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Case No: HT-06-04

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 24/08/2007

Before :

THE HON. MR. JUSTICE RAMSEY

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Between :

Hanifa Dobson et al	**Claiman**
-and-	
Thames Water Utilities Limited	**Defenda**
-and-	
The Water Services Regulation Authority ("Ofwat")	**Intervene**

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John Hand QC;John Bates (instructed by **Hugh James**) for the **Claimants**

David Hart QC: Michael Daiches (instructed by **Osborne Clarke**) for the **Defendants**

Josh Holmes (Instructed by **Ofwat**) for the **Interveners**

Hearing dates: March 19,20,21, 2007

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Judgment

The Hon, Mr Justice Ramsey :

Introduction

1.
These proceedings between multiple claimants ("the Claimants") and Thames Water Utilities Limited ("Thames Water") arise from complaints made by the residents of Isleworth and Twickenham who live in the vicinity of the Mogden Sewage Treatment Works ("Mogden STW") situated in Mogden Lane, Isleworth, Middlesex.

2.
A Group Litigation Order dated 21 December 2005 applies to these proceedings. The Claimants are divided into two categories: those who have occupied properties as owners or lessees and those who have occupied without any legal interest in the properties.

3.

The Claimants served a Group Statement of Case on 9 March 2006 in which they pleaded that odours and mosquitoes from the Mogden STW have caused a nuisance; that they have been caused by the negligence of Thames Water and that Thames Water have breached rights under Article 8(1) of and Article 1 of the First Protocol to the European Convention on Human Rights 1950. As a result the Claimants seek damages for nuisance, negligence and damages under the Human Rights Act 1998 (the "HRA") for breach of their Human Rights.

4.
In the Defence to the Group Statement of Case, Thames Water raised various threshold defences to the claims. In particular, it contended that complaints about odour or mosquitoes from Mogden STW were complaints of a failure of its duties under s.94(1)(b) of the Water Industry Act 1991 (the "WIA") effectually to deal with the contents of sewers at Mogden STW and/or a failure to treat wastewater received and discharged by Mogden STW in accordance with the Urban Waste Water Treatment Regulations. Thames Water contends that such failures are enforceable under s.18 of the WIA by the Water Services Regulation Authority ("Ofwat"), which was substituted for the Director of Water Services by s. 34 of the Water Act 2003.

5.
As a result, Thames Water submits that no common law remedy or remedy under the Human Rights Act lies to enforce those duties, whether in nuisance, negligence, nuisance by reference to negligence or under the Human Rights Act because such causes of action are precluded by the decision of the House of Lords in Marcic v Thames Water Utilities Ltd.[2004] AC 42. In addition Thames Water raises various other defences in relation to damages and limitation.

6.
Because these proceedings raise matters which concern the duties of a sewerage undertaker under the WIA and the extent to which remedies involving Ofwat precluded other causes of action, Ofwat applied for permission to intervene in particular in relation to issues arising from the decision in Marcic. I granted permission on 27 October 2006 under CPR r 19.2.

7.
Directions were given for the identification and formulation of preliminary issues and for the agreement of any necessary factual assumptions. The final formulation of the issues was set out in an order dated 24 January 2007 which included at Annexure 1 the factual assumptions and legislative provisions on which the trial of the issues was to be based.

8.
Written submissions were provided on behalf of the Claimants, Thames Water and Ofwat and a hearing limited to oral submissions was held on 19, 20 and 21 March 2007.

9.
Mr John Hand QC and Mr John Bates appeared for the Claimants; Mr David Hart QC and Mr Michael Daiches appeared for Thames Water and Mr Josh Holmes appeared for Ofwat.

10.
The issues are conveniently divided into three categories:

(1)
The Marcic Issues (issues 1 to 5);

(2)

Damages Issues (issues 6 to 11);

(3)
Limitation Issues (issues 12 to 14).

The Marcic Issues

11.
The fundamental question which arises on issues 1 to 5 is the extent to which a common law remedy exists given the statutory provisions in s.94(1) of the WIA. This issue requires an analysis of those common law remedies and the provisions of the WIA in the light of the decision of the House of Lords in Marcic v Thames Water Utilities Ltd[2004] AC 42.

12.
In Marcic, a claim was made by Mr Marcic against Thames Water in respect of flooding to his property from an external sewer. He sought a mandatory order compelling Thames Water to improve its sewerage system. In addition he sought damages. He relied on a common law cause of action in nuisance and on Article 8(1) and Article 1 of the First Protocol of the European Convention of Human Rights 1950, as set out in Schedule 1 to the Human Rights Act 1998.

The Decision in Marcic

13.
It is convenient to make some general observations on the decision in Marcic before considering the issues which I have to determine.

14.
In the House of Lords, the two main speeches were by Lord Nicholls of Birkenhead and Lord Hoffmann. Lord Steyn and Lord Scott of Foscote agreed with both of those speeches. Lord Hope of Craighead agreed with the speech of Lord Nicholls but set out his own reasons in respect of Article 8(1) and Article 1. In summary, the House of Lords held that Mr Marcic could not succeed either on the basis of nuisance or under the Human Rights Act.

15.
In relation to nuisance, Lord Nicholls held at paras 33 and 34 that the “common law of nuisance should not impose on Thames Water obligations inconsistent with the statutory scheme” and that Mr Marcic’s claim was, in effect, that “Thames Water ought to build more sewers”. He said at para 35 that:

“Individual householders may bring proceedings in respect of inadequate drainage only when the undertaker has failed to comply with an enforcement order made by the Secretary of State or the director. The existence of a parallel common law right, whereby individual householders who suffer sewer flooding may themselves bring court proceedings when no enforcement order has been made, would set at nought the statutory scheme. It would effectively supplant the regulatory role the director was intended to discharge when questions of sewer flooding arise.”

16.
Lord Hoffmann said at para 64 that under the WIA and under previous legislation “the question of whether more or better sewers should be constructed has been entrusted by Parliament to administrators rather than judges” and that “These are decisions which courts are not equipped to make in ordinary litigation”. He said at para 70 that the WIA “makes it even clear[er] than the earlier

legislation that Parliament did not intend the fairness of priorities to be decided by a judge. It intended the decision to rest with the Director, subject only to judicial review. It would subvert the scheme of the [WIA] if the courts were to impose upon the sewage undertakers, on a case-by-case basis, a system of priorities which is different from that which the Director considers appropriate."

17.
In Marcic the relevant provision of the WIA was section 94(1)(a) which provides:

"(1) It shall be the duty of every sewerage undertaker-

(a) to provide, improve and extend such a system of public sewers (whether inside its area or elsewhere)… as to ensure that that area is and continues to be effectually drained."

18.
Section 94(3) of the WIA provides that "The duty of a sewerage undertaker under subsection (1) above shall be enforceable under section 18 above" by Ofwat.

19.
Under section 18(1) if Ofwat is satisfied that the company is contravening or is likely to contravene any statutory requirement which is enforceable under section 18 then Ofwat shall by a final enforcement order make such provision as is requisite for the purpose of seeking compliance with that requirement.

20.
Although section 18(1) indicates that Ofwat "shall" make a final enforcement order the mandatory nature of that requirement is reduced by two provisions. First, under section 18(2) Ofwat may, instead of making a final order, make a provisional enforcement order. Secondly, section 19(1) provides that, in summary, Ofwat shall not be required to make an enforcement order if satisfied that the contraventions are of a trivial nature or that the company has given and is complying with an undertaking or, importantly, that the duties imposed on Ofwat by Part I of the WIA precludes the making of an enforcement order. The provisions of Part I impose various requirements on the manner in which Ofwat can perform its duties which take into account wider considerations in relation to such matters as finance and charging, the position of all customers and environmental considerations.

21.
In Marcic therefore the House of Lords held that Mr Marcic could not bring a cause of action based on nuisance or breach of Human Rights in relation to the duty to provide, improve and extend the system of public sewers under section 94(1)(a) of the WIA.

22.
In this case the question raised is whether that "Marcic principle" applies to all the duties under section 94(1) and, in particular, those under section 94(1)(b) and, if so, whether that precludes the Claimants' pleaded causes of action based on nuisance, negligence and breach of Human Rights.

Nuisance

23.
The cause of action in nuisance alleged in Marcic was based on a line of authority built on the decision in Sedleigh-Denfield v. O'Callaghan[1940] AC 880, as applied in Goldman v. Hargrave [1967] 1 AC 645 and Leakey v. Natural Trust [1980] QB 485, with a similar approach being adopted in

Holbeck Hall Hotel Ltd v. Scarborough BC [2000] QB 836 and Delamere Mansions Ltd v. Westminster City Council [2002] 1 AC 321. I shall refer to this as nuisance based on the "Leakey principle".

24.
As Lord Nicholls said at para 32 of Marcic, the Leakey principle establishes "that occupation of land carries with it a duty to one's neighbour. An occupier must do whatever is reasonable in all the circumstances to prevent hazards on his land, however they may arise, from causing damage to a neighbour".

25.
In the context of Marcic the Leakey principle would require a court to decide, in particular, whether Thames Water owed a duty to take such steps as were reasonable in all the circumstances to prevent the discharge of surface and foul water onto Mr Marcic's property. Mr Marcic contended that this duty, in his case, required the construction of new sewers.

The duty to build new sewers

26.
The duty to build new sewers is one imposed on Thames Water by section 94(1)(a) of the WIA and is enforceable by Ofwat who have to take into account and balance a number of considerations. Under the WIA Thames Water therefore only has to comply with any enforcement order and only to the extent of that enforcement order.

27.
In principle, therefore, the Court could come to a conclusion that Thames Water should construct a new sewer as part of a remedy for the claim in nuisance whilst, at the same time, Ofwat might under the WIA determine not to issue an enforcement order or decide to issue one on terms which required different works to be carried out by Thames Water, to those required to remedy any nuisance.

28.
The reason in Marcic for not imposing a remedy at common law in nuisance was that the obligations imposed would be inconsistent with and conflict with the statutory scheme under the WIA.

29.
Lord Nicholls and Lord Hoffmann both referred to a line of authority dealing with remedies for breach of an obligation to make "such sewers as may be needed for effectually draining their district" under section 15 of the Public Health Act 1875 and a similar provision in section 14 of the 1936 Act.

30.
That line of authority was dealt with in para 30 of Marcic by Lord Nicholls and at para 54 to 55 by Lord Hoffmann. Lord Nicholls cited a passage from the judgment of Lord Esher in Robinson v. Workington Corporation[1897] 1QB 619 at 621 where he said:

"It has been laid down for many years that, if a duty is imposed by statute which but for the statute would not exist, and a remedy for default or breach of that duty is provided by the statute that creates the duty, that is the only remedy. The remedy in this case is under s. 299, which points directly to s. 15, and shews what is to be done for default of the duty imposed by that section. That is not the remedy sought for in this action, which is brought to recover damages."

31.

Lord Nicholls said that the existence of this general principle of statutory interpretation had been constantly followed in relation to the 1875 and 1936 Act.

32.
Lord Hoffmann dealing with the line of authority said at para 54 that “Until the decision of the Court of Appeal in this case, there was a line of authority which laid down that the failure of a sewage authority to construct new sewers did not constitute an actionable nuisance. The only remedy was by way of enforcement of the statutory duty now contained in section 94(1) of the 1991 Act, previously contained in section 14 of the Public Health Act 1936 and before that in section 15 of the Public Health Act 1875. The earlier Acts also had a special procedure for enforcement which the courts held to be exhaustive.”

33.
At para 55 Lord Hoffmann cited the following passage from the judgment of Denning LJ in Pride of Derby v. British Celanese Ltd [1953] Ch 149 at 190, as setting out the effect of the previous authorities:

“When a local authority take over or construct a sewage and drainage system which is adequate at the time to dispose of the sewage and surface water for their district, but which subsequently becomes inadequate owing to increased building which they cannot control, and for which they have no responsibility, they are not guilty of the ensuing nuisance. They obviously do not create it, nor do they continue it merely by doing nothing to enlarge or improve the system. The only remedy of the injured party is to complain to the Minister.” That was the Minister of Health, under the 1936 Act enforcement procedure.

34.
Lord Hoffmann also referred at para 56 to the passage in the judgment of Upjohn J in Smeaton v. Ilford Corporation[1954] Ch 450, a case where overloading caused the corporation's foul sewer to erupt through a manhole and discharge "deleterious and malodorous matter" into Mr Smeaton's garden.Upjohn J said, at 464-465: “No doubt the defendant corporation are bound to provide and maintain the sewers (see section 14 of the Public Health Act 1936), but they are not thereby causing or adopting the nuisance. It is not the sewers that constitute the nuisance; it is the fact that they are overloaded. That overloading, however, arises not from any act of the defendant corporation but because, under section 34 of the Public Health Act 1936 ... they are bound to permit occupiers of premises to make connexions to the sewer and to discharge their sewage therein ... Nor, in my judgment, can the defendant corporation be said to continue the nuisance, for they have no power to prevent the ingress of sewage into the sewer.”

35.
The emphasis in those passages is on the lack of control or responsibility of the local authority where an adequate system existed and becomes inadequate because of the increased use from new connections or buildings. That reasoning, it appears, is a, if not the, relevant policy consideration for not imposing liability in nuisance but rather limiting the remedy to that under statute.

The Leakey Principle

36.
The attack by Mr Marcic on those authorities in Marcic was based on the Leakey principle.

37.

Lord Nicholls said at para 33 that the cases from which the Leakey principle was to be derived "exemplify the standard of conduct expected today of an occupier of land towards his neighbour. But Thames Water is no ordinary occupier of land… The common law of nuisance should not impose on Thames Water obligations inconsistent with the statutory scheme".

38.
Lord Hoffmann said at paras 62 and 63 that the difference between that line of authority and cases relating to sewers was that Sedleigh-Denfield, Goldman and Leakey were "dealing with disputes between neighbouring land owners simply in that capacity as individual land owners. In such cases it is fair and efficient to impose reciprocal duties upon each landowner to take whatever steps are reasonable to prevent his land becoming a source of injury to his neighbour". He said that "the court in such cases is performing its usual functions of deciding what is reasonable as between the two parties to the action. But the exercise becomes very different when one is dealing with the capital expenditure of a statutory undertaking providing public utilities on a large scale."

39.
Lord Hoffmann referred to the wider considerations which arise in respect of such decisions and added at para 64 "Those are decisions which courts are not equipped to make in ordinary litigation. It is therefore not surprising that for more than a century the question of whether more or better sewers should be constructed has been entrusted by Parliament to administrators rather than Judges."

40.
It is evident from both speeches that in relation to a statutory undertaker's duty under section 94(1)(a) of the WIA "to provide, improve or extend such a system of public sewers", the statutory scheme of enforcement under the WIA was the only remedy and there was no remedy in nuisance.

41.
This case raises the wider question of whether the Marcic principle is limited to that particular duty under s94(1)(a) of the WIA or whether it applies more generally to the duties under sections 94(1)(a) and 94(1)(b).

42.
With these observations on the decision in Marcic I now turn to issues 1 to 5.

Issue 1: Are the Claimants seeking to enforce duties which arise under section 94(1)(b) WIA 1991 in respect of :

a.
Odours from the MSTW and/or

b.
Mosquitoes,

i.
falling within paragraph 19.1 of the Factual Assumptions and/or

ii.
falling within paragraph 19.2 of the Factual Assumptions?

Issue 1(b)(ii)

43.

I can deal immediately with the answer to issue 1(b)(ii). It is common ground that the claimants are not seeking to enforce duties under s.94(1)(b) in respect of mosquitoes which live and breed on the Mogden STW site but do so not as a result of the sewage or sewage sludge or the plant and equipment holding or treating the sewage sludge. In particular, there are mosquitoes which live and breed in areas of standing surface water and lush vegetation.

Issues 1(a) and 1(b)(i)

44.
In relation to the other parts of this issue, I have to consider the Claimants' claims in respect of odours from Mogden STW and the effects of mosquitoes, which "live and breed as a result of sewage or sewage sludge at Mogden STW and/or the plant and equipment at Mogden STW holding or treating such sewage or sewage sludge". Do those claims seek to enforce the duty under s. 94(1)(b) of the WIA?

45.
The Claimants contend that they are not seeking to enforce duties under section 94(1)(b) whereas Thames Water, supported by Ofwat, contends that the Claimants are seeking to enforce such duties.

46.
In construing the WIA it has to be borne in mind that it is a consolidating statute. As Peter Gibson LJ said in British Waterways Board v. Severn Trent Water Ltd[2002] Ch 25 at para. 6:

"The 1991 Act is a consolidation Act (with amendments, not material to this case, to give effect to recommendations of the Law Commission). As has recently been reaffirmed by the House of Lords in R. v Environment Secretary, Ex p. Spath Holme Ltd.[2001] 2 WLR 15, the court when construing a consolidation Act will normally seek to ascertain the intention of Parliament by looking only to the way that intention was expressed in the words used in that Act and will not construe that Act by reference to the repealed statutes which the enactment has consolidated. The good sense of that rule is obvious: there would be little benefit in consolidation if the ascertainment of the intention of Parliament required recourse to the antecedent legislation in the hope that that would provide a sufficiently clear indication of the meaning of the statutory language in the consolidating Act. But that rule is subject to exceptions. If there is an ambiguity in the consolidation Act or if the court finds itself unable to interpret a provision in that Act in the social and factual context which originally led to its enactment, then it will be permissible to look at the superseded legislation for such help as it may give (see p. 28 per Lord Bingham, with whom on this point Lord Nicholls and Lord Cooke agreed). The starting point is the consolidation Act itself."

47.
Here the relevant duty to consider is that under s. 94(1)(b). It is appropriate to consider the whole of s. 94(1) which provides:

"It shall be the duty of every sewerage undertaker -

(a) to provide, improve and extend such a system of public sewers (whether inside its area or elsewhere) and so to cleanse and maintain those sewers as to ensure that that area is and continues to be effectually drained; and

(b) to make provision for the emptying of those sewers and such provision (whether inside its area or elsewhere) as is necessary from time to time for effectually dealing, by means of sewage disposal works or otherwise, with the contents of those sewers."

The Claimants' Submissions

48.
The Claimants submit that s.94(1)(b) is only concerned with "effectually dealing… with the contents of sewers" and that this obligation is only concerned with getting rid of the contents of the sewers and not with environmental protection issues. In particular, the Claimants contend that:

(1)
Unlike s. 94(1)(a), there is no duty under s. 94(1)(b) to "maintain or cleanse" and one cannot be implied: South Wales Electricity plc v. Director General of Electricity Supply (The Times October 28, 1999).

(2)
"Effectually dealing" with the contents is a question of degree. The existence of odours or mosquitoes does not mean the contents of the sewers have not been effectually dealt with.

(3)
Effectually dealing with the contents does not extend to treatment of the contents. The dictionary definition of to "deal with" something is "to act in regard to, administer, handle, dispose in any way of (a thing)". The Claimants draw support for this meaning from the use of the word "disposal" as describing the duty to deal effectually with the contents of sewers in the judgment of Simon Brown LJ in R v. Falmouth & Truro Port Health Authority ex parte South West Water Ltd [2000] 3 All ER 306.

(4)
British Waterways Board v. Severn Trent Water Ltd at para 41 illustrates the Claimants' contention that the duty in section 94(1)(b) is concerned with "getting rid" of the contents of sewers rather than environmental protection. The Claimants contend that the reference to "provided that it does not cause pollution" is a reference to the requirements of s. 117(5) and s.186(3), even though these provisions do not apply to s. 94 as set out in para. 84 of the judgment, otherwise those provisions would be otiose.

49.
The Claimants submit that the considerations which arose in Marcic in relation to s.94(1)(a) do not apply here. The Claimants refer to the assumed fact that the emission of odours and the infestation of mosquitoes have been caused by the negligence of Thames Water, and submit that there is no question of the nuisance arising because of the duty of Thames Water to accept connections to its sewerage system under s.106 of the WIA. The Claimants contend issues of capital expenditure and the regulation of the industry by Ofwat which arise under s 94(1)(a) do not arise under s.94(1)(b). The Claimants submit that Thames Water has other sources of finance and the fact that Ofwat might allow works to abate the nuisance as part of the price setting process is irrelevant. Further the Claimants submit that the question here is not whether sewage works with greater capacity should be built, which is equivalent to "better sewers" in Marcic. The Claimants submit that the relevant issue is the need for sewage works with "better environmental controls" which falls outside Marcic. Rather, the Claimants contend that the issue is the use of the sewage works or a failure to cleanse and maintain, not a question of capacity.

50.
Therefore, the Claimants submit that no complaint lies to Ofwat based on s.94(1)(b) in respect of pollution of waters by sewers or STWs or for odours and mosquitoes arising from that source.

51.
Further the Claimants also say that if the causes of action which they seek to pursue were ones by which they were seeking to enforce s. 94(1)(b) duties then under Marcic a cause of action in nuisance would be excluded. In the circumstances, the Claimants contend that if a cause of action in nuisance were not available then the effect of s.94(1)(b) of the WIA would be to give a right to the statutory undertaker to cause a nuisance by odour and mosquitoes from STWs if measures to abate the nuisance would not be cost effective. The Claimants point to agreed fact 15: "There is no statutory compensation scheme under the Water Supply and Sewerage Services (Customer Services Regulations) 1989 (as amended) regarding nuisance in respect of odours, mosquitoes or otherwise from sewage treatment works."

52.
Finally, the Claimants refer to s. 80 of the Environment Protection Act 1990 ("the EPA") which enables a local authority to serve an abatement notice in respect of a "statutory nuisance" and to s. 82 which provides for an individual to issue a summons in the magistrate's court in respect of such a nuisance. The Claimants refer to the decision in London Borough of Hounslow v. Thames Water Utilities Limited[2003] EWHC 1197 (Admin) arising out of the odour at Mogden STW as showing that odour from sewage treatment works is capable of being a statutory nuisance under section 79(1)(d) of the EPA.

53.
In addition, the Claimants refer to a Code of Practice on Odour Nuisance from Sewage Treatment Works issued by DEFRA which sets out the practice to be followed by local authority environmental health officers in respect of statutory nuisance proceedings under the EPA. The Claimants refer to Ofwat's response to the DEFRA consultation on that code and submit that Ofwat did not seek to argue that the enforcement regime under the WIA was an exclusive regime, in the context of that provision of the EPA.

54.
As a result, the Claimants contend that they are not seeking to enforce duties which arise under s. 94(1)(b) but are seeking to enforce separate common law rights or rights under the Human Rights Act 1998.

Submissions by Thames Water

55.
In response, Thames Water submits that clause 94(1)(b) contains two duties. The first is a duty to make provision for emptying the sewers and the second is a duty to make provision for effectually dealing with the contents of the sewers.

56.
Thames Water submits that the duty to empty under the first part of s. 94(1)(b) means that the second part of that sub-section applies to the contents when emptied and is aimed at dealing with the contents of the sewers. Further Thames Water submits that the contents cannot be effectually dealt with unless that phrase includes treatment where necessary, so as to reduce the harmful and polluting effects of the sewage, typically such treatment being carried out in a sewage disposal works.

57.
In particular Thames Water refers to:

(1)
s. 219(1)(b) of the WIA where disposal is defined as including treatment.

(2)
s. 219(2)(b) and s. 219(1) of the WIA as showing that sewage disposal works do not fall within the definition of sewers.

58.
Thames Water also relies on the words “as is necessary from time to time” in s.94(1)(b) as implying that what is necessary may vary over time and therefore requires a sewage undertaker to improve or upgrade the treatment methods.

59.
Thames Water says that like the duty to ensure that an area is “effectually drained” in s. 94(1)(a), the duty to make provision for “effectually dealing” with the contents of the sewer is not absolute. Rather, Thames Water submits that the duty in both cases is one which has to be complied with to the standard ultimately determined by Ofwat.

60.
Thames Water also relies on the provision of the Urban Waste Water Treatment (England and Wales) Regulations 1994 SI 2841 which implements an EC Council Directive by amending s. 94 of the WIA as follows by Regulation 4(4):

“The duty imposed by subsection (1)(b) of the said section 94 shall include a duty to ensure that urban waste water entering collecting systems is, before discharge, subject to treatment provided in accordance with regulation 5, and to ensure that—

(a) plants built in order to comply with that regulation are designed (account being taken of seasonal variations of the load), constructed, operated and maintained to ensure sufficient performance under all normal local climatic conditions;

(b) treated waste water and sludge arising from waste water treatment are reused whenever appropriate; and

(c) disposal routes for treated waste water and sludge minimise the adverse effects on the environment.”

61.
This provision, Thames Water submits, shows that under this amendment Ofwat has the duty to ensure that disposal routes minimise the adverse effects on the environment and therefore it cannot be argued that s 94(1)(b) is not concerned with environmental protection.

62.
Thames Water states that it is not contending for an implied term or that the substance of the Claimants’ complaint is that Thames Water failed to cleanse and maintain. Rather Thames Water submits that the Claimants are saying that Thames Water omitted to make “further provision” as was “necessary from time to time for effectually dealing” with the contents of the sewers and that all such questions are matters solely for Ofwat.

63.

Thames Water does not accept that the statutory scheme differs between s. 94(1)(a) and s. 94(1)(b). It submits that the two sub-sections are clearly related and, although dealing with different operations, are both the subject of precisely the same statutory enforcement scheme.

64.
In response to the Claimants' contention that, as construed by Thames Water, s.94(1)(b) would give them a right to commit a nuisance without compensation, Thames Water submits that:

(1)
There is nothing objectionable in that conclusion and that this was the effect of the decision in Marcic based on s.94(1)(a).

(2)
The Severn Trent Water case was concerned with trespass which is actionable without proof of damage and is therefore distinguishable.

(3)
The ability of Ofwat to act by making enforcement orders means that the period for compensation under s. 94(1)(b) would be limited.

65.
Thames Water submits that the Claimants' claim, in summary, is that Thames Water should have dedicated more resources to addressing odours and mosquito problems at Mogden STW. This, Thames Water contends, is where Ofwat's involvement under the statutory scheme conflicts with such complaints being dealt with in Court. Thames Water states that Ofwat is concerned with:

(1)
The impact of capital expenditure on water charges.

(2)
The impact of operating expenditure on water charges.

(3)
The requirement for water charges to represent a fair return on capital.

66.
Thames Water refers to paragraphs 11 to 13 of the Factual Assumptions and submits that Ofwat's authorisation of limited capital expenditure for reduction of odour emissions shows that, if the courts could decide on the requirement for emission reduction, there would be likely to be inconsistent determinations by Ofwat and the courts. Further, the fact that Thames Water has other sources of revenue does not, Thames Water submits, affect the position because there was the same situation in Marcic.

67.
Thames Water submits that the decision in Baron v. Portslade UDC is distinguishable because the breach of the duty to cleanse sewers was not enforceable by the statutory regime existing at that time, whereas here under s.94(1)(b) and s.94(3) of the WIA, the duty is only enforceable by Ofwat under s. 18.

Submissions by Ofwat

68.

Ofwat supports the submissions made by Thames Water and submits that the duty to make provision for effectually dealing with the contents of sewers under s.94(1)(b), on its natural meaning, encompasses an obligation to treat the sewage in such a way as to render it reasonably harmless and inoffensive. Ofwat contends that sewage is not effectually dealt with if it gives rise to unreasonable odours or to insect infestations while at a sewage treatment works.

69.
Ofwat submits that the wider statutory context supports the natural meaning and it adopts Thames Water's submissions regarding the Urban Waste Water Treatment (England and Wales) Regulations 1994. Ofwat also refers to its general environmental duty when formulating any proposals relating to any functions of a relevant undertaker. That duty, under s.3(2)(c) of the WIA is to "take into account any effect which the proposals would have on the beauty or amenity of any rural or urban area or on any such flora, fauna, features, buildings, sites or objects". In Ofwat's submission, there is no basis for construing s.94(1)(b) as being concerned only with "getting rid of the contents of sewers" to the exclusion of "environmental protection"

70.
Ofwat submits that the Claimants cannot gain support from various matters:

(1)
The British Waterways Board case does not support the contention that section 94(1)(b) is confined to getting rid of the contents of sewers. On the facts of that case it was only the question of discharge of water from sewers into canals and watercourses which was in issue. The reference by Peter Gibson LJ to the need for a sewerage undertaker not to "cause pollution" when discharging the contents of sewers is a corollary of the duty of effectual dealing and not,as the Claimants contend, a reference to the requirements of sections 117(5) and 186(3) WIA which Peter Gibson LJ notes in paragraph 42 "do not extend to the functions in section 94".

(2)
R v. Falmouth and Truro Port Health Authority did not concern the scope of section 94(1)(b). Simon Brown LJ referred to the "disposal" rather than the "treatment" of sewage because the case involved discharge. In any event, the Claimants appear to acknowledge that "disposal" encompasses disposal by treatment at a sewage works.

(3)
The DEFRA Code of Practice on Odour Nuisance and the judgment in London Borough of Hounslow do not support the proposition that s. 94(1)(b) cannot encompass an obligation to avoid the unreasonable emission of odours from sewage treatment works. In so far as they might suggest that the statutory nuisance regime applies to the emission of odours from sewage treatment works, nothing in the DEFRA Code could affect the proper construction of s. 94(1)(b) and Hounslowwas decided before the House of Lords' decision in Marcic.

Decision

71.
The central question is whether the Claimantsare seeking to enforce duties which arise under s. 94(1)(b) WIA in respect of odours from the Mogden STW and/or mosquitoes.

72.

Thames Water, supported by Ofwat, contends that the Claimants are seeking to enforce the duty on Thames Water, as a sewerage undertaker, to make such provision as is necessary from time to time for effectually dealing, by means of sewage disposal works or otherwise, with the contents of those sewers. The issue between the parties is whether the phrase “effectually dealing” means that Thames Water has to deal with the contents of the sewers so as to avoid odours or mosquitoes.

73.
It is common ground that what is needed to deal effectually with the content of sewers is a matter of degree. However, where the contents of a sewer when emptied at a sewage treatment works causes odours and mosquitoes then I consider that, on the natural meaning of that phrase, the contents of the sewers have not been effectually dealt with.

74.
I reach this conclusion for the following reasons:

(1)
The provision in s. 94(1)(b) has two obligations: to empty the contents and to deal with the contents. Whilst in some circumstances merely emptying the contents might “effectually deal” with that contents, there will generally be something further that has to be done.

(2)
If the obligation to deal effectually were limited to “getting rid” of the contents then it is difficult to see what more would have to be done that was not covered by the obligation to “empty” the contents.

(3)
What has to be done is a matter of degree. The obligation under s. 94(1)(b) expressly refers to “effectually dealing” as being “by means of sewage disposal works or otherwise.” The fact that a sewage disposal works is one of the means indicates that such a process may be necessary. Under the WIA “disposal” is defined under s. 219(1)(b) which states “disposal…in relation to sewage, includes treatment”. In those circumstances, what has to be done to deal effectually with the contents of sewers includes treatment.

(4)
There is no need to imply any duty to “maintain or cleanse”, as suggested by the Claimants. The obligation to deal effectually with the contents of sewers imposes a sufficient relevant obligation.

(5)
There is a requirement to have regard to environmental pollution as part of the duty under s. 94(1)(b). This, in my judgment, is consistent with s. 3(2)(c) of WIA and the amendment to s. 94(1)(b) introduced by Regulation 4(4) of the Urban Waste Water Treatment (England and Wales) Regulations 1994 which is premised on the basis that treatment may be included as part of the process of effectually dealing with the contents of sewers under s. 94(1)(b).

(6)
One of the purposes of the requirement for effectually dealing with the contents is therefore to treat the sewage in such a way as to render it reasonably harmless and inoffensive. I consider that this would include treatment so that it does not give rise to unreasonable odours or to insect infestations, while at a sewage treatment works.

75.

I gain support for this view from the decision in the British Waterways Board case. The question in that case was whether Severn Trent Water had an implied power, incidental to the power to lay and maintain pipes, to discharge the pipes into any available watercourse. In that case, they sought to discharge non-foul surface water into the Stourbridge Canal. In finding that there was no such implied power Peter Gibson LJ, with whom Chadwick and Keene LJJ agreed, relied on s. 94(1)(b) of WIA as directly addressing the question of discharge and imposing on the sewerage undertaker provisions for emptying and effectually dealing with the contents of sewers.

76.
Peter Gibson LJ said at para 41: "It can do this by discharge into rivers or the sea (provided that it does not cause pollution or offend environmental controls), by discharge onto its own land (and I have already noted the compulsory purchase power conferred bysection 155 subject to the authority of the Secretary of State), including via its own sewage works, or by procuring the consent of the landowner, such as occurred in the present case until the licence was terminated." (emphasis added).

77.
The reference to requirement that the discharge should "not cause pollution or offend environmental controls" is, in my view, derived from the natural meaning of the phrase "effectually dealing". It is not derived from s. 117(5)(b) or s. 186(3) of the WIA, as the Claimants suggest. S. 117(5)(b) requires a sewerage undertaker not to discharge "without the water having been so treated as not to affect prejudicially the purity and quality of the water" into which it flows and s. 186(3) prevents a sewerage undertaker from "injuriously affecting the supply, quality or fall of water". As the WIA shows and as Peter Gibson LJ expressly stated in para 42: "the prohibitory provisions of section 117(5)(b) and section 186(3) do not extend to the functions insection 94". He did not, I consider, base his conclusions in para 41 upon any other provisions of the WIA but on the meaning of s. 94(1)(b).

78.
I derive no assistance on the need for treatment as part of disposal from the passage in the judgment of Simon Brown LJ inR v. Falmouth and Truro Port Health Authority where after referring to the duty under s. 94(1) to deal effectually with the contents of sewers he made the general comment "It is, therefore, required to dispose of the sewage of Falmouth." That has to be viewed in the context of a case dealing with discharge into an estuary. In any event "disposal" is defined to include "treatment" under the WIA.

79.
Whilst I accept that Ofwat's comments on the DEFRA Code of Practice on Odour Nuisance and the judgment in London Borough of Hounslow might be seen as lending support to the Claimants' contention that a cause of action in nuisance is not seeking to enforce s.94(1)(b) duties, I do not consider that they do support it. Ofwat's comments cannot affect the meaning of the statute and London Borough of Hounslow was decided before the House of Lords' decision in Marcic and proceeded on a narrow point as to whether the Mogden STW were "premises" under s. 79(1)(d) EPA without considering the wider issues in Marcic.

80.
I consider that if, in practical terms, the Claimants are seeking to enforce duties which arise under s. 94(1)(b) then it is under Issue 2 that the effect of that conclusion falls to be determined in terms of its impact on causes of action in nuisance and negligence. Thus I consider that whether, in accordance with the assumed facts, the emission of odours and the infestation of mosquitoes have been caused by the negligence of Thames Water, are matters which may be relevant to Issue 2 and the scope of the

principle in Marcic. Equally whether, if a cause of action in nuisance were not available then the effect of s.94(1)(b) of the WIA would be to give a right to the statutory undertaker to cause a nuisance by odour and mosquitoes, is also a matter to be considered under Issue 2.

81.
Issue 1 is concerned with whether the Claimants are seeking to enforce duties which arise under s. 94(1)(b). That is a question of interpretation of that statute in the light of the claim made by the Claimants. In Marcic the claim was not phrased as a claim under s. 94(1)(a) any more than the Claimants here seek to rely on s. 94(1)(b). In Marcic the claim was, in practical terms, that "Thames Water ought to build more sewers". I consider that in this case the claim is, in essence, that "Thames Water ought to make further provision for effectually dealing with the contents of sewers."

82.
In principle, I cannot see why issues of capital expenditure and the regulation of the industry by Ofwat which arise under s 94(1)(a) do not arise under s.94(1)(b). Thames Water may have other sources of finance but that is no different to the position in Marcic. If, as the Claimants submit, there is a need for sewage works with "better environmental controls" then I do not consider that this falls outside the statutory regime of s. 94(1)(b). I accept, as Thames Water submits, that questions of whether Thames Water omitted to make "further provision" as was "necessary from time to time for effectually dealing" are matters which are best determined by Ofwat.

83.
In summary, I therefore consider that the Claimants are seeking to enforce duties which arise under section 94(1)(b) of the WIA in respect of odours from Mogden STW and/or Mosquitoes which "live and breed as a result of sewage or sewage sludge at Mogden STW and/or the plant and equipment at Mogden STW holding or treating such sewage or sewage sludge".

84.
Accordingly, the answer to Issue 1(a) and Issue 1(b)(i) is "yes" and to Issue 1(b)(ii) is "no".

Issue 2: If so, are they precluded from bringing a claim in,

a.
Nuisance, absent any negligence,

b.
Nuisance involving allegations of negligence,

c.
Negligence

d.
Under the Human Rights Act 1998

by reason of the principle in Marcic, or does section 18(8) WIA 1991 enable the bringing of such claims despite the principle in Marcic?

85.
The parties' cases on this Issue 2, as finally formulated, were as follows:

Issue 2(a):

Claimants: No, so long as the nuisance is actionable at common law; in any event, nuisance, without negligence, is not alleged by the Claimants.

Thames Water: Yes, C's exclusive remedy is by way of complaint to Ofwat.

Ofwat: Yes

Issue 2(b):

Claimants: No

Thames Water: Yes, C's exclusive remedy is by way of complaint to Ofwat.

Ofwat: No, insofar as the claims involve allegations of negligence in the operation of the sewage treatment works.

Issue 2(c):

Claimants: No

Thames Water: Yes, C's exclusive remedy is by way of complaint to Ofwat.

Ofwat: No, insofar as the claims involve allegations of negligence in the operation of the sewage treatment works.

Issue 2(d)

Claimants: Yes, if any HRA claim is in respect of an alleged infringement of Convention rights which on the facts would not be actionable at common law because it would be inconsistent with WIA; otherwise, no.

Thames Water: Yes, C's exclusive remedy is by way of complaint to Ofwat and Marcic decides that the statutory scheme is within the margin of appreciation.

Ofwat: No, insofar as the claims involve allegations of negligence in the operation of the sewage treatment works.

Nuisance, absent Negligence

86.
This issue appears to be of academic interest as the Claimants do not rely on nuisance in the absence of negligence.

87.
In Marcic the main ground for the claim was on the basis of nuisance. The Court of Appeal [2002] QB 929 at [83] held that Thames Water were "under a duty to Mr Marcic to take such steps as, in all the circumstances, were reasonable to prevent the discharge of surface and foul water onto Mr Marcic's property." That decision was reversed by the House of Lords on the basis that an action in nuisance was inconsistent with and excluded by the statutory scheme. In doing so the House of Lords distinguished the position of a statutory undertaker from that of an ordinary occupier of land on whom a duty rests based on Goldman v. Hargrave[1967] 1 AC 645 and Leakey v. National Trust [1980] QB 485.

88.

In my judgment because, as determined in Issue 1, the Claimants are seeking to enforce duties which arise under s. 94(1)(b) WIA in respect of odours from Mogden STW and/or Mosquitoes, the principle in Marcic would preclude them from bringing a claim in nuisance based on the Leakey principle, absent any negligence. The Claimants are therefore precluded from bringing a claim in nuisance, absent any negligence.

Nuisance involving allegations of Negligence

The Claimants' submissions

89.
The Claimants submit that their claim is based on Allen v. Gulf Oil Refining[1981] AC 1001 which was a claim in nuisance involving allegations of negligence. On that basis they contend that the statutory scheme does not, and was not intended to, give Thames Water statutory immunity for negligence, which is not a cause of action which is inconsistent with the statutory scheme.

90.
In Marcic the Claimants submit that the basis of the cause of action in nuisance under the principle in Leakey was confined to non-feasance in the form of the negligent failure to fulfil the statutory duty; it did not extend to misfeasence in the form of a negligent failure to cleanse or maintain the sewers: see Lord Nicholls at para. 34 and Lord Hoffmann at para 53. The Claimants state, however, that in this case they base their claim not on Leakey but on Allen v. Gulf Oil.

91.
The Claimants submit that Marcic is not authority that sewerage undertakers enjoy blanket immunity for negligence where they have created the harm. They submit that any such immunity would not be consonant with recent developments in the law, as in Kane v. New Forest District Council[2001] EWCA Civ 878 at para. 33 and that making blanket exceptions for negligence is contrary to art 6 of the ECHR: Barrett v. Enfield LBC[2001] 2 AC 550 at 559.

92.
The Claimants rely on the speech of Lord Hutton in Barrett v. Enfield LBC at 583 where he said "It is only where the decision involves the weighing of competing public interests or is dictated by considerations which the courts are not fitted to assess that the courts will hold that the issue is non-justiciable on the ground that the decision was made in the exercise of a statutory discretion." They also refer to the distinction between 'policy' and 'operational' decisions drawn by Lord Browne Wilkinson in Barrett v. Enfield LBC at 557.

93.
As a result, the Claimants submit that where the operational decision of a statutory authority can be shown to have been negligent and caused harm to the Claimants there is no weighing of competing public interests and the court is fitted to assess the negligence involved and its consequences. Such an action would not be inconsistent with the statutory scheme. Accordingly they submit that an action in nuisance involving allegations of negligence can be brought when a sewerage undertaker has created harm by its operations, even if odour and mosquito control fall under the duty in s. 94(1)(b).

94.
The Claimants also submit that section 18(8) WIA enables them to bring an action where the breach of the duty in section 94(1)(b) is the result of an act or omission caused by negligence in the sense used

by Lord Wilberforce in Allen v. Gulf Oil at 1011. They also rely on the decision of Dyson J in Queally v. London Borough of Brent (Unreported, December 6, 1996) at paras 23 – 30.

95.
The Claimants contend that Thames Water is wrong to submit that any action that requires spending by an undertaker is ruled out as that would mean that hardly any claim could be brought under s. 18(8). The Claimants rely on the judgment of Moses LJ in Thames Water Utilities v. Ministry of Defence[2006] EWCA Civ 1620 (B5/4) at para. 50 as showing that claims for restitution could be brought and, in such a case would have to be met from the resources of Thames Water.

96.
The Claimants rely on para 27 of Queally as drawing a crucial difference on the wording of s. 18(8) WIA between remedies for acts or omissions which constitute contraventions of statutory or other requirements enforceable under section 18 and acts or omissions in the performance of statutory duties rather than acts or omissions which constituted breaches of those duties. They submit that common law claims are limited to acts or omissions which constitute a contravention of section 94(1)(b) but that an action may be brought, as here, in respect of acts or omissions involved in the performance of the duties under section 94(1)(b).

Submissions by Thames Water

97.
Thames Water notes that the Claimants' claim is based on the principle inAllen v Gulf Oil rather than Leakey. Thames Water submits that if it can establish that, by reason of the Marcicprinciple, it was not under any relevant legal duty in relation to the omissions relied on by the Claimants, it will have established that noneof those omissions can be relied on by the Claimants as constituting a failure by Thames Water to conduct its operations with all reasonable regard and care for the interests of other persons.

98.
Thames Water submits that it was not under any legal duty in relation to the omissions relied on by the Claimants because any such duty is inconsistent with the statutory scheme which requires effectual dealing with the contents of sewers, and the Claimants' allegations all amount to complaints about the way in which Thames Water has failed properly to perform that duty.

99.
Thames Water submits that the decisions cited by the Claimants (Kaneand Barrett) can be distinguished because it is not claiming blanket immunity whatever the facts; it is claiming a specific "immunity" in relation to omissions which amount, if proven, to breaches of the statutory duty imposed by s.94(1) and for which the Claimants have remedies under the statute.

100.
In relation to the Claimants' suggested distinction between "policy" and "operational" decisions, Thames Water submits that there is no relevant distinction and it is not clear that Lord Browne-Wilkinson in Barrett v. Enfield LBC was accepting that there was. But in any event Thames Water submits that omissions which constitute a breach of the s.94(1)(b) statutory duty to treat the contents of sewers "effectually" (including the omissions alleged at paras 18 and 21 of the agreed factual assumptions) are as capable of falling within the "policy" category as they are in the "operational" category; it is a matter of "policy" as to what the relevant standard ought to be and it is up to Ofwat, not the courts, to determine the relevant standard. Thames Water refers, by way of example, to the

question of an odour standard and submits that differing standards may have profound effects on the Ofwat price determination process.

101.
In relation to s. 18(8) WIA, Thames Water submits that the duties asserted by the Claimants would, as set out above, be inconsistent with the statutory scheme. In Thames Water Utilities Ltd v Ministry of Defenceit was held that an ordinary claim for restitution was not inconsistent with the statutory scheme. As to Queally, it was a first instance decision which was decided before the House of Lords decision in Marcic. In deciding a further issue of law on misfeasance/non-feasance grounds Dyson J appears to have rejected the Marcicprinciple completely at paragraph 45.

102.
Moreover, Thames Water submits that a particular omission might be seen as either constituting a breach of a statutory duty or performance of a statutory duty. In Marcic, the omission to build new sewers might have constituted negligent performance of the statutory duty. However, if it be relevant, Thames Water submits that the omissions relied on by the Claimants constitute the non-performance of a statutory duty (under s.94(1)(b)), and do not constitute omissions in the performance of the statutory duty.

Submissions by Ofwat

103.
Ofwat submits that the Marcic principle is not confined to section 94(1)(a) but extends beyond claims requiring more sewers to be built and also encompasses claims that better sewers should be built (overlapping with the section 94(1)(a) duty) and similarly that better sewage works should be built (overlapping with the section 94(1)(b) duty). Ofwat submits that all of these cases raise the same issues of resource expenditure and regulatory balancing which weighed with the House of Lords in Marcic.

104.
However, Ofwat submits that in Marcic a class of claims was expressly preserved where the cause of complaint arises from fault on the part of a sewerage undertaker in the manner in which it operated its sewers or sewage treatment works. Ofwat therefore submits that there is still scope for claims to be brought (whether framed in nuisance, negligence or under the HRA 1998) insofar as they involve allegations of negligence by the sewerage undertaker provided that they involve negligence in the physical operation of the works or the sewers.

105.
Ofwat submits that the decision in Marcic was based on the need to preserve to Ofwat its statutorily assigned role in determining what level of resource it is in the public interest to commit to improving the sewer network; it was not confined to claims that more sewers should be built (s. 94(1)(a)). Ofwat refers to the speech of Lord Hoffmann where he expressly extended it to encompass claims that “better sewers” should be built. Ofwat submits that the principle applies with equal force to claims that better sewage treatment works should be built (s. 94(1)(b)) and that any other interpretation would introduce an arbitrary distinction into this area of the law so that upgrading of sewers would be excluded under Marcic whilst the upgrading of sewage treatment works would not and a claim related to flooding would be excluded under Marcic whilst other consequences of the sewage or its treatment would not.

106.

Ofwat also submits that the speeches of Lord Nicholls and Lord Hoffmann not only explained the nineteenth and twentieth century case-law on sewer flooding but also extended it to Mr Marcic's action under the Human Rights Act 1998, on the basis of a broader policy concern to avoid undermining the statutory scheme under the WIA and the role accorded to Ofwat under that scheme. Ofwat refers to para 28 and 30 to 33 of the judgment of Pill LJ in Thames Water Utilities Ltd v. Ministry of Defence[2006] EWCA Civ 1620 as supporting the broader interpretation of Marcic.

107.
However, Ofwat does not support the Defendants' broad proposition that Marcic decided that "all questions relating to a complaint which, in substance, amount to a complaint that a statutory sewerage undertaker has omitted to perform a statutory duty enforceable by Ofwat, must be determined solely by Ofwat".

108.
Ofwat submits that the Marcicprinciple does not supply a defence against all claims in respect of matters which also fall within an undertaker's statutory duties under section 94(1) WIA. Ofwat points out that in Marcic it was not alleged that the sewerage undertaker had failed to operate the sewerage system properly and both Lord Nicholls and Lord Hoffmann referred to the absence of any allegation that the Defendant had failed to "cleanse and maintain" its sewers. In doing so Ofwat submits that their Lordships were not suggesting that all breaches of an undertaker's statutory duty under section 94 WIA were immune from challenge at common law or under the HRA.

109.
Ofwat submits that if the Marcicprinciple were given too wide an ambit, it would leave s. 18(8) WIA without any useful purpose. If claims in nuisance, negligence, or under the HRA are subject to their own internal limitations such that they may neverbe brought against a sewerage undertaker where statutory duties under s. 94(1) are engaged, there would be no need for s. 18(8) expressly to preserve the scope for such claims.

110.
Ofwat submits that it is reasonable to assume that their Lordships in Marcic intended to preserve scope for claims to be brought arising out of allegations of negligence in the physical operation of sewers or sewerage treatment works. It refers to the emphasis placed on the fact that the Defendant in Marcicwas not accused of having failed to operate its sewerage system properly. In addition, it submits that such allegations are unlikely to raise the issues of regulatory balancing and infrastructure investment which were the focus of the decision in Marcic.

111.
Ofwat submits that as a matter of policy, their Lordships were concerned to reserve to Ofwat the task of determining an appropriate level of services to be supplied by sewerage undertakers given the resulting resource implications for undertakers and customers and it was those issues of prioritisation and the balancing involved which were regarded as being inherently unsuited for judicial determination. However, Ofwat submits that where sewage flooding, odour or insect nuisance can be shown to follow not from a failure to invest resources in upgrading the sewage network, but rather from some specific operational failing on the part of an undertaker, the concern underlying the House of Lords' decision in Marcicdoes not arise.

112.
Ofwat states that it would not be unduly difficult to distinguish between allegations to the effect that more resources should have been committed under the regulatory framework which would fall under

the Marcic principle and allegations that existing infrastructure has not been properly operated which would not.

Decision

113.
The Claimants in this case assert claims on the basis of Allen v. Gulf Oil[1981] AC 1001. In that case an inhabitant of a neighbouring village brought proceedings in relation to construction and operation of an oil refinery which had been constructed by Gulf Oil under the Gulf Oil Refining Act 1965. Those proceedings were for nuisance in the operation of the refinery, alternatively for negligence in the construction and operation of that refinery.

114.
Lord Wilberforce, with whom the majority agreed, set out the relevant principles which apply to a case where there is statutory authority. He said at 1011:

“We are here in the well charted field of statutory authority. It is now well settled that where Parliament by express direction or by necessary implication has authorised the construction and use of an undertaking or works, that carries with it an authority to do what is authorised with immunity from any action based on nuisance. The right of action is taken away: Hammersmith and City Railway Co. v. Brand(1869) L.R. 4 H.L. 171, 215 per Lord Cairns. To this there is made the qualification, or condition, that the statutory powers are exercised without "negligence" - that word here being used in a special sense so as to require the undertaker, as a condition of obtaining immunity from action, to carry out the work and conduct the operation with all reasonable regard and care for the interests of other persons: Geddis v. Proprietors of Bann Reservoir(1878) 3 App.Cas. 430, 455 per Lord Blackburn. It is within the same principle that immunity from action is withheld where the terms of the statute are permissive only, in which case the powers conferred must be exercised in strict conformity with private rights: Metropolitan Asylum District v. Hill(1881) 6 App.Cas. 193.”

115.
The question is whether the cause of action based on negligence which defeats the defence to statutory authority can also be relied on by the Claimants to defeat or overcome the Marcic principle.

116.
In Marcic in the House of Lords, whilst there was a reference to Allen in argument, it was not referred to in the speeches. The case proceeded on the basis that liability in nuisance was to be established on the principles in Leakey. However, both before His Honour Judge Havery QC and in the Court of Appeal there was argument as to the existence of a cause of action in negligence, as in Allen, to overcome the submission that there was statutory duty immunity from an action in nuisance. At [2002] QB 929, 950 at para 47, Judge Havery QC said this: “Nevertheless, the policy of the act is clear: there is no statutory liability to pay compensation. I conclude that that policy excludes the existence of a common law duty of care to fulfil the duty.”

117.
At para 57 of the judgment of the Court of Appeal at [2002] QB 929, 987 Lord Phillips MR posed the question of how a common law cause of action might be affected by the provisions of the WIA. At para 61 he said that Mr Marcic's case was pleaded in breach of statutory duty, negligence and nuisance. He rejected the plea that there was a cause of action for breach of statutory duty. He continued at para 62:

“Under the concluding words of section 18(8) any common law claim will lie which does not involve the averment of violation of the Act. Thames have not sought to establish that the flooding of Mr Marcic's property was the inevitable consequence of the exercise of their statutory duties or powers so that they have not been negligent in the special meaning of that word in Allen's case [1981] AC 1001. As that case makes plain, the burden of establishing this defence falls on Thames. In the event the judge held that Thames had the resources and the powers necessary to remedy the nuisance. It follows that no defence of statutory authority has been made out in relation to the claims founded in negligence and nuisance. The issue is whether such claims lie at common law. It is time to look at the line of authority which led the judge to conclude that they do not.”

118.
The Court of Appeal then held that Mr Marcic had a valid claim in nuisance under the common law on the Leakey principle. At para 112 Lord Phillips MR returned to Allen and said:

“Where a sewerage undertaker in performance of its statutory duty and in the exercise of its statutory powers constructs a new system it will be liable if this results in a foreseeable nuisance unless this was inevitable: see Allen's case [1981] AC 1001. It will be no answer to show that disproportionate expenditure would have been needed to avoid the nuisance.”

119.
The issue between the parties is how far the decision of the House of Lords in Marcic on the interrelationship between s. 94(1)(a) and nuisance on Leakey principles also applies s. 94(1)(b) and nuisance based on negligence as in Allen.

120.
I have come to the conclusion that there is a distinction to be drawn in this case so that certain causes of action in nuisance based on negligence will exist alongside the duties under WIA. I do so based on an analysis of the second limb of s. 94(1)(a) and of s. 18(8) of the WIA and on the reasoning in Marcic.

The Second Limb of s. 94(1)(a)

121.
Marcic was only concerned with the first of the two duties in s. 94(1)(a) and did not deal at all with the duties in s. 94(1)(b). However observations were made in Marcic in relation to a duty to clean and maintain sewers. It is the second limb of s. 94(1)(a) which contains a duty to “cleanse and maintain those sewers”.

122.
In Marcic a distinction was drawn between a cause of action based on the duty under s. 94(1)(a) to build more sewers expressed as a duty “to provide, improve or extend such a system of public sewers” and a duty to clean and maintain sewers.

123.
In relation to this distinction, Lord Nicholls said at para 34 that Mr Marcic’s case came down to “Thames Water ought to build new sewers. This is the only way Thames Water can prevent sewer flooding of Mr Marcic's property. This is the only way because it is not suggested that Thames Water failed to operate its existing sewage system properly by not cleaning or maintaining it. Nor can Thames Water control the volume of water entering the sewers under Old Church Lane”. That passage strongly suggests that the position might have been different if the case had related to a failure to clean or maintain the sewers.

124.
Secondly Lord Hoffmann at para 53 said “The flooding has not been due to any failure on the part of Thames Water to clean and maintain the existing sewers. Nor are they responsible for increased use.” Again that strongly suggests a different position if Thames Water had failed to clean and maintain the existing sewers.

125.
Lord Hoffmann said at para 54 that the existence of the statutory procedure for the enforcement of statutory duties in the 1875 and 1936 Public Health Acts did not “exclude common law remedies for common law torts, such as nuisance arising from failure to keep a sewer properly cleaned”. He referred to the decision in Baron v. Portslade UDC[1900] 2 QB 588.

126.
That case was concerned with the duty under section 19 of the Public Health Act 1875 which provided that “Every local authority shall cause the sewers belonging to them… to be kept so as not to be a nuisance or injurious to health and to be properly cleaned and emptied”. The local Authority discontinued a practice of cleaning the sewer at intervals and a nuisance was caused. Following the line of authority based on Robinson v. Workington Corporation, it was argued that the existence of a remedy under section 299 of the Act where the local authority “has made default in providing their district with sufficient sewers, or in the maintenance of existing sewers” meant that the only remedy in such a case was under that section and not in nuisance.

127.
The Court of Appeal rejected that argument and the Earl of Halsbury LC said this at 590 to 591:

“I agree with the learned judge that the maintenance of a sewer is not the same thing as that which it is the duty of the local authority to do by virtue of s. 19 - that is, to keep the sewer so that it shall not be a nuisance or injurious to health, and to see that it is properly cleansed and emptied. Sect. 299 does not, in my opinion, touch the duty of the local authority to use proper diligence in the management of existing sewers, and I cannot see either in the section or in the cases cited anything to take away the right of action of a person who has sustained an injury through the neglect of the local authority”

128.
The decision in Baron v. Portslade was therefore based on the fact that the 1875 Act did not provide a remedy under s. 299 and therefore did not “take away” the cause of action in “neglect” of the local authority.

129.
Historically the distinction has therefore been based on there being no remedy under the previous acts for what is now the second limb of the duty under s. 94(1)(a) to “cleanse and maintain those sewers”. That, in my judgment, was the basis of the decision in Baron v. Portslade.

130.
However, it is clear that both Lord Nicholls and Lord Hoffmann considered that there was still a distinction to be drawn although, as was evident, the second limb of s.94(1)(a) also contained that other duty. Thus, although there was a duty which, like the duty to build new sewers under the first limb of s.94(1)(a), could be the subject of the remedy of an enforcement notice by Ofwat under section 18 of the WIA, that did not exclude a remedy outside the Act.

131.
The distinction drawn by Lord Nicholls and Lord Hoffmann cannot have been founded on the narrow reasoning in the decision in Baron v. Portslade derived from section 299 of the 1875 Act because that reasoning would not apply to sections 94 and 18 of the WIA. It must, in my judgment, have been based on a wider distinction which permitted causes of action for a failure to cleanse or maintain the sewer.

Section 18(8) of the WIA

132.
In Marcic Lord Nicholls, Lord Hoffmann and Lord Hope referred to s. 18(8) of the WIA and in doing so did not rule out the existence of other remedies, except that a cause of action for Leakey nuisance was inconsistent with the first duty under s. 94(1)(a).

133.
Section 18(8) of the WIA provides:

"(8) Where any act or omission-

(a) constitutes a contravention of a condition of an appointment under Chapter 1 of this Part or of a condition of a licence under Chapter 1A of this Part or of a statutory or other requirement enforceable under this section; or

(b) causes or contributes to a contravention of any such condition or requirement,

the only remedies for, or for causing or contributing to, that contravention (apart from those available by virtue of this section) shall be those for which express provision is made by or under any enactment and those that are available in respect of that act or omission otherwise than by virtue of its constituting, or causing or contributing to, such a contravention."

134.
Therefore, in the case of the duties under sections 94(1)(a) and (b) which are enforceable under section 18, the only remedies for any act or omission which constitutes causes or contributes to a contravention of those duties, apart from those available under s 18, are:

(1)
remedies for which express provision is made by or under and enactment;

(2)
remedies that are available in respect of that act or omission otherwise than by virtue of its constituting or causing or contributing to, such a contravention.

135.
What remedies are therefore available in respect of the act or omission otherwise than under s. 18 of the WIA?

136.
Section 18(8) is cited by Lord Nicholls at para 14 of Marcic where he said that "where contravention of a statutory requirement is enforceable under s. 18, s. 18(8) limits the availability of other remedies". At para 21 he said that Mr Marcic's difficulty was this: "Section 94(3) provides, so far as relevant, that a sewerage undertaker's duty to provide an adequate system of public sewers under section 94(1) is enforceable by the director under section 18, in accordance with a general authorisation given by the Secretary of State. Hence, as provided in section 18, the remedy in respect of a

contravention of the sewerage undertaker's general drainage obligation lies solely in the enforcement procedure set out in section 18. Thus, a person who sustains loss or damage as a result of a sewerage undertaker's contravention of his general duty under section 94 has no direct remedy in respect of the contravention".

137.
At para 22 Lord Nicholls continued: "Rather, in advancing claims based on common law nuisance and under the Human Rights Act 1998, Mr Marcic seeks to sidestep the statutory enforcement code. He asserts claims not derived from section 94 of the 1991 Act. Since the claims asserted by him do not derive from a statutory requirement, section 18(8) does not rule them out even though the impugned conduct, namely, failure to drain the district properly, is on its face a contravention of Thames Water's general statutory duty under section 94. The closing words of section 18(8) expressly preserve remedies for any causes of action which are available in respect of an act or omission otherwise than by virtue of its being a contravention of a statutory requirement enforceable under section 18."

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138.
Lord Nicholls did not therefore rule out the remedies in nuisance and under the Human Rights Act on the basis of section 18(8). Lord Hoffmann dealt with the position in a similar way at para 51 to 52 and concluded: "Section 18(8) does not exclude any remedies "available in respect of [an] act or omission otherwise than by virtue of its constituting ... a contravention [of a duty enforceable under section 18] ". It follows that if the failure to improve the sewers to meet the increased demand gives rise to a cause of action at common law, it is not excluded by the statute. The question is whether there is such a cause of action".

139.
Lord Hoffmann said at para 54 that the existence of a statutory enforcement procedure under the Public Health Acts 1875 and 1936 "did not (any more than s.18(8) of the 1991 Act) exclude common law remedies for common law torts, such as a nuisance arising from failure to keep a sewer properly cleaned". Those comments and the existence of s. 18(8) would indicate that there is not a complete removal of other remedies but that what is to be considered is whether, on consideration of the facts, a particular common law remedy can exist alongside the statutory regime of the WIA.

Causes of actions which are not precluded by s. 94(1)

140.
I consider that there is, in principle, a boundary to be drawn between matters which would fall within the duties under s. 94(1) and are actionable solely under s. 18 and matters which are actionable apart from the existence of any statutory duty. That boundary may be difficult to draw and may depend on such uncertain phrases as matters or decisions relating to "policy" or "capital expenditure" matters or decisions as contrasted with "operational" or "current expenditure" matters or decisions. In Marcic the boundary fell between building new sewers and cleaning and maintaining the existing sewers.

141.
The existence of the boundary and the difficulty of defining it were dealt with, in a different context, in the House of Lords in Barrett v. Enfield BC[2001] 2 AC 550. That was a case where it was alleged that there had been negligence whilst the plaintiff was in the care of the local authority between the ages of 10 months and 17. On an application to strike out the cause of action Lord Browne-Wilkinson (at

556 to 557) said in relation to the requirement that the imposition of liability in negligence must be just and reasonable:

“Lord Woolf MR also considered that the damage alleged (psychiatric illness) could not have been caused by the only kinds of negligence which could conceivably be actionable, i.e. operational acts done carelessly by the servants of the defendants in the course of carrying out policy decisions taken in relation to the plaintiff by the defendant council. He was of the view that the only damage suffered by the plaintiff must have flowed from the policy decisions which were not actionable and not from any operational acts which might be actionable….

I find it impossible to say that all careless acts or omissions of a local authority in relation to a child in its care are not actionable: indeed I do not read the Court of Appeal so to have held. If certain careless conduct (operational) of a local authority is actionable and certain conduct (policy) is not, it becomes necessary to divide the decisions of the local authority between those which are "policy" and those which are "operational". It is far from clear what the expressions "operational" and "policy" connote.”

142.
In Marcic Lord Nicholls emphasised the “no fault” position in which Thames Water found itself. At para 34 he said “it is not suggested that Thames Water failed to operate its existing sewage system properly by not cleaning or maintaining it” and was “unable to prevent connections being made to the existing system…even if this risks overloading the existing sewers.” In those circumstances, he said at para 35 that proceedings would “set at nought the statutory scheme” and “effectively supplant the regulatory role” of Ofwat. Again Lord Hoffmann at para 53 referred to the same lack of a failure by Thames Water and at para 63 referred to the distinction where the exercise involved “capital expenditure of a statutory undertaking” as to which the statutory scheme not the court can make the relevant decisions. Otherwise as he said at para 70 the courts would “subvert the scheme of the 1991 Act.”

143.
There are, in my judgment, two aspects to the reasoning. First, there is the emphasis on absence of fault. Secondly, there is the concept of an inconsistent court process which conflicts with the statutory scheme. If there is fault in the form of negligence and if there is a different cause of action which is not inconsistent and does not conflict then I consider there is nothing to preclude a claim being made on that basis. Policy matters are likely to lead to such inconsistency and conflict whilst operational matters are less likely to do so. It must be a question of fact and degree. Where an allegation is tantamount to requiring major plant renewal that will fall on one side of the line whilst an allegation that a filter should be cleaned will lie on the other side. The mere fact that the effect of the cause of action is to enforce the duty in s. 94(1) does not in itself preclude the cause of action.

The assumptions of negligence

144.
It is convenient to consider the assumed basis for the claims. The assumed facts in this case include assumptions as to negligence, as follows:

(1)
At para 18 of the assumptions, in relation to odours, that Thames Water had been negligent in the following areas:-

18.1 inadequate monitoring of odours at site,

18.2 inadequate odour control measures,

18.3 management failings in respect of, or indeed the failure to provide, appropriate technologies, including:-

18.3.1 failing to deal with gas leaks from sludge digestors;

18.3.2 inadequate ferric dosing;

18.3.3 no automatic storm washing equipment

18.3.4 no covers from the storm water tanks and Primary Settlement Tanks ("PST"s);

18.3.5 inadequate sludge consolidation capacity;

18.3.6 inappropriate scum accumulation on the PSTs;

18.3.7 inadequately controlled overflows from and lack of covers on the Picket Fence Thickeners;

18.3.8 a more vigorous cleaning system.

(2)
At para 21 of the assumptions, in relation to mosquitoes, that Thames Water had been negligent in failing and neglecting to take a variety of preventative measures in respect of:

21.1 leakages from plant or equipment at Mogden STW;

21.2 pooling of water from plant or equipment at Mogden STW and/or pooling of surface water unrelated to such plant or equipment;

21.3 surface water drains unrelated to such plant and equipment;

21.4 plant maintenance;

21.5 vegetation management;

21.6 steps which should have been taken to minimise or eradicate mosquitoes (including better surveys and more chemicals)

145.
Whether and to what extent any of those matters give rise to a cause of action in nuisance involving those allegations of negligence will depend on the extent to which the allegation concerns policy matters or capital works such as building new or better facilities at Mogden STW rather than operational matters requiring current expenditure on matters such as maintenance. I do not consider that in Marcic it would have been sufficient for Mr Marcic, relying on Allen, to say that Thames Water failed "to carry out the work and conduct the operation with all reasonable regard and care for the interests of other persons" to provide a cause of action in parallel to the remedy under s. 18 of the WIA. The nature of the policy considerations involved in capital expenditure would have meant that the court was embarking on similar considerations to those arising under the statutory scheme. However, I consider that if the allegation had been that Thames Water had failed to clean and maintain the sewer then Mr Marcic could have based a cause of action on the fact that Thames Water had failed "to carry out the work and conduct the operation with all reasonable regard and care for the interests of other persons".

146.
At this stage any views on the existence of a cause of action must be provisional because, in my judgment, it is a matter of fact and degree whether the cause of action raises the concerns in Marcic that the court is embarking on an exercise which conflicts with the statutory regime or comes within the sphere of operational matters such as cleaning and maintaining the sewer. It is inappropriate to come to a concluded view merely on the basis of an assumed pleaded allegation which has not been fully explored in evidence.

147.
However, on that provisional basis and subject to further argument, I consider that the assumptions in para 18.1 and any failings in the management of the plant under para 18.3 are likely to give rise to causes of action whilst the other allegations might require the court to embark on an exercise that conflicts with the statutory regime. In relation to para 21.1 to 21.6 the nature of the preventative steps indicate that they are all likely to give rise to causes of action.

Summary

148.
Whilst the principle in Marcic precludes the Claimants from bringing claims which require the court to embark on a process which is inconsistent and conflicts with the statutory process under the WIA, it does not preclude the Claimants from bringing a claim in nuisance involving allegations of negligence where, as a matter of fact and degree, the exercise of adjudicating on that cause of action is not inconsistent and does not involve conflicts with the statutory process under the WIA.

Negligence

149.
The arguments relied on by the Claimants, Thames Water and Ofwat in relation to negligence are the same as those relied on in relation to the cause of action arising from nuisance involving allegations of negligence.

150.
Accordingly, the answer to Issue 2c is the same as the answer to Issue 2b: The Claimants are not precluded from bringing a claim involving allegations of negligence where, as a matter of fact and degree, the exercise of adjudicating on that cause of action is not inconsistent and does not involve conflicts with the statutory process under the WIA.

The Human Rights Act 1998

151.
The Claimants accept that they are precluded from bringing a claim under the HRA if that claim is in respect of an alleged infringement of Convention rights, which would on the facts of the infringement not be actionable at common law because it would be inconsistent with the statutory scheme of the WIA. Otherwise, the Claimants contend that they are not precluded from bringing a claim.

152.
Thames Water submits that the Claimants are precluded from bringing a claim under the HRA and that Marcic decides that the statutory scheme is within the margin of appreciation.

153.

Ofwat submits that the Claimants are not precluded from bringing a claim under the HRA if that claim involves allegations of negligence in the operation of the sewage treatment works. Otherwise, Ofwat contends that the Claimants are precluded from bringing a claim.

154.
I consider that the answer to this issue should follow the answer to Issue 2b.

155.
Accordingly, the answer to Issue 2d is that the Claimants are not precluded from bringing a claim based on negligence under the Human Rights Act 1998 where, as a matter of fact and degree, the exercise of adjudicating on that cause of action is not inconsistent and does not involve conflicts with the statutory process under the WIA.

Issue 3: In particular are any such claims limited to nuisance involving negligence or HRA 1998 issues arising out of the physical operation and /or operational management of the works?

156.
The Claimants submits that there is no prima facie reason why a cause of action cannot arise from an act or omission in the performance of a statutory duty which is not related to the physical and/or operational management of the works. They give an example of negligent advice to a Claimant.

157.
Thames Water contends that all claims relate to the non-performance of the s. 94(1)(b) duty and are precluded by Marcic.

158.
Ofwat submits that claims involving allegations of negligence relating to the physical operation of a sewage treatment works are not excluded by the principle in Marcic even where such negligence would also entail a breach of the duty laid down in section 94(1)(b). It also submits that the same applies to claims involving allegations of negligence arising out of the "operational management of the works" if by that is meant managerial failures in directing the physical operation of the works, as opposed to such matters as a failure to press for more funding within the regulatory framework laid down in the WIA.

159.
As set out above, there are limits on the causes of action where, as a matter of fact and degree, the exercise of adjudicating on that cause of action is not inconsistent and does not involve conflicts with the statutory process under the WIA. I consider that causes of action based on thephysical operation and/or operational management of the works are not likely to be precluded. I cannot go further than that at this stage.

Issue 4: In particular does a claim lie against the Defendant for failing or neglecting to press for capital funding for odour related expenditure within the Asset Management Plan system prior to 2000 as pleaded in paragraph 27.2 of the Claimant's Group Statement of Case as further particularised in the Schedule of Responses – Odour Nuisance?

160.
The Claimants submit that on the basis of the decision in Allen negligence means that the undertaker has to "carry out the work and conduct the operation with all reasonable regard and care for the interests of other persons."

161.
The Claimants submit that any failure by Thames Water to try and obtain funding for works in the AMP system prior to 2000 so as to be able to fund odour abatement is a failure to conduct the operation with all reasonable regard and care for the interests of other persons. They state that this allegation has nothing to do with Marcic because it is an allegation that the Defendants should have sought a revision of the AMP process to include funding for odour related expenditure and, prior to 2000, such expenditure was not included in the statutory regime. There is therefore no argument that it would be "inconsistent with the statutory regime."

162.
The Claimants accept that, once odour related expenditure is within the statutory regime, then the Marcic principle may apply to prohibit a claim that Ofwat should have funded any works under the current AMP.

163.
Thames Water submits that the Claimants' contention that this allegation has nothing to do with Marcicbecause, at the time, such expenditure was not included in the statutory regime, is not well founded. Thames Water refers to paragraph 10 of the Factual Assumptions coupled with the appended Annex to MD 190.

164.
It submits that, as set out in the third paragraph of the Annex, odour management has always been "an integral element of a company's functions": Thames Water submits that, as set out in paragraph 10 of the Factual Assumptions, the only change in the run up to AMP 4 was that sewerage undertakers now "submittedspecific particularised proposals for funding necessary to reduce odour emissions from existing works".

165.
Thames Water also submits that the Marcicprinciple extends to all questions relating to an issue which is, in substance, an issue relating to the non-performance of a statutory duty enforceable by Ofwat, must be determined solely by Ofwat. The complaint referred to in issue 4 is a complaint that D failed to perform its statutory duty to treat the contents of the sewers effectually by failing to press for capital funding for odour related expenditure. That complaint falls within the Marcicprinciple.

166.
Ofwat submits that a claim should not lie against the Defendant for failing or neglecting to press for capital funding for odour related expenditure within the Asset Management Plan system because such a claim would inevitably involve exactly the types of detailed regulatory issue which the House of Lords in Marcic sought to preserve for Ofwat to consider within the statutory scheme of the WIA.

167.
Ofwat submits that such a claim would raise the intractable issues of proving that the "failure" of Thames Water was caused by inadequate funding; of proving that the decision by Thames Water as to how to frame its submissions to Ofwat (including what aspects of its regulated activities required additional finance, and when) was so unreasonable as to be negligent and of showing what Ofwat would have done if during the relevant price review the Defendant had made further submissions to it, of an unspecified nature, regarding the need for capital funding for odour abatement.

168.

The Factual Assumption in paragraph 10 is as follows: “During the price setting process for AMP 4, sewerage undertakers, for the first time, where they considered that relevant investment levels needed to increase from those compatible with price limits previously allowed, submitted specific particularised proposals for funding necessary to reduce odour emissions from existing works. When setting the price limits at AMP4, where an undertaker showed strong evidence of odour problems, and of customer willingness to pay in order to tackle existing odour problems, Ofwat allowed specific additional (or new) odour abatement schemes to be funded-see the Annex to MD 190, attached.”

169.
As set out above, I consider that the principle in Marcic precludes the Claimants from bringing claims which require the court to embark on a process which is inconsistent and conflicts with the statutory process under the WIA.

170.
In this case, the allegation of negligence relates to a failure to press for capital funding for odour related expenditure within the Asset Management Plan system prior to 2000. I do not consider that such a cause of action would be precluded by the Marcic principle as being inconsistent and conflicting with the statutory regime. The court would be determining whether Thames Water owed a duty to press for such expenditure and whether they were negligent in not doing so. Those issues would not be inconsistent with or involve conflicts with the statutory process under the WIA. Questions of causation and damages would raise issues as to what would have happened pursuant to the statutory process under the WIA. It would not be inconsistent with or conflict with that process.

171.
Whilst I accept that the adjudication upon the claim would raise the type of seemingly intractable issues which Ofwat identifies, the court has often to determine issues which are equally as complex. However such concerns as to intractability do not, in my judgment, go to the issue of whether the cause of action is precluded by the Marcic principle.

172.
I therefore consider that the Marcic principle would not preclude a claim against Thames Water for failing or neglecting to press for capital funding for odour related expenditure within the Asset Management Plan system prior to 2000.

Issue 5: Does it make any difference to the above conclusions if it were to be established at trial that any steps referred to in paragraphs 18 and 21 of the Factual Assumptions were not taken because of a lack of funding from customer charges under the WIA or otherwise for the taking of such steps?

173.
The Claimants submit that in relation to negligence the court ought to bear in mind the passage from the speech of Lord Hatherley LC inA.G v. Colney Hatch Lunatic Asylum LR 4 Ch App. 146 at 158 where he said “This Court is not in the habit of listening to any argument on the ground of expense when it restrains the doing of a wrong”. They contend that, on that basis, if Thames Water cannot fund the works from customer charges it must reach into its own pockets and, if it cannot fund the works from either of these sources then it would have to provide evidence that the company would have been in severe financial difficulty if it had carried out the works. In determining ‘severe financial difficulty’, the Claimants submit that the payments made to directors and shareholders by the company would be relevant.

174.
The Claimants also submit that taking into account the financial position of Thames Water may be in breach of Article 174.2 of the EC Treaty which provides that "Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay."

175.
Thames Water accepts that lack of funding from customer charges is not in itself a defence to the claim. If, contrary to its case, the Court finds that Thames Water cannot rely on the Marcicdefence on the basis of Issues 1 to 4, then Thames Water does not seek to assert that it can nevertheless rely on the Marcicdefence on the basis of issue 5. It submits however that lack of funding may be one factor relevant to proof of negligence, if such a claim lies in principle.

176.
Ofwat submits that the principle in Marcicis unrelated to the ability of a sewerage undertaker to draw on other sources of finance to improve the sewage network or sewage treatment works. It submits that the issue is not whether a given undertaker could, in practice, find resources elsewhere; rather it is whether the courts should become involved in decisions as to such expenditure, thereby supplanting the regulatory role reserved for Ofwat under WIA.

177.
In relation to any cause of action based on allegations of negligence in respect of odours and mosquitoes then, as Thames Water submits, it could not seek to raise the Marcic principle by contending that certain actions were not taken because of a lack of funding from customer charges under the WIA or otherwise.

178.
Whilst Thames Water might seek to raise questions of funding in relation to negligence, I consider that, in general, the ability to fund expense will not provide a defence to an allegation of negligence.

Damages Issues

Issue 6: Should damages for nuisance – where there is unlikely to be an award for diminution of capital values because the nuisance is not a permanent one - be based on:

a.
The difference in rental value between:

i.
The property unaffected by smells and mosquitoes sufficient to cause a nuisance and

ii.
The property affected by smells and mosquitoes sufficient to cause a nuisance;

b.
The physical inconvenience and distress to the Claimant; or

c.
A general loss of amenity?

179.
There is common ground between the Claimants and Thames Water that where nuisance has been caused to a property by smells and mosquitoes then the diminution in letting value is the proper measure of damages. There is also common ground that an assessment by reference tothe physical inconvenience and distress to the Claimant is not an appropriate measure of damages.

180.
Finally there is common ground that a sum for general loss of amenity will, in certain circumstances, provide an appropriate measure. The Claimants submit that general loss of amenity is only appropriate if no assessment can be made as to the difference in rental values. Thames Water submits that general loss of amenity will be appropriate if the differences in values cannot be reliably ascertained.

181.
Whilst there is a difference in language between the parties as to whether a sum for general loss of amenity will apply when “no assessment can be made” or “values cannot be reliably ascertained”, the underlying consideration depends on what is reasonable and practicable on the facts and circumstances of the case. If, on the facts, no assessment can be made then a sum for general loss of amenity is more likely to be an appropriate measure. If values cannot be reliably ascertained then the matter is more likely to depend on whether such ascertainment as can be made is a reasonable or practicable measure of damages.

182.
I accept that, as the Claimants submit, even if the court cannot arrive at a figure for diminution of value with certainty, damages can still be assessed. They refer to the passage in the well-known judgment of Vaughan Williams LJ in Chaplin v Hicks[1911] 2 KB 786 at 792 where he said in relation to assessment of damages: “Sometimes, however, there is no market for the particular class of goods; but no one has ever suggested that, because there is no market, there are no damages. In such a case the jury must do the best they can, and it may be that the amount of their verdict will really be a matter of guesswork. But the fact that damages cannot be assessed with certainty does not relieve the wrong-doer of the necessity of paying damages for his breach of contract.”

183.
I also accept that, as Thames Water submits, at this stage and in the absence of valuation evidence, the matter cannot be taken further. There may be a number of difficulties in reasonably and practicably assessing diminution in value so that general damages for loss of amenity may be the correct measure. Whether and to what extent the difficulties arise will depend on the issues raised above and the evidence. I do not think that it is necessary or desirable to go further at this stage.

184.
I consider that the common ground between the parties properly reflects the position on the award of damages which may be summarised as follows:

(1)
That damages awarded for nuisance, where there has been personal discomfort, are assessed on the basis of compensation for diminution of the amenity value of the land rather than damages for that personal discomfort. In Hunter v. Canary Wharf[1997] AC 655 at 706 Lord Hoffmann said that in the case of “nuisances “productive of sensible personal discomfort” the action is not for causing discomfort to the person but… for causing injury to the land. True it is that the land has not suffered “sensible” injury, but its utility has been diminished by the existence of the nuisance. It is for…the

diminution in such utility that he is entitled to compensation." He said that in such cases "the owner or occupier is entitled to compensation for the diminution in the amenity value of the property during the period for which the nuisance persisted." He added "But inconvenience, annoyance or even illness suffered by persons on land as a result of smells or dust are not damage consequential upon the injury to the land. It is rather the other way about: the injury to the amenity of the land consists in the fact that the persons upon it are liable to suffer inconvenience, annoyance or illness." Lord Hope said "I do not see how an assessment of the damages appropriate for claims for personal injury at the instance of all those who happened to be on the land can be the right measure. If this were so, the amount recoverable would depend on the number of those affected, not the effect on the amenity of the land. At best it is no more than a guide to the true measure of liability, which is the extent to which the nuisance has impeded the comfortable enjoyment of the plaintiff's property."

(2)
That damages for diminution of amenity value are measured by reference to the size, commodiousness and value of the property not the number of occupiers. In Hunter v. Canary Wharf at 706 Lord Hoffmann said "It follows that damages for nuisance recoverable by the possessor or occupier may be affected by the size, commodiousness and value of his property but cannot be increased merely because more people are in occupation and therefore suffer greater collective discomfort. If more than one person has an interest in the property, the damages will have to be divided among them. If there are joint owners, they will be jointly entitled to the damages. If there is a reversioner and the nuisance has caused damage of a permanent character which affects the reversion, he will be entitled to damages according to his interest. But the damages cannot be increased by the fact that the interests in the land are divided; still less according to the number of persons residing on the premises."At 696 Lord Lloyd said "The effect of smoke from a neighbouring factory is to reduce the value of the land. There may be no diminution in the market value. But there will certainly be loss of amenity value so long as the nuisance lasts. If that be the right approach, then the reduction in amenity value is the same whether the land is occupied by the family man or the bachelor." At 724 Lord Hope said:"I do not see how an assessment of the damages appropriate for claims for personal injury at the instance of all those who happened to be on the land can be the right measure. If this were so, the amount recoverable would depend on the number of those affected, not the effect on the amenity of the land. At best it is no more than a guide to the true measure of liability, which is the extent to which the nuisance has impeded the comfortable enjoyment of the plaintiff's property."

(3)
That damages for compensation for diminution of amenity value of the land may be reflected either in diminution of capital value or rental value. In Hunter v. Canary Wharf at 724 Lord Hope said "Diminution in the value of the plaintiffs' interest, whether as owner or occupier, because the capital or letting value of the land has been affected is another relevant head of damages. When the nuisance has resulted only in loss of amenity, the measure of damages must in principle be the same.." At 706 Lord Hoffmann said "But diminution in capital value is not the only measure of loss. It seems to me that the value of the right to occupy a house which smells of pigs must be less than the value of the occupation of an equivalent house which does not. In the case of a transitory nuisance, the capital value of the property will seldom be reduced."

(4)
That damages for diminution in value frequently raise difficult issues of assessment which can usually be resolved by expert evidence. If such assessment is not reasonable or practicable then the principles on which damages are assessed are sufficiently flexible to do justice between the parties by

arriving at a sum for general damages for loss of amenity. In Hunter v. Canary Wharf at 696 Lord Lloyd said "Damages for loss of amenity value cannot be assessed mathematically. But this does not mean that such damages cannot be awarded: see Ruxley Electronics and Construction Ltd. v. Forsyth[1996] A.C. 344, per Lord Mustill, at pp. 360-361, and per Lord Lloyd of Berwick, at p. 374." At 706 Lord Hoffmann said "the owner or occupier is entitled to compensation for the diminution in the amenity value of the property during the period for which the nuisance persisted. To some extent this involves placing a value upon intangibles. But estates agents do this all the time. The law of damages is sufficiently flexible to be able to do justice in such a case: compare Ruxley Electronics and Construction Ltd. v. Forsyth[1996] A.C. 344."

185.
In addition, there is an issue between the parties as to the extent that the decision of Buckley J. in Dennis v Ministry of Defence [2003] EWHC 793 correctly follows the principles in Hunter. In that case, the owner of a property and his wife brought a claim in nuisance and for breach of Human Rights for noise caused by Harrier jets from the Defendant's neighbouring RAF station. In considering damages for nuisance reference was made to Farley v. Skinner[2002] 2AC 732 where damages for distress and inconvenience for non-performance of a contract were awarded under the rule in Watts v Morrow [1991] WLR 1421.

186.
I consider that in Dennis the judge was assessing loss of amenity and made reference to the air noise case of Farley v. Skinnermerely by way of background in arriving at that loss of amenity.He arrived at a loss of amenity of £50,000, having rejected the claim for diminution in letting value on evidential grounds.I do not consider that in Dennis the sum was assessed on the basis of a sum to reflect damages for distress and inconvenience.

Issue 7: To what extent, if at all, are the above conclusions dependent on or affected by any evidence of valuers as to the difficulty or otherwise of assessing diminution in rental value in the case of non-permanent nuisance?

187.
As set out above, damages for diminution in value frequently raise difficult issues of assessment which can usually be resolved by expert evidence. If such assessment is not reasonable or practicable then the principles on which damages are assessed are sufficiently flexible to do justice between the parties by arriving at a sum for general damages for loss of amenity.

Issue 8: What is the position in damages for nuisance where no diminution in rental value can be shown?

188.
Again, if no diminution in rental value can be shown then the principles on which damages are assessed are sufficiently flexible to do justice between the parties by arriving at a sum for general damages for loss of amenity.

Issue 9: Do, or might, damages for nuisance confer a sufficient remedy on those with a legal right to occupy such as to disentitle those living in the same household without such a legal right to a separate remedy under Article 8 and/or the Human Rights Act 1998?

189.

The Claimants rely on the fact that, as set out above, damages for nuisance do not take into account the number of people living in the affected property as they are awarded in respect of the damage to the land. The Claimants submit that this does not accord "just satisfaction" to victims of an unlawful act under section 8(3) of the HRA 1998 because an award of damages under section 8(3) must be made to the individual victim of the unlawful act so as to be "just satisfaction to the injured party."

190.
The Claimants accept that in awarding any damages the court must, under s. 8(3)(a), take into account "any other relief or remedy granted". However they submit that in the case of lodgers or residents of a retirement or children's home, an award of damages in nuisance to the owner could not be just satisfaction for the affected lodgers or residents or be taken into account for the purposes of section 8(3)(a) as any such award would not be bound to be shared.

191.
The Claimants refer to Fadeyeva v. Russia[2005] ECHR 376 where €6000 was awarded as damages for inconvenience and mental distress and a degree of physical suffering over a seven year period.

192.
In the case of non-proprietary partners or children the Claimants accept that an award of damages in nuisance to the partner or parent(s) who have a proprietary interest in the home is a matter to be taken into account for the purposes of section 8(3)(a), although they submit that the position of foster children may be different.

193.
In these proceedings, there is a pleaded case on behalf of Thomas Bannister. Thames Water submit that, if his parents obtain an award in a nuisance action, then it is not necessary to make a further award in Thomas' favour. The Claimants submit that Thomas is a 'victim' of the assumed violation of his rights by the Defendant and that, even if there has been an award to Thomas' parents which may be favourable to him, the court is concerned with "whether he or she has received reparation for the damage caused." The Claimants submit that the fact that his parents, who are also victims, have received appropriate and sufficient redress for the violations in respect of them cannot be relevant to violations in respect of Thomas.

194.
The Claimants refer to the decision in Scordino v Italy[2006] ECHR 276 (B5/25) at paras 180 and 181 where the Court said "The Court also reiterates that a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention. [181] The issue as to whether a person may still claim to be the victim of an alleged violation of the Convention essentially entails on the part of the Court an ex post facto examination of his or her situation. As it has already held in other length-of-proceedings cases, the question whether he or she has received reparation for the damage caused – comparable to just satisfaction as provided for under Article 41 of the Convention – is an important issue. It is the Court's settled case-law that where the national authorities have found a violation and their decision constitutes appropriate and sufficient redress, the party concerned can no longer claim to be a victim within the meaning of Article 34 of the Convention."

195.
The Claimants submit that the correct approach in cases like this where there are victims of a violation other than the proprietors living in a home is that the court first assesses the damages in

nuisance to the proprietors, it then considers, in isolation from those damages, whether damages would be awarded to the other victims under s. 8 of the HRA 1998 (R v Secretary of State for the Home Department exp. Greenfield[2005] UKHL 14 (B5/26) at para. 6) and determines the amount of those damages. Next the court considers whether the damages in nuisance amount to 'full reparation' to the other victims of the violation, which the Claimants submit would be rare. If the damages do not amount to "full reparation", then the court determines the amount of damages that should be awarded to the other victims so that full reparation is made.

196.
In terms of damages for continuing nuisance, the Claimants note that in Scordino (B5/25) the Court said at [204] "Regarding non-pecuniary damage, the Court … assumes that there is a strong but rebuttable presumption that excessively long proceedings will occasion non-pecuniary damage. It also accepts that, in some cases, the length of proceedings may result in only minimal non-pecuniary damage or no non-pecuniary damage at all." They submit that these considerations apply equally to the continuing nuisance in this case.

197.
Thames Water submits that the only factual basis against which this question can be considered is the claim of Thomas Bannister. He is 13 and lives with his parents who own their property. Thames Water contends that if Mr and Mrs Bannister recover damages in nuisance in respect of loss of letting value or loss of amenity, the purpose of those damages is to compensate them for the temporary past impairment in their interest in the whole of their house. In those circumstances, if Thomas has an Article 8 claim, Thames Water submits that it is not "necessary" for him to receive damages within section 8 HRA in order to afford him just satisfaction because the family is receiving sufficient compensation via the parents' claim in respect of the house in which he lives.

198.
Thames Water points out that the Claimants accept that an award of damages to his parents is "a matter to be taken into account for the purposes of s.8(3)(a)" and submits that, on the Bannister facts, the court should say that compensation in nuisance for the parents will mean that the family is properly compensated, and that no further damages should be payable under the HRA.

199.
Thames Water refers to the judgment of Buckley J in Denniswhere a claim was also brought under the HRA and at para 91 he said this, based on the Court of appeal decision in Marcic:

"As in Marcic, since I have awarded damages for common law nuisance and I regard them as "just satisfaction" the Human Rights Act claims add nothing save that it was mooted that Mrs Dennis herself would have such a claim. Whilst that is theoretically true, my figure for damages, in particular loss of amenity, is based on loss of enjoyment of the Estate which envisages enjoyment by a family as opposed to one individual. I do not therefore consider it appropriate to add to the figure at which I have arrived. If I am invited to make a separate award, it would be £20,000 to Mrs Dennis and I would reduce the damages for nuisance accordingly."

200.
Thames Water relies on this and on the reference in Marcic as showing that given the damages payable to her husband, there had been proper compensation for loss of enjoyment "by a family as opposed to oneindividual".

201.

Thames Water refers to the reliance by the Claimants on Scordino but submits that Scordinodoes not assist. It was a complaint that the state was in breach of the claimants' Article 6(1) rights to have proceedings determined within a reasonable time. The issue in the passage referred to by the Claimants was whether the applicants were still victims despite having received some damages from the domestic court for breach of their Article 6(1) rights. The Grand Chamber of the ECHR held that they were still victims, not least because the domestic court's assessment of damages awarded no more than about 10% of what the applicants would have been entitled to under the ECHR's own case law for the same breach. Thames Water submits that this is not relevant to the present issue which assumes that Thomas's parents have received compensation for the continuing nuisance, and poses the question whether Thomas is entitled to further damages to afford him just satisfaction. Thames Water states that the fact that the Scordinos had not received proper compensation for the delays does not reflect on the issue.

202.
In relation to other claims by those without a proprietary interest, Thames Water submits that the court should not consider any case, other than that of Thomas Bannister, because there are no facts upon which the Court could proceed. None of the five claims by lodgers have been pleaded out and Thames Water know nothing about their circumstances, nor of the position of residents of a retirement or children's home or of foster children.

203.
In this case I cannot consider the position of those living in the same household as those with a proprietary interest other than Thomas Bannister, who is a boy living with his parents. For him, the Claimants accept that an award of damages in nuisance to parents who have a proprietary interest in the home is a matter to be taken into account for the purposes of section 8(3)(a).

204.
I accept that damages for nuisance are based on the loss of amenity value of the property and do not take into account the number of people living in that affected property. That raises the possibility that damages for nuisance may not accord "just satisfaction" to the individual victims of an unlawful act as required by section 8(3) of the HRA 1998. I do not consider that the decision of the European Court of Human Rights in Fadeyeva assists in resolving the question in this case. In that case the wife of a worker at a steel plant suffered from pollution from the steel plant. She lived in a flat which the steel plant let to her husband on a tenancy agreement. It does not appear that there was any claim by the husband and the award to the wife of €6000 does not reflect on the issues which I have to consider as to the sufficiency of a remedy in nuisance.

205.
The decision of the European Court of Human Rights (Grand Chamber) in Scordino also provides little assistance. It was a length of proceedings case where the court held that the quantum of damages awarded by the domestic court was significantly less than would have been awarded by the European Court. The observation at para 181 that "the issue as to whether a person may still claim to be the victim of an alleged violation of the Convention essentially entails on the part of the Court an ex post facto examination of his or her situation" would indicate that there is no settled principle and that whether a person can still be described as a victim after an award of damages for nuisance will depend on the facts.

206.

In Dennis Buckley J held that because the award of loss of amenity was based on loss of enjoyment of the Estate which envisages enjoyment by a family as opposed to one individual, it was not appropriate to award further sums to the wife of the owner. It seems to me that this was a finding which depended on the facts and was not a finding that, as a matter of law, an award of damages in nuisance would provide just satisfaction to all those in the same household.

207.
Buckley J based his decision on the passage from the judgment of the Court of Appeal in Marcic at para.104 where, having found that Mr Marcic had a claim in nuisance against Thames Water, the court considered:

"What are the consequences of this? We have been dealing with matters that Judge Richard Havery Q.C. dealt with as preliminary points, and no argument has been addressed to us as to the measure of damages to be applied to his claim in nuisance. It is reasonable to assume, however, that the damages to which Mr Marcic is entitled will afford him 'just satisfaction' for the wrong that he has suffered. On that premise, and having regard to the provisions of section 8(3) of the Human Rights Act 1988, Mr Marcic's right to damages at common law displaces any right that he would otherwise have had to damages under the Act. Thames' appeal against the Judge's finding that they were in breach of Section 6 of that Act and Article 8 of the Convention thus becomes academic."

208.
That a person who receives damages for the loss of amenity in his property will receive "just satisfaction" again does not resolve the position of those who do not directly receive such damages.

209.
I consider thatwhen the court award**s** damages for nuisance to those with a legal interest that will usually afford just satisfaction to partners and children but that there might be circumstances where they will not. In the case of Thomas Bannister, he lives in the same household as his parents who will receive damages for the loss of amenity of their property. There is nothing in the claim to show that such damages received by the household would not afford just satisfaction as they did for Mrs Dennis or would have done for Mr Marcic. I conclude that those damages would afford Thomas Bannister just satisfaction.

210.
There may be circumstances where others without a legal right to occupy may have a right to a separate remedy under Article 8 and/or the Human Rights Act 1998 for which there will not be just satisfaction by an award of damages for nuisance.

211.
I therefore consider that the appropriate answer to Issue 9 is that damages for nuisance might confer a sufficient remedy on those with a legal right to occupy such as to disentitle those living in the same household without such a legal right to a separate remedy under Article 8 and/or the Human Rights Act 1998 but whether they do will depend on the facts.

Issue 10: Are:

a. The alternative remedies referred to in:

(i) Paragraph 9 of the Claimant's Amended Statement of Case on Preliminary Issues (sections 80 and 82 of the Environmental Protection Act 1990) and /or

(ii) Paragraph 29 of the Defendant's Defence thereto (the complaint to Ofwat under s. 94 WIA 1991 and the earlier availability of that route for complaint (if these matters do constitute a breach of s. 94(1)(b) duties)) and/or

b. The current abatement notice as pleaded in paragraphs 21 – 24 of the Claimant's Group Statement of Case

relevant to the issue of whether damages for owners/occupiers and/or those without a legal interest in their homes are necessary to afford just satisfaction under section 8(3) of HRA 1998?

212.
The Claimants accept that these issues may be relevant but submit that, on the assumed facts of a nuisance lasting 87 months, are unlikely to constitute appropriate and sufficient redress.

213.
In relation to section 82 of the Environmental Protection Act 1990 the Claimants accept that an individual can issue a summons in the Magistrates' Court to obtain an order for the abatement of a nuisance and for payment of compensation of up to £5,000 under sections 130 – 134 of the Powers of Criminal Courts (Sentencing) Act 2000. However, the Claimants submit that compensation is only awarded in clear cases where the amount of compensation can be readily and easily ascertained: Hyde v Emery (1984) 6 Cr App R (S) 206. In a case like this, where there are issues as to what damages are payable and limitation issues, the Magistrates' Court is not suitable. Further the Claimants point out that proceedings must be brought within six months and as there are no group action provisions in the Magistrates' Court; each of the 1300 Claimants would have to issue a summons every six months.

214.
In relation to the procedure under section 80 of the Environmental Protection Act 1990 which enables a local authority to issue an abatement notice to require the abatement of a nuisance, the Claimants rely on the fact that neither the authority nor the court can award compensation. Further the Claimants submit that the section 80 procedure cannot amount to an alternative remedy for a Claimant because it is dependant on action by the local authority and if that third party does not consider that there is a nuisance, the Claimants have no remedy under section 80.

215.
The Claimants submit that the abatement notice in this action is not an alternative remedy for a Claimant. Whilst it may, in July 2008, abate the nuisance through the programme of works the Claimants may by then have suffered a nuisance for 112 months and the Claimants submit that this would not be a sufficient remedy or afford just satisfaction to the Claimants.

216.
In relation to a complaint to Ofwat, the Claimants submit that it is not an alternative remedy as it depends on Ofwat reaching a decision as to whether a nuisance exists and it is not clear how Ofwat would approach a case where Thames Water says that there is no nuisance or negligence There is no provision for a public hearing by Ofwat or any procedure for the hearing of witnesses, for disclosure of documents or for expert evidence. As set out under agreed fact 15, there is no provision for any compensation in respect of nuisance under the WIA.

217.

As a result, the Claimants submit that a complaint to Ofwat in a case like this is a wholly unsuitable remedy.

218.
Thames Water submits that there is consensus between the Claimants and the Defendants that, as the Claimants submit “these issues may be relevant.” Given that and that Thames Water submits that no definitive view can be reached without considering the evidence, Thames Water says that the issue cannot be taken further at this stage.

219.
Thames Water relies on the underlying principles of damages under the HRA and refers to the passage in Anufrijeva v. Southwark BC[2004] 1 QB 1124,at paras 52 to 53 which was adopted by the House of Lords in R v Secretary of Sate for the Home Department ex parte Greenfield[2005] UKHL 14at para 9, where Lord Woolf CJ, giving the judgment of the Court of Appeal said:

“52……The remedy of damages generally plays a less prominent role in actions based upon articles of the Convention, than in actions based on breaches of private law obligations where, more often than not, the only remedy claimed is damages.

53. Where an infringement of an individual’s human rights has occurred, the concern will usually be to bring the infringement to an end and any question of compensation will be of secondary, if any, importance….”

220.
Thames Water submits that that the fact that there are alternative remedies available to the Claimants, including the Ofwat remedy and that the Claimants have had in recent times the benefit of the abatement notice, all have to be weighed in the balance.

221.
In relation to the Claimant’s observations about procedure in respect of complaints to Ofwat, Thames Water states that the Claimants are wrong to claim that in the absence of a public oral hearing with disclosure, Ofwat’s procedures violate the C’s Article 6(1) rights. Thames Water refers to the availability of judicial review in the event of an adverse decision and points out that such a submission is inconsistent with the decision in Marcicwhere Lord Nicholls at paras 40 to 46, Lord Hoffmann at para.71 and Lord Hope at para.83 addressed Article 6(1) issues.

222.
In terms of the issue posed, I consider that the alternative remedies under sections 80 and 82 of the Environmental Protection Act 1990, the complaint to Ofwat under s. 94 of the WIA 1991 and the current abatement notice are all relevant to the issue of whether damages for owners/occupiers and/or those without a legal interest in their homes are necessary to afford just satisfaction under section 8(3) of HRA 1998.

223.
So far as the issue of whether they constitute appropriate and sufficient redress, I do not consider that I am in a position to answer that question. However, I accept that the question must be answered bearing in mind that for an infringement of an individual’s human rights, the concern will usually be to bring the infringement to an end and any question of compensation will be of secondary, if any, importance.

Issue 11: In the light of the answers to the above and given the terms of section 8(3) of HRA 1998:

a.What are the potential correct measures of damages in this type of case for a Claimant who succeeds in an action under section 7(1) (a) of the HRA 1998?

b If damages for nuisance are lower than those a Claimant with a legal interest in his or her home could obtain under the HRA 1998, can these damages be "topped up" under the 1998 Act?

The potential correct measures of damages under section 7(1)(a)HRA 1998

224.
The Claimants submit that the measure of non-pecuniary damages for a victim of a human rights violation in this type of case is that in Fadeyeva v Russia at 136, namely damages for inconvenience, mental distress and physical suffering. This should take into account factors such as age, the victim's state of health and the duration of the situation complained of. The Claimants submit that there may also be pecuniary (special) damages.

225.
Thames Water submits that, based upon the sample cases before the Court, the proprietary claimants are entitled to damages under the law of nuisance and HRA damages would simply be duplicative of this, and hence those claimants would have already received just satisfaction at common law and non-proprietary members of the family with proprietary claimants as parents, for similar reasons, have no additional claim.

226.
I consider that, where such damages are to be awarded to an individual, the measure of non-pecuniary damages for a victim of a human rights violation in this type of case is damages for inconvenience, mental distress and physical suffering, taking into account all relevant circumstances including factors such as age, the victim's state of health and the duration of the situation complained of, together with any special damages that can be proved.

227.
However, I consider that such damages would only be awarded if taking account of the measure of damages for nuisance and the availability of the alternative remedies, such damages were necessary to afford just satisfaction.

Can damages for nuisance be "topped up" under HRA 1998?

228.
The Claimants again refer to Scordino where the Court indicated at

"268. That the amount it will award under the head of non-pecuniary damage under Article 41 may be less than that indicated in its case-law where the applicant has already obtained a finding of a violation at domestic level and compensation by using a domestic remedy. Apart from the fact that the existence of a domestic remedy is fully in keeping with the subsidiarity principle embodied in the Convention, such a remedy is closer and more accessible than an application to the Court, is faster and is processed in the applicant's own language; it thus offers advantages that need to be taken into consideration.

269. The Court considers, however, that where an applicant can still claim to be a “victim” after exhausting that domestic remedy he or she must be awarded the difference between the amount obtained from the court of appeal and an amount that would not have been regarded as manifestly unreasonable compared with the amount awarded by the Court if it had been awarded by the court of appeal and paid speedily.”

229.
The Claimants submit that there is a clear ‘top-up’ provision in the Convention jurisprudence and that recourse to common law precedent is unnecessary. For the purposes of Article 41 of the Convention there is only “partial reparation.”

230.
The Claimants rely on what the Court said in Scordino at para 189:

“Where a State has made a significant move by introducing a compensatory remedy, the Court must leave a wider margin of appreciation to the State to allow it to organise the remedy in a manner consistent with its own legal system and traditions and consonant with the standard of living in the country concerned. It will, in particular, be easier for the domestic courts to refer to the amounts awarded at domestic level for other types of damage – personal injury, damage relating to a relative’s death or damage in defamation cases for example – and rely on their innermost conviction, even if that results in awards of amounts that are lower than those fixed by the Court in similar cases.”

231.
The Claimants refer to Sandra Weston’s Statement of Case and submit that the Court may consider that the awards in the sums set out in para. 16 were within the margin of appreciation as compared to the award in Fadeyeva of about £4,300 and that the sums in para. 17 may be inside or outside of that margin. The Claimants submit that, if they are outside that margin then they are “manifestly unreasonable.”: see Scordino at paras 214 and 269 and should then be ‘topped up.’ In relation to para. 18, to make no award because there was no diminution in value would not be just satisfaction for the violation of her human rights. She would still be a victim of the violation.

232.
Thames Water submits that, based upon the sample cases before the Court, the proprietary claimants are entitled to damages under the law of nuisance and that HRA damages would simply be duplicative of this, and hence those claimants would have already received just satisfaction at common law and non-proprietary members of the family with proprietary claimants as parents, for similar reasons, have no additional claim.

233.
Thames Water submits that there is nothing about the law of damages in nuisance which prevents proper compensation being awarded to claimants and loss of amenity amounts to such proper compensation. Thames Water says that it does not argue for no compensation at common law if the facts are as assumed and so no question of HRA top-up arises, as there is no basis for a more generous award under the HRA than at common law. Thames Water submits that the premise envisaged in the question, and under consideration in Scordino,simply does not arise.

234.
The court in awarding damages for nuisance assesses them on principles that are sufficiently flexible to do justice as between the parties. In such circumstances it is unlikely that any further damages are necessary to give “just satisfaction”.

235.
I consider that if, despite the considerations set out above, there is a Claimant who still remains a victim because he or she has not received just satisfaction then that person would be entitled to further damages.

236.
However, as stated above, I consider thatwhen the court award**s** damages for nuisance to those with a legal interest in the property that will usually be just satisfaction to partners and children. Unless there are particular circumstances there will not be any further damages.

Limitation Issues

Issue 12: In determining a limitation issue under section 7(5)(b)HRA 1998 does the court:

a.
Exercise its discretion – by analogy with section 33 Limitation Act 1980 - with regard to all the circumstances of the individual claimant? And/or

b.
In a group action, with regard to all the circumstances of the group?

237.
The Claimants refer to the decision in Cameron v. Network Rail Infrastructure Ltd [2006] EWHC 1133 where Sir Michael Turner said at para 43: "Section 7 of the HRA prescribes a limitation period of one year from the date of the occurrence giving rise to, and the initiation of, the proceedings except that, if the court considers it equitable to extend the period, it may do so. The word 'equitable' in this statutory context has an obvious resonance with its use in the Limitation Act 1980. Section 33(1) of th at Act permits the court to direct that the primary period of limitation shall not apply if it appears to the court that it would be 'equitable' to allow an action to proceed, having regard to the extent to which prejudice would be caused to the claimant or the defendant as the case might be. While it would not be right to incorporate all the circumstances to which the court is enjoined to have regard as set out in subsection (3) of section 33, which are inclusive and not exclusive of "all the circumstances", it would not make any sense to disregard them as having no relevance to the circumstances which the court should consider in exercising its discretion whether or not to extend time under these provisions of the HRA."

238.
However the Claimants submit that section 33 is aimed at personal injury actions, not actions in nuisance in which there is no allegation of personal injury: see Stubbings v. Webb [1993] 1 AC 498. They submit that section 7(5) should be considered in the light of the type of action being brought.

239.
The Claimants contend that they were entitled to wait until the conclusion of the statutory nuisance proceedings in the Magistrates' Court on 5 November 2004 and there was no prejudice to Thames Water by them so doing. Further the Claimants submit that the court should be consistent. It is 'equitable' that the HRA Claimants have the same limitation period as the nuisance Claimants.

240.
As far as the circumstances of the group are concerned, the Claimants refer to "Access to Justice," (July 1999) in which Multi-Party Actions were considered in Chapter 17 and, in particular, at para. 45 where Lord Woolf wrote: "In some circumstances defendants and the Legal Aid Board may be well

aware that there are large numbers of people who might be affected by the product in question. In those circumstances the claim may be more manageable if the initial certification puts any further individual applications for legal aid on hold and provides for deemed inclusion of unidentified potential claimants on an 'opt-out' basis until definitive criteria can be established to provide for the effective filtering of potential claims before they are entered on the register. There is, however, a need for action to be taken in relation to the limitation period and this can only be effective if there are provisions to suspend or freeze the running of the limitation period on certification of the MPS, as in many other jurisdictions, so that further claimants whose claims were not being considered in detail at this stage were not disadvantaged. This will require primary legislation. In the absence of such legislation I have no doubt that courts will continue to exercise their discretion to admit latecomers since the existence of the MPS ensures that defendants are already aware of the potential claims against them."

241.
In exercising a discretion under section 7(5)(b), the Claimants submit that the court can rule that the relevant date for all Claimants is 1 March 2005 as, at that date, Thames Water were aware of the potential claims against them.

242.
Thames Water submits that the discretion must be exercised in respect of the individual claimant and that the circumstances of the group (of which the individual forms a part) whilst not irrelevant are not determinative. It submits that this is consistent with Cameron.

243.
Thames Water submits that the Claimants put forward no justification as to why nuisance and personal injury claims ought to be governed by different principles, despite that assertion.

244.
Thames Water submits that it would be entirely inappropriate for the Court to rule, on the basis of the exiguous evidence adduced, that the relevant date was 1 March 2005, when the Claimants say that Thames Water became aware of the potential claims against them. Of more relevance, Thames water submits, is the date when the Claimants became aware that they might have a claim – and that will involve consideration not only of Group material, such as consultations with solicitors and the deliberation of the Mogden pressure group (known as MRAG) and also individual material. If a Claimant has known since October 2000 that he has a claim in nuisance and under the HRA, Thames Water submits that the claim should be out of time.

245.
I respectfully adopt the reasoning of Sir Michael Turner in Cameron which I consider reflects the correct approach in these cases. I consider that in determining a limitation issue under section 7(5)(b)HRA 1998 the court should exercise its discretion, by analogy with section 33 of the Limitation Act 1980, having regard to all the circumstances of the individual claimant. In doing so, one of those circumstances will be the circumstances of the group in a group action. Those circumstances may affect the individual. At this stage, it is not possible to make a finding of a particular date in response to this issue.

Issue 13: In a continuing nuisance action should a court start the discretionary exercise under section 7(5)(b) in a case where damages may be awarded as 'just satisfaction' for any interference in a Claimant's rights under article 8 of the ECHR on the basis of a period of:

a.Six years from the date of the commencement of the action – by analogy with section 2 of the LA 1980 or

b.The whole time a Claimant was subject to the interference with his or her rights, but excluding any period before 1st October 2000 – Fadeyeva v Russia[2005] ECHR 376, para. 138.

246.
The Claimants refer to the case of Mrs Weston. If she is found to have suffered a nuisance then she would be entitled to bring her claim within six years of the cause of action accruing. However there is a risk she may not be awarded damages for that nuisance. If she can only be awarded damages under HRA then the six year period would drop to one year under section 7(1)(a).

247.
The Claimants submit that it is inequitable that she should have two different limitation periods for the same harm and that the law should be consistent.

248.
The Claimants refer to the fact that in Human Rights cases under Article 26, a complaint to the Commission must be made within six months of the final decision of the national court being taken and so issues such as those in section 33 of the LA 1980 do not arise in such cases and the applicant will be well aware of his or her legal rights, having exhausted all domestic remedies.

249.
The Claimants submit that the fact that in Fadeyeva the complaint was made in time is irrelevant to the discretion of the court under section 7(5)(b). The issue is whether, in a complaint to the ECHR, the court would award damages for non-pecuniary loss under article 41 to cover the whole period over which the nuisance occurred. The Claimants submit that following Fadeyeva it would.

250.
Thames Water submits that the limitation period in nuisance may be a relevant consideration when looking at the appropriate period under s.7(5)(b) but accepts that so are other individual and group considerations.

251.
Thames Water also submits that the decision in Fadeyevadoes not assist a domestic court when seeking to construe s.7(5)(b). No limitation issue arose in Fadeyeva; the Convention came into force against Russia in May 1998 and the application was lodged with the ECHR in December 1999 and her award appears to have been computed from May 1998 until judgment in June 2005. If no limitation issue arose and was adjudicated upon in Fadeyeva,Thames Water submits that the conclusion that Mrs Fadeyeva was entitled to non-pecuniary loss for over 7 years cannot assist the present limitation question.

252.
I do not consider that the decision in Fadeyeva assists in this case, for the reasons submitted by Thames Water. I consider that the 6 year limitation period may be a relevant factor when considering the appropriate period under s. 7(5)(b). The court may also take account of the period of time when a Claimant was subject to the interference with his or her rights, excluding any period when the rights did not exist.

Issue 14: In the case of infants should the court apply the same rules as those in section 28 (1) and (2) of the Limitation Act 1980 so that they are treated as being under a disability so that they have either one year (s.7(5)(a)) or a discretionary period (s.7(5)(b)) from ceasing to be an infant to bring their action?

253.
The Claimants refer to the fact that under CPR rule 21.2(3) a court can authorise a child to conduct proceedings on his or her own based, usually, on an assessment of the maturity of the child and his or her ability to understand what is being done.

254.
However the Claimants submit that the fact that one child may be able to bring an action or that another's parents may do so on his behalf, is no reason to say that all children have to do so within the time limit set by s. 7(5)(a) and that this would discriminate between active parents or children and inactive ones.

255.
In HRA terms the Claimants submit that if a child must bring an action when he or she is unable to do so under CPR 21 then he or she has been denied access to the court under Article 13. The Claimants therefore submit that the answer to issue 14 should be 'Yes.'

256.
Thames Water states that the Limitation Act periods of disability do not apply to the HRA but agrees that they may be a relevant consideration though such periods are not necessarily determinative of the HRA issue.

257.
Thames Water submits that the procedural considerations of children needing litigation friends prior to the age of 18 are irrelevant to the issue of the relevance of the statutory period of disability under s.28 Limitation Act 1980 to the present period of limitation which is not governed by the LA 1980.

258.
Thames Water submits that the Claimants' contentions ignore the fact that a child can start an action at any age, if he or she has a litigation friend and hence Thomas Bannister is a claimant. There is therefore no question of any child being denied access to the court, per Article 13 of the Convention. Thames Water questions why he and his parents did not begin their actions earlier, and submits that there is no a priori reason why the merits of their reasons for not doing so should not be considered together and ruled upon using similar considerations.

259.
Again, I consider that the provisions of section 28 (1) and (2) of the Limitation Act 1980 may be relevant to this issue but they are not determinative of the limitation periods under s. 7(5) of the HRA.

Summary

260.
I summarise my conclusions on the issues as follows, subject to any argument on the form of the wording:

(1)

Issue 1: The Claimants are seeking to enforce duties which arise under section 94(1)(b) WIA in respect of odours from Mogden STW and/or Mosquitoes which live and breed as a result of sewage or sewage sludge at Mogden STW and/or the plant and equipment at Mogden STW holding or treating such sewage or sewage sludge. The claimants are not seeking to enforce duties under s.94(1)(b) in respect of mosquitoes which live and breed on the Mogden STW site but do so not as a result of the sewage or sewage sludge or the plant and equipment holding or treating the sewage sludge.

(2)
Issue 2: The Claimants are precluded from bringing a claim in nuisance, absent any negligence by reason of the principle in Marcic. The Claimants are precluded by the principle in Marcic from bringing claims for nuisance involving allegations of negligence, negligence or based on negligence under the HRA where the exercise of adjudicating on that cause of action is inconsistent and conflicts with the statutory process under the WIA.

The Claimants are not precluded from bringing a claim in nuisance involving allegations of negligence, negligence or based on negligence under the HRA where, as a matter of fact and degree, the exercise of adjudicating on that cause of action is not inconsistent and does not involve conflicts with the statutory process under the WIA. In such a case, section 18(8) WIA enables the bringing of such claims despite the principle in Marcic.

(3)
Issue 3: The claims in nuisance involving allegations of negligence, negligence and under the HRA which are not precluded are those where, as a matter of fact and degree, the exercise of adjudicating on the cause of action is not inconsistent and does not involve conflicts with the statutory process under the WIA. Causes of action based on thephysical operation and/or operational management of the works are not likely to be precluded but that will depend on the facts.

(4)
Issue 4:The Marcic principle would not preclude a claim against Thames Water for failing or neglecting to press for capital funding for odour related expenditure within the Asset Management Plan system prior to 2000.

(5)
Issue 5: In relation to any cause of action based on the allegations of negligence in respect of odours and mosquitoes, Thames Water could not seek to raise the Marcic principle by contending that certain actions were not taken because of a lack of funding from customer charges under the WIA or otherwise. In general, the ability to fund expense will not provide a defence to an allegation of negligence.

(6)
Issue 6: Where an award for diminution of capital values cannot be made because the nuisance is not permanent, damage for nuisance caused to a property by smells and mosquitoes should be based on diminution in letting value. An assessment by reference to the physical inconvenience and distress to the Claimant is not an appropriate measure of damages. A sum for general loss of amenity is an appropriate measure where the ascertainment of diminution in letting value is not reasonable or practicable.

(7)
Issue 7: Damages for diminution in value frequently raise difficult issues of assessment which can usually be resolved by expert evidence. If, after taking account of any expert evidence, the court

concludes that such assessment is not reasonable or practicable then the principles on which damages are assessed are sufficiently flexible to do justice between the parties by arriving at a sum for general damages for loss of amenity.

(8)
Issue 8: If no diminution in rental value can be shown then the principles on which damages are assessed are sufficiently flexible to do justice between the parties by arriving at a sum for general damages for loss of amenity.

(9)
Issue 9: Damages for nuisance might confer a sufficient remedy on those with a legal right to occupy such as to disentitle those living in the same household without such a legal right to a separate remedy under Article 8 and/or the HRA. When the court awards damages for nuisance to those with a proprietary interest those damages will usually afford just satisfaction to partners and children but that there might be circumstances where they will not. Equally, there may be circumstances where others without a legal right to occupy may have a right to a separate remedy under Article 8 and/or the Human Rights Act 1998 for which there will not be just satisfaction by an award of damages for nuisance.

(10)
Issue 10: The alternative remedies under sections 80 and 82 of the Environmental Protection Act 1990, the complaint to Ofwat under s. 94 WIA and the current abatement notice are all relevant to the issue of whether damages for owners/occupiers and/or those without a legal interest in their homes are necessary to afford just satisfaction under section 8(3) of HRA 1998.

(11)
Issue 11:

(a)
Damages would only be awarded undersection 8(3) of HRA if taking account of the measure of damages for nuisance and the availability of the alternative remedies, such damages were necessary to afford just satisfaction. Where they are awarded, the measure of non-pecuniary damages for a victim of a human rights violation in this type of case might include damages for inconvenience, mental distress and physical suffering, taking into account all relevant circumstances, includingfactors such as age, the victim’s state of health and the duration of the situation complained of, together with any special damages that can be proved.

(b)
Damages would only be awarded undersection 8(3) of HRA 1998 if taking account of the measure of damages for nuisance and the availability of the alternative remedies, such damages were necessary to afford just satisfaction. An award of damages for nuisance to those with a proprietary interest will usually afford just satisfaction to partners and children. If, despite that, there is a Claimant who still remains a victim because he or she has not received just satisfaction then that person would be entitled to further damages under s. 8(3) of the Human Rights Act 1996.

(12)
Issue 12:In determining a limitation issue under section 7(5)(b)HRA 1998 the court should exercise its discretion, by analogy with section 33 of the Limitation Act 1980, having regard to all the circumstances of the individual claimant. In doing so, one of those circumstances will be the circumstances of the group in a group action.

(13)

Issue 13: In determining the relevant period under section 7(5)(b) in a case of damages for interference in a Claimant's rights under article 8 by a continuing nuisance the 6 year limitation period under the Limitation Act 1980 may be a relevant factor and the court may also take account of the period of time when a Claimant was subject to the interference with his or her rights, excluding any period when the rights did not exist.

(14)

Issue 14: In the case of infants the provisions of section 28 (1) and (2) of the Limitation Act 1980 may be relevant to but are not determinative of the limitation periods under s. 7(5) of the HRA.