
16. My concern however - as was Lord Justice Jonathan Parker's and His Honour Judge Hughes' concern - is that public money should not be spent unnecessarily in the conduct of further litigation. I understand from counsel for Southern Water Services that his client would be perfectly content that the matter should be referred to the Court of Appeal Mediation Scheme. That will require the consent of the other two parties. For my part, it seems to me that this matter should not be argued in court unless and until an attempt at mediation has been shown to be unsuccessful.

17. I give permission to appeal therefore on the footing that the applicant will refer the matter to the Court of Appeal Mediation Scheme and will actively seek the consent of the other two parties to that reference so it can be mediated before it has to be further litigated.

(Minute of order to be lodged with court)

The Claimant/Respondent was not represented and did not attend

The First Defendant was not represented and did not attend

MR CLIFFORD DARTON (instructed by Southern Water Services Ltd) appeared on behalf of the Second Defendant/Applicant