IN THE HIGH COURT OF JUSTICE
DIVISION ADMINISTRATIVE
[2018] EWHC 3726 (Admin)

CO/2564/2018 QUEEN'S BENCH COURT

Royal Courts of Justice

Thursday, 6 December 2018

Before:

MR JUSTICE LEWIS

B E T W E E N :

MUSTAFA — Appellant

- and -

(1) LONDON BOROUGH OF ENFIELD
(2) THAMES WATER COMPANY — Respondents

THE APPELLANT appeared in Person.

MR N. OSTROWSKI (instructed by the London Borough of Enfield) appeared on behalf of the First Respondent.

MR P. JOLLY (instructed by Thames Water Company) appeared on behalf of the Second Respondent.

J U D G M E N T

MR JUSTICE LEWIS:

Introduction

1 This is an appeal by way of case state from the Highbury Corner Magistrates' Court. The Magistrates' Court dismissed an appeal by Mr Mustafa against a notice served under s.59 of the Building Act 1984 requiring him to take certain steps in order to make satisfactory provision for drainage of a property owned by him at 343 Green Lanes in London.

2 In essence, a pipe at the property carries waste water or foul water from the property to a sewer located in an alleyway adjacent to but not within the curtilage of 343 Green Lanes. The pipe was connected at some stage to a sewer which removes surface water, such as rain, rather than being connected to a foul sewer, which would remove waste water.

3 Mr Mustafa contends that, in the circumstances of his case, a notice under s.59 of the Building Act 1954 could not be served upon him as the drainage provided at the building was satisfactory and the problem arose away from his property in the connection with the manhole under the alleyway and he contends that was the responsibility of either the local authority or the water company or both. The district judge rejected that contention, dismissed the appeal and upheld the notice. The districted stated a case to the opinion of the High Court in the following terms:

> "Whether it was open to the judge to find that a building has unsatisfactory provision for drainage within s.59 of the Building Act 1984 when foul waters conveyed down a vertical side pipe and into a lateral drain carrying waste water away from the building to a surface water drain rather than a foul water sewer where the location in this connection occurs on land that is not within the building's curtilage or vested in the owner of the building and both the lateral drain carrying the waste water away from the building and the surface water drain is owned by the local sewerage undertaker."

The facts

4 Against that background, I set out briefly the facts which are set out in more detail in the case stated from the Magistrates' Court. The appellant, Mr Mustafa, purchased the freeholding of the building at 343 Green Lanes in about 1990. He purchased it with planning permission to convert a maisonette into three flats. It currently comprises a shop at ground floor level and then three flats above and the flats are referred to as 343A Green Lanes.

5 An external pipe serves the three flats and removes waste water, that is foul water from things like showers and sinks, from the three flats. That connects with a pipe running vertically down the side of the property. That, in turn, goes into the original cast iron pipe which goes down into the ground under the alleyway and connects with the sewer which is located under the alleyway but is adjacent to but not part of the curtilage of the building at 343 Green Lanes. It is that pipe which removes the waste water from the three flats at 343 Green Lanes. The sewer to which the pipe connects removes surface water, not foul water.

It is said that there is a misconnection at the point in the system where the pipe coming from 343 Green Lanes has been connected to the surface water system; it should have been connected to the foul water system. As a result of the misconnection, foul water emanating originally from the flats at 343 Green Lanes is being discharged into the surface water drainage system and not into the foul water drainage system.

6 It is accepted, and it is obvious, that this is unsatisfactory and can cause significant environmental harm. Foul water from the flats contained within the surface water drain is conveyed into the surface water system, including rivers, lakes and reservoirs, rather than being conveyed into the foul water drainage system to be taken to a treatment works and treated.

7 On 24 February 2017, the local authority, the London Borough of Enfield, served a notice on Mr Mustafa pursuant to s.59 of the Building Act 1984 in the following terms:

> "Whereas s.59(1)(a) of the Building Act 1984 provides that if it appears to a local authority that, in the case of a building, satisfactory provision has not been and ought to be made for drainage or that the drainage is insufficient or otherwise defective, they shall, by notice, require the owner of the building to do such work as may be necessary for renewing or repairing the existing drainage system and whereas the owner of 343 Green Lanes, London, N13 4TY and it appears to the council of the London Borough of Enfield, herein referred to as "the council", that the drainage of the said building is unsatisfactory or defective in the respects detailed in the attached Schedule, the council acting for the local authority of the district under the said section hereby gives you notice that they require you within a period of 90 days from the date of this notice to execute in connection with the said building the word specified in attached Schedule B."

Schedule A, which describes the respects in which the drainage is said to be defective, is in the following terms:

> "Schedule A. Existing foul waste pipe serving 343A Green Lanes, London, N13 4TY cannot be connected to a surface water manhole as shown in the attached plan."

Schedule B sets out the works that must be taken in the following terms:

> "Schedule B. The foul waste pipe serving 343A Green Lanes must be connected to a foul drain. Ensure that all works are carried out with authorisation from Thames Water and London Borough of Enfield Building Control Department to a satisfactory standard."

An accompanying letter made it clear that the works would be subject to further inspection to ensure compliance with the notice.

8 Mr Mustafa appealed, as he was entitled to, to the Magistrates' Court pursuant to s.102 of the Building Act 1984. He appealed on four grounds, the first of which was that the notice or requirement was not justified by the terms of the provisions under which it purports to be given and then there were further grounds given. The nub of the appeal is set out in this paragraph:

> "In particular, it is hereby declared that the liability for the work falls upon Enfield Council and/or Thames Water in accordance with the law and that, hence, the main complaint is that under (a) above, that the notice or requirement is not justified by the terms of the provision under which it purports to be given on the premise that the notice has not been served on the right party and, indeed, should not have been served on me, Mr T Mustafa, but upon Enfield Council and/or Thames Water, who is responsible for the execution of the work specified in the notice. The dwelling above the shop premises forms part of the original building to which foul water services must be provided, the owner of which, past and present, is not responsible for the final connection to the building, which now transpires to have been improperly connected by the water authority at the time of construction."

9 Mr Mustafa, very clearly and courteously today, has outlined his main arguments about the proper interpretation of the Building Act 1984 and why, in his submission, it is not fair that the notice is served on him. In many ways, at the heart of his case is what he says is simple unfairness. Neither he nor the previous owner created the problem that has occurred in this case. Neither he nor the owner, he says, made the mistaken connection joining the foul waste pipe to the surface water sewer; why, therefore, should he have to bear the cost of remedying an error that is not his fault?

10 Ultimately, this is a case which turns upon the proper interpretation of an Act of Parliament and, in particular, the terms of s.59 of the Building Act 1984. This court must decide what Parliament intended to achieve when it enacted s.59. Did Parliament intend to bring this set of facts within the scope of s.59 on the basis that there was a public health or environmental health problem that needed to be remedied in the public interest and, whatever the rights and wrongs of the matter, the owner must bear the cost, or is the relevant provision, s.59, more limited in its scope and does it, in fact, properly interpreted, require people in the position of Mr Mustafa to bear the costs of remedying the misconnection that has occurred? That is the central issue of law which lies at the heart of this case and it is to the relevant statutory provisions that I now turn.

11 Section 59 of the Building Act 1984 is headed "Drainage of a building". Section 59(1) is in the following terms:

> "If it appears to a local authority that in the case of a building - (a) satisfactory provision has not been, and ought to be, made for drainage…"

I omit (b), (c) and (d).

> "… they shall by notice require the owner of the building to make satisfactory provision for the drainage of the building, or, as the case may be, require either the owner or the occupier of the building to do such work as may be necessary for renewing, repairing or cleansing the existing cesspool, sewer, drain, pipe, spout, sink or other appliance, or for filling up, removing or otherwise rendering innocuous the disused cesspool, sewer or drain."

Section 59(6) says this:

> "In subsection (1) above, "drainage" includes the conveyance, by means of a sink and any other necessary appliance, of refuse water and the conveyance of rainwater from roofs."

Section 121 of the Building Act 1984 gives a definition of the word "building" and it means "any permanent or temporary building and, unless the context otherwise requires, it includes any other structure or erection of whatever kind or nature (whether permanent or temporary)". Unless the context otherwise requires, it also includes part of a building and the reference to the provision of services, fittings and equipment in or in connection with buildings or to services, fittings and equipment so provided, includes a reference to the affixing of things to buildings or, as the case may be, to things so affixed.

12 Against that background, I turn, then, to the issue which is at the heart of this case, the meaning of s.59(1)(a) of the Building Act 1984 and the reference to, in the case of a building, satisfactory provision has not been and ought to be made for drainage. In my judgment, satisfactory provision for drainage includes satisfactory provision for ensuring the water is conveyed from a building into an adequate sewer or lateral drain. Satisfactory provision includes not simply the physical pipes on the property or within the curtilage of the property. It also extends to provision for ensuring that the water is conveyed to a sewer or lateral drain and that the arrangements for connecting the pipe to the sewer or lateral drain are satisfactory. By way of example, if a foul water pipe left a building and was unconnected to any other drain or sewer and simply discharged the foul water into the street, satisfactory provision would not have been made for the drainage, that is the conveyance of the refuse water, in the case of that building. I understand Mr Mustafa to say, "Well, there will be other provisions of other Acts that will deal with that problem." However, we are dealing with the interpretation of s.59; in my judgment, it would be the case that the circumstances I have described would be an example of a lack of satisfactory provision for drainage. Similarly, if the provision for the conveyance of foul water involved discharging the foul water into a surface water drain or sewer, again, that would not involve the provision of satisfactory drainage in the case of the building. The arrangements for providing for drainage would be unsatisfactory, as they would be providing for the discharge of foul water into a surface water system. On its wording, therefore, s.59 does bring within its scope a situation where satisfactory provision has not been and ought to be made for drainage because there is not satisfactory connection between the pipe that removes the foul water from a building and the sewer or lateral drain into which the water is conveyed.

13 Secondly, that interpretation of s.59 is consistent with other provisions of the Building Act 1984. As originally enacted, s.21 required plans to be provided showing that such a statutory provision would be made for the drainage of the building and a local authority had to reject the plans initially if they were not satisfactory. Subsection 21(4) provided as follows:

> "A proposed drain shall not be deemed a satisfactory drain for the purposes of this section unless it is proposed to be made as the local authority are on appeal in Magistrates' Court may require either to connect with the sewer or to discharge into a cesspool or some other place, but a drain shall not be required to be made to connect with a sewer unless (a) hat sewer is within one hundred feet of the site of the building or, in the case of an extension,

> the site either of the extension or of the original building, and is at a level that makes it reasonably practicable to construct a drain to communicate with it, and, if it is not a public sewer, is a sewer that the person constructing the drain is entitled to use, and (b) the intervening land is land through which that person is entitled to construct a drain."

That provision reflects the provisions in s.37 of the Public Health Act 1936 and s.39 of that Act reflects the provisions of s.59 of the Building Act 1984.

14 The Acts themselves have their origins in Victorian times. But the terms of s.21(4), as originally enacted, supports the case for interpreting s.59 as including the provision of drainage as involving connection to a sewer. Section 21(4) presupposes that the plans may include arrangements for connecting the pipe removing waste water with the sewer.

15 Thirdly, the interpretation that I have found to be the correct interpretation of s.59 is consistent with dicta of Lord Goddard, Chief Justice, in *Chesterton Rural District Council v Ralph Thompson Limited* [1947] KB 300. That case concerned a different factual issue. It concerned s.37 of the Public Health Act 1936, which is in similar provisions to s.21, as originally enacted, of the 1984 Act. The plans prepared by the developer in that case involved plans for constructing 24 houses and 10 flats. The pipes or drains connecting the proposed houses and flats to the private sewer were satisfactory, but the sewers discharged their contents thereafter into a stream and the question of whether or not the drainage system was part of a provision of drainage for the 24 houses and 10 flats. On that issue, Lord Goddard, Chief Justice, said this:

> "I think the wording of s.37(1) does indicate that all you ought to consider is the drainage of the particular building and it is abundantly clear from other sections to which our attention has been called that if the sewage from the various houses is not satisfactorily disposed of, if the sewer and the cesspool are not satisfactory, there is ample provision made in the Public Health Act by which the local authority can see that it is remedied. It may be that the local authority someday will perform their duty under s.14 of the Act and provide for the laying of public sewers to take the sewage of the district. I daresay that at the present moment, owing to shortage of labour and the expense and so forth, that may not be immediately possible. But I do not think, especially having regard to the words "of the building", that one can read the word "drainage" in s.37(1) as meaning a system of drainage. At one time, I thought you might be able to by reason of the definition of "sewer" which is to be found in s.343. It is not actually a definition, but it is in these words: "sewer does not include a drain to be found in this section but, save the aforesaid, includes all the sewers and drains used for the drainage of buildings. A drain is only for the drainage of one building."

Pausing there, what the court was saying was that satisfactory drainage is satisfactory drainage of a building. It did not extend to the wider drainage system providing for those buildings and other buildings and Humphries J and Lewis J agreed with that interpretation.

16 However, Lord Goddard also said, by way obiter dictum, having referred to s.37(1) of the Public Health Act 1936, this:

> "I entirely agree that the mere fact that the drain may be shown to connect with the sewer, as it must if it is not to drain into a cesspool or other drain, does not mean, of necessity, that once it is shown to connect with a sewer it is satisfactory. That is not conclusive. Because, although the drain must have a terminus to which it leads, it does not at all follow, if it does lead to that terminus, namely a sewer, that it must be satisfactory."

Two observations arise from that dictum. First, that dictum is consistent with the view that the method of connecting a pipe carrying waste water from a building to the sewer system does form part of the provision for drainage in the case of a particular building. Secondly, the fact that there is a connection to a sewer does not, of itself, mean that the provision will be satisfactory. That will depend on all the circumstances of the case.

17 Having regard to the wordings of s.59, the wider context and wording of the remainder of the 1984 Act, and supported by the observations of Lord Goddard, Chief Justice, in *Chesterton*, I am satisfied that satisfactory provision for drainage in the case of a building is capable of including the means of connecting the waste pipe that takes water from the building to the sewer system. For those reasons, I consider that the interpretation given by the Magistrates' Court to section 59 of the Building act 1984 in this case is correct. In considering whether satisfactory provision for drainage has not been and ought to have been made in the case of this building, the Magistrates' Court was entitled to have regard to the provision made for connecting the pipe removing the waste water from the building with the appropriate public sewer. The Magistrates' Court was entitled to find that the provision was not satisfactory because the foul water from the pipe was discharged into the surface water sewer rather than a foul water sewer.

18 This case ultimately turns on the interpretation of s.59 of the Building Act. I note, however, that the interpretation that I have given to s.59 is in harmony with the arrangements governing sewers and access by householders and others to sewers. Those provisions are contained in the Water Industry Act 1991. That Act consolidates earlier enactments which, in fact, originate in Victorian times, as appears from *Barratt Homes Limited v DWR Cymru Cyfyngedig (Welsh Water)* [2009] UKSC, see especially para.6 and 15 and 16. In brief, s.94 of the Water Industry Act 1991 imposes a duty on every sewage undertaker to provide a system of public sewers. Section 98 imposes a duty on sewage undertaker to provide a public sewer to be used for the drainage for domestic purposes of premises in a particular locality. Section 102 provides for sewage undertakers to adopt a sewer. Section 106 provides for owners and occupiers of premises to have a right to communicate with public sewers, that is a right to have drains from his or her property discharge foul water and surface water into a sewer maintained by a sewage undertaker. There are provisions in s.109 dealing with when it would be lawful and unlawful so to do. The system therefore contemplates that the owner will have access to a public sewer and can ensure that waste water from his premises is transferred or conveyed into a sewer. There is no legal or physical impediment preventing an owner who is made the subject of a s.59 notice from being able to have access to the relevant sewer for the discharge of foul water.

19 I turn, then, to the particular arguments advanced by Mr Mustafa today. First, Mr Mustafa says that his building, in effect, makes adequate or satisfactory provision. The pipes installed for removing foul water at the three flats in 343A Green Lanes are, he says, perfectly adequate and they provide for the removal from his property of foul water. The foul water is taken from the property into the new pipe, down into the original cast iron pipe, much as it was in 1920, and out into the ground beneath the alleyway adjacent to his

property. If there is a problem, as there appears to be, he says it is a problem on adjacent land, the alleyway, where there has been a misconnection of the pipe and it has been connected to the surface water drain. That, he says, falls within the responsibility of the London Borough of Enfield and Thames Water. Mr Mustafa says it is their misconnection, in effect, which has created the problem, it is their responsibility, he says, to correct that problem. Furthermore, he submits that the likelihood is that the problems were, in fact, caused by the actions of the sewage undertakers when they connected the pipe to the wrong sewer rather than him or his predecessor.

20 On a proper interpretation of the Building Act 1984, however, the question is whether satisfactory provision is made in the case of a building for drainage. It is not a question of whether the building has the adequate or satisfactory provision in place for removing water from and conveying it away from the building and its curtilage. The issue is whether provision for drainage includes the provision of discharge into the sewer, in the case of a particular building. That is what has to be satisfactory. For the reasons I have given, the provision for drainage in the present case is not satisfactory because of the problems in getting access to or connecting with the correct sewer.

21 Secondly, Mr Mustafa relies on s.21 of the Buildings Act 1984. It is appropriate to look at the whole of the Act when interpreting s.59, but, for the reasons given, that supports the interpretation of the phrase "satisfactory provision" as including the arrangements for connection between the pipe and the sewage system.

22 Mr Mustafa makes a different or an additional point today. He submits that here the plans were approved, not rejected, by the local authority in about 1990. The provision was considered satisfactory by the authority in about 1990. Nothing has happened, he says, to make that provision unsatisfactory. Now, that would be a factual argument that the magistrates would have had to consider. On the facts, as I understand it, it is not clear whether the plans did include the current arrangements relating to the actual connection between the pipe and the surface water drain. It appears that the point was not argued in this way before the Magistrates' Court. There is certainly no ruling by the Magistrates' Court on whether, as a matter of fact, the arrangements were or were not included within a plan approved by the local authority. I accept, therefore, that I should not assume that, on the facts, that these arrangements, including the specific connection arrangements, were included with plans approved by the local authority. This issue is not part of this appeal.

23 Secondly, Mr Mustafa referred to the Water Industry Schemes for Adoption of Private Sewers Regulations 2011. He makes the point that the water company has taken over responsibility for these sewage systems and they are able to charge money for the services they provide as a result of taking over the sewage systems. In those circumstances, he submits that it is right and reasonable that they take responsibility for problems arising out of connections to the sewage systems. I understand the reasoning underlying Mr Mustafa's submission. However, the 2011 Regulations are dealing with a different question. They are dealing with who is responsible for the private sewers. They are not dealing with the specific question that this court is dealing with, which is whether or not the connection between pipes from a private premises to the sewers that had been adopted by the water company constitutes part of the provision of drainage in the case of a particular building. Those regulations, therefore, do not assist in reaching a conclusion on the proper interpretation of s.59 of the Building Act 1984.

24 Finally, there is one further matter that Mr Mustafa raises and raises very powerfully in the arguments he has put to this court today. He submits that the interpretation put forward by the authority and the water company and accepted by this court has the potential for unfairness. He says that a lack of satisfactory provision might be the fault of the water company, not the owner of the premises. For example, the water company might have done the connecting work and they might have made a mistake, they might have connected the pipe to the wrong drain. He says in those circumstances it would be unfair to make the owner bear the responsibility for the mistake of the water company. First, those considerations do not affect the interpretation of the words of s.59. Those are words adopted in an Act of Parliament and the responsibility of this court is to interpret and apply the words in an Act of Parliament. For the reasons that I have given, the words are clear and Parliament has decided that the arrangement for drainage in the case of a particular building include the arrangements for connecting the pipe taking water from the building to the sewage system and therefore the local authority can serve a notice under that section in this case.

25 Secondly, the situation is such that under s.106 a developer, rather than the water company, might, in fact, do the connecting work. In the case of an individual, for example Mr Mustafa, it might be unlikely that an individual would carry out the work and dig up the road and connect the water pipe to the sewer. However, in the case of a commercial developer, different considerations apply and they might well take on the responsibility, as they are entitled to under s.106, to carry out the work themselves. Section 59 must be given an interpretation that is capable of covering both situations, where the developer does the work or where the undertaker does the work. It cannot be assumed that Parliament was proceeding on the basis that it would always be the undertaker who did the work, so it would be odd if it placed responsibility on a person who might not be responsible for the work. Parliament was proceeding on the basis that it might be the undertaker or the developer. What Parliament was deciding was that if, in the interests of public health and environmental protection, work needed to be carried out, the owner could be served with a notice and, *prima facie*, the owner would have to bear the cost of the work necessary to safeguard public health and the environment.

26 Thirdly, however, Mr Ostrowski, for the local authority, submitted that there may be a means of remedy unfairness to any individual in the provisions governing an appeal to the Magistrates' Court against a notice under s.102. Section 102 provides for an appeal against a notice on a number of grounds and s.102(3) provides that the court may make such orders it thinks fit, with respect to, (1), the person by whom any works are to be executed and the contribution to be made by any other person towards the cost of the works or, (2), the proportions in which any expenses that may become recoverable by the local authority are to be borne by the appellant and such other person. Mr Ostrowski submits that that power, which is not confined, on his analysis, to the particular grounds of appeal or, indeed, to the appeal being successful, is a mechanism by which a Magistrates' Court could decide that another person, such as a water company or some other person or body, can be ordered to contribute towards the cost of the works. That, he submits, would be a way of addressing any potential unfairness to an individual who suddenly gets a s.59 notice requiring him to carry out works to remedy something that was not his fault. It is not necessary to reach a concluded view as to whether the interpretation of s.102(3) of the Building Act 1984 advanced by Mr Ostrowski is correct. It may be correct and it may address what otherwise might be perceived as unfairness.

27 On the facts of this case, however, there is nothing to suggest that the Magistrates' Court was asked to order Thames Water, or any other person or body, to bear some or all of the costs of the work involved. In any event, the Magistrates' Court did not make an order that somebody else should bear some of the costs of remedying the problem that has occurred in this case and the issue does not, therefore, form part of this appeal. Furthermore, there is nothing to suggest that the Magistrates' Court did, or was asked to, determine who was actually responsible for any action leading to the connection of the waste water pipe to the surface water drain. In those circumstances, it is not necessary, as I say, to reach a concluded view as to whether s.102(3) is a means of addressing any unfairness to any particular individual who receives a s.59 notice. It is better that that issue is determined on full argument in a case where it arises on the facts.

28 In the circumstances, therefore, in my judgment, this appeal must be dismissed. Satisfactory provision for drainage in the case of a building can include satisfactory provision for connecting the pipe removing waste or foul water to a sewer or lateral drain. I would therefore answer the question put by the magistrates in the following way:

> "It was open to the judge to find that unsatisfactory provision for drainage in the case of a building exists within the meaning of s.59 of the Building Act 1984 when foul water is conveyed down a vertical soil pipe and into a lateral drain carrying waste water away from the building to a surface water drain rather than a foul water sewer where the location i of this connection occurs on land that is not within the building's curtilage or vested in the owner of the building and both the lateral drain carrying the waste water away from the building and the surface water drain is owned by the local sewage undertaker."
