UPPER TRIBUNAL (LANDS CHAMBER)

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**Location: Royal Courts of Justice, Strand,
London WC2A 2LL**

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – WATER – injurious affection – damage to land – diminution in value – compensation under paragraph 2(3) of Schedule 12 of the Water Industry Act 1991 – whether compensation can be claimed for diminution in value as a result of the keeping and use of pipes on neighbouring land

A REFERENCE UNDER SCHEDULE 12 TO THE WATER INDUSTRY ACT 1991

BETWEEN:

**JOHN BLAND CHARLTON (1)
HELEN ELIZABETH CHARLTON (2)**

Claimants

-and-

NORTHUMBRIAN WATER LIMITED

Respondent

**Re: Bleach Green Farm,
Alum Waters,
New Brancepeth,
Durham,
DH7 7JP**

**Judge Elizabeth Cooke and Mrs Diane Martin MRICS FAAV
Heard on: 18 October 2022**

Decision Date: 25 November 2022

Mr Simon Goldberg KC for the claimants, instructed by Gibson & Co Solicitors Ltd
Ms Melissa Murphy KC for the respondent, instructed by Eversheds Sutherland International LLP

The following cases are referred to in this decision:

Clift v Welsh Office [1999] *1 WLR 796, CA*
Manchester Ship Canal Co Ltd v United Utilities Water plc [2014] 1 WLR 2576
Wildtree Hotels Ltd v Harrow LBC [2001] 2 AC 1

Introduction

1. Bleach Green Farm is a rural property near Durham. Its owners, the claimants, seek compensation for depreciation in its value following the construction of an underground sewage reservoir by the respondent on neighbouring land. This is the Tribunal's decision on the preliminary issue as to whether compensation for diminution in value of their property, caused not by the works to install the reservoir but by its continued presence and use nearby, is recoverable under the terms of the Water Industry Act 1991.

2. The claimants were represented by Simon Goldberg KC and the respondent by Melissa Murphy KC, and we are grateful to them both.

The factual background

3. As this is a decision about a preliminary point of law we can set the scene very briefly, and of course we are not making any findings of fact.

4. Bleach Green Farm is a property of 16.38 acres, including a farmhouse, gardens, a range of buildings, two fields and some woodland. It has the benefit of an easement over a track from the highway; the owners of Bleach Green Farm do not own their access.

5. In recent years there have been increasingly frequent overflows from the sewers in the locality, and in response to that the respondent constructed an underground sewage storage reservoir in 2018 on neighbouring land, 20m from the boundary of Bleach Green Farm and about 100m from the farmhouse. We are told (by Mr Goldberg KC) that the reservoir "has a capacity of 900,000 gallons (equivalent to more than an Olympic swimming pool)". At the hearing there was some uncertainty about precise capacity, but at any rate it can hold a vast quantity of what a nineteenth century statute referred to as "excrementitious material". The claimants were given notice of the work to be done because of their right of access over the track, which had to be upgraded as part of the work.

6. The claimants have expert evidence from Mr Alistair Cochrane MRICS FAAV to the effect that the value of Bleach Green Farm has been diminished by the upgrading of the access track (which is said to give the area a more industrial feel) and because purchasers will be anxious about odours from the reservoir and about the potential for flooding from the River Deerness. The depreciation is said to amount to £124,500. Mr Paul Hine MRICS, expert witness for the respondent, has concluded that there has been no diminution in the value of the property. We make no comment on the expert evidence in this decision save to note the legally important point that the claimants are not asking for compensation for damage caused to their property by the work of installation of the reservoir; they seek compensation for diminution in value caused by its presence and use. Moreover, the diminution in value is not said to be caused by any physical damage but by the perception of how the access looks and by the anxieties of purchasers as a result of the presence of the reservoir.

7. The Tribunal directed the hearing of a preliminary issue:

> "Is the claimed diminution in value of the claimants' land damage to, or injurious affection of, land within the meaning of para 2(3) of Schedule 12 to the Water Industry Act 1991?"

The legal background

(1) The provisions of the Water Industry Act 1991

8. The water industry was privatised by the Water Act 1989, and the Water Industry Act 1991 ("the WIA 1991") followed as a consolidating statute. It makes provision for the appointment of water and sewage undertakers and sets out their duties and powers. Section 158 enables them to lay pipes in streets. Section 159 empowers them to do so on other land:

> "(1) Subject to the following provisions of this section, to section 162(9) below and to the provisions of Chapter III of this Part, every relevant undertaker shall, for the purpose of carrying out its functions, have power—
>
> (a) to lay a relevant pipe (whether above or below the surface) in any land which is not in, under or over a street and to keep that pipe there;
>
> (b) to inspect, maintain, adjust, repair or alter any relevant pipe which is in any such land;
>
> (c) to carry out any works requisite for, or incidental to, the purposes of any works falling within paragraph (a) or (b) above."

9. A "relevant undertaker" is defined in section 219 as a water or sewage undertaker, and a "relevant pipe" is defined in section 158 as, in relation to a sewage undertaker, a sewer or disposal main.

10. Schedule 12 to WIA 1991 is about compensation. Paragraph 4 reads as follows:

> "(1) Subject to the following provisions of this paragraph, a sewerage undertaker shall make full compensation to any person who has sustained damage by reason of the exercise by the undertaker, in relation to a matter as to which that person has not himself been in default, of any of its powers under the relevant sewerage provisions."

11. That right to "full compensation" was first set out in section 308 of the Public Health Act 1875. In that statute the right to full compensation extended to any person who sustained any damage by reason of the exercise of powers under that Act. But the provisions of the WIA 1991 are "more specific and more elaborate", as Lord Sumption put it in *Manchester Ship Canal Co Ltd v United Utilities Water plc* [2014] 1 WLR 2576 at paragraph 11. In the WIA 1991 the right to "full compensation" is confined to those who have sustained damage as a result of the exercise of "relevant sewerage provisions", which do not include section 159. It is not in dispute that paragraph 4 of Schedule 12 is not relevant to this reference.

12. Instead, the claimants rely upon paragraph 2 of Schedule 12 to the WIA 1991 which sets out entitlements to compensation following the exercise of "power to carry out pipe-laying works", defined to include the powers conferred by section 159. Separate provision is made

in paragraph 2(1) and (2) for compensation in respect of "relevant land", which means the land where the power is exercised or land held with that land, and in respect of land which is not relevant land (paragraph 2(3)), as follows:

> "(1) If the value of any interest in any relevant land is depreciated by virtue of the exercise, by any relevant undertaker, of any power to carry out pipe-laying works on private land, the person entitled to that interest shall be entitled to compensation from the undertaker of an amount equal to the amount of the depreciation.
> (2) Where the person entitled to an interest in any relevant land sustains loss or damage which—
> (a) is attributable to the exercise by any relevant undertaker of any power to carry out pipe-laying works on private land;
> (b) does not consist in depreciation of the value of that interest; and
> (c) is loss or damage for which he would have been entitled to compensation by way of compensation for disturbance, if his interest in that land had been compulsorily acquired under section 155 of this Act,
> he shall be entitled to compensation from the undertaker in respect of that loss or damage, in addition to compensation under sub-paragraph (1) above.
>
> (3) Where any damage to, or injurious affection of, any land which is not relevant land is attributable to the exercise by any relevant undertaker, of any power to carry out pipe-laying works on private land, the undertaker shall pay compensation in respect of that damage or injurious affection to every person entitled to an interest in that land."

13. Paragraph 3 deals with the assessment of compensation:

> "(1) Any question of disputed compensation under paragraph 2 above shall be referred to and determined by the Upper Tribunal ; and in relation to the determination of any such compensation the provisions of section 4 of the Land Compensation Act 1961 shall apply, subject to any necessary modifications.
>
> (2) For the purpose of assessing any compensation under paragraph 2 above, so far as that compensation is in respect of loss or damage consisting in depreciation of the value of an interest in land, the rules set out in section 5 of the Land Compensation Act 1961 shall, so far as applicable and subject to any necessary modifications, have effect as they have effect for the purpose of assessing compensation for the compulsory acquisition of an interest in land.

14. The claimants and the respondent agree that in installing the reservoir on neighbouring land and keeping it there the respondent was and is exercising power to carry out pipe-laying works; and they agree that the claimants' land is not relevant land. The claim is made under paragraph 2(3).

15. What the parties do not agree is whether the claimants can recover under paragraph 2(3) compensation for diminution in the value of their land, and that is the preliminary issue we have to decide (without regard to whether in fact there has been any such diminution).

16. Before we explore that we have to set out the relevant elements of a different body of law; the parties agree as to its content, but not as to its relevance.

(2) The meaning of "injurious affection" in section 10 of the Compulsory Purchase Act 1965

17. The term "injurious affection" is a term of art with a meaning developed through case law in the context of section 10 of the Compulsory Purchase Act 1965. We were taken through a great deal of material about this, but as the parties are in agreement as to the significance of the term in the context of section 10 we can simply set out the explanation given by Sir Christopher Slade in *Clift v Welsh Office* [1999] 1 WLR 796, CA, at 800 F – 801 D:

> "Section 10 of the Act of 1965, so far as material, provides:
>
> > "(1) If any person claims compensation in respect of any land, or any interest in land, which has been … injuriously affected by the execution of the works … any dispute arising in relation to the compensation shall be referred to and determined by the Lands Tribunal.
> >
> > (2) This section shall be construed as affording in all cases a right to compensation for injurious affection to land which is the same as the right which section 68 of the Lands Clauses Consolidation Act 1845 has been construed as affording …"
>
> The phrase "injurious affection" under the Act of 1965 thus takes its meaning from cases decided under section 68 of the Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 16) which, so far as material, provided: "If any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been … injuriously affected by the execution of the works" he shall follow the course therein directed.
>
> In *Argyle Motors (Birkenhead) Ltd. v. Birkenhead Corporation* [1975] A.C. 99 , 129 Lord Wilberforce described section 68 as having "over 100 years, received through a number of decisions, some in this House, and by no means easy to reconcile, an interpretation which fixes on it a meaning having little perceptible relation to the words used." It is common ground that as a result of this process of judicial interpretation, if not judicial legislation, the right to compensation under section 10 of the Act of 1965 is dependent on the fulfilment of a number of conditions, some of which are derived from the leading case of *Metropolitan Board of Works v. McCarthy* (1874) L.R. 7 H.L. 243 … as follows.
>
> (1) The injurious affection must be the consequence of the lawful exercise of statutory powers, otherwise the remedy is in an action in the civil courts: see *Biscoe v. Great Eastern Railway Co. (1873) L.R. 16 Eq. 636* .

> (2) The injurious affection must arise from that which will give rise to a cause of action if done without the statutory authority for the relevant scheme of works: see *McCarthy's* case, at p. 261.
>
> (3) The damage or injury for which compensation is claimed must be in respect of some loss of value of the land of the claimant: see *McCarthy's* case, at p. 262, and the *Argyle Motors* case, at p. 129.
>
> (4) The loss or damage to the claimant's land must arise from the execution of the works and not from the authorised use of the lands compulsorily acquired following completion of the works …
>
> (5) The amount of compensation must be ascertainable in accordance with the general principles which apply to damages in tort."

18. We believe it is not (and could not be) in dispute both that this passage sets out the meaning of "injurious affection" in the context of section 10 of the 1965 Act, and that therefore if this were a claim under section 10 the claimants would not be able to recover, because their claim falls foul of points 2 and 4 above. As to point 2, the diminution in value they claim does not arise from anything that would give rise to a cause of action if done without the statutory authority for the pipe-laying works. It arises from the presence of the reservoir on the neighbouring land, and neighbours are entitled to make reasonable use of their land. The presence of the reservoir is not in itself a tort. As to point 4, the damage claimed arises from the authorised use of the neighbouring land and not from the works carried out to put the reservoir there.

19. The respondent says that for the same reasons the claimants cannot recover under paragraph 2(3) of Schedule 12 to the WIA, and the claimants disagree.

The arguments about the preliminary issue

20. The claimants' case is that their land has been devalued by the pipe-laying works, because it is going to be less attractive to purchasers, even though it has not been physically damaged.

21. Mr Goldberg KC acknowledged the meaning of "injurious affection" as it has evolved in the context of section 10 of the 1965 Act. He pointed out that even in that context diminution in value can be recovered, citing the decision of the House of Lords in *Wildtree Hotels Ltd v Harrow LBC* [2001] 2 AC 1 where the claimant was compensated for the temporary loss in value of its land while access to it was obstructed while works were being carried out. However, his primary argument was that "injurious affection" does not have the meaning it has under section 10 of the 1965 Act when it appears in the very different statutory context of Schedule 12 to the WIA 1991. Where Parliament intended to incorporate the provisions of other statutes it did so expressly, as it did in paragraph 3(1) and (2) – and indeed the reference to the rules in section 5 of the Land Compensation Act 1961 means that compensation for diminution in value may be claimed under paragraph 2(3) just as it can under paragraph 2(1) (otherwise why provide for those rules to have effect in the context of paragraph 2 as a whole rather than only of paragraph 2(1)?).

22. Mr Goldberg KC argued that the very different meaning of "injurious affection" in this context can be seen from the definition of "pipe-laying works", which include not only the installation of the reservoir but also its being kept on the neighbouring land, because the power in section 159 is "to lay a relevant pipe in any land which is not … a street **and to keep that pipe there**" (emphasis added). Indeed, if the reservoir is regarded as an accessory to pipes then the very definition of accessory in section 219(1) of the WIA 1991 (as a sewer, pipe, etc "designed or adapted for use in connection with the use or maintenance of the main, sewer or other pipe …") includes the concept of use. Accordingly the principle that a claimant cannot recover for loss caused by the continued presence of the installation, once the works are completed, cannot be relevant.

23. In any event, whereas section 10 of the 1965 Act refers only to injurious affection (of land that has not been compulsorily acquired), paragraph 2(3) uses an expression with a wider meaning: "damage to, or injurious affection of, any land".

24. The claimants' claim, it is argued, is for a loss of amenity, which is "damage" within the meaning of paragraph 2(3), and the measure of it is loss of value. The word "damage" can include depreciation, which is evident from paragraph 2(2) which refers to "loss or damage which … does not consist in depreciation of the value of that interest". Mr Goldberg KC quotes Lord Hoffmann in *Wildtree Hotels* at 12 B-C:

> "… I agree with Ward LJ that damage to the amenity of land caused by nuisances involving personal discomfort, having the effect of reducing the value of the land to let or sell, is damage to the land just as much as physical injury."

25. In his skeleton argument at paragraph 39 Mr Goldberg KC said "Cs put their case on the basis of damage to the Property, not injurious affection."

26. Ms Murphy KC argued that "injurious affection" cannot be detached from its meaning in the case law. She referred to the well-known principle of statutory interpretation that if a word or phrase has a technical meaning in a certain branch of the law, and is used in a context dealing with that branch, it is to be given that meaning unless the contrary intention appears (*Bennion, Bailey and Norbury on Statutory Interpretation* 22.5).

27. She went on to explain that the WIA 1991 deliberately created something much more specific than the right to "full compensation" found in the earlier statutes relating to water and sewerage. The impact of "relevant sewerage provisions" is treated differently (in paragraph 4 of Schedule 12) to that of other operations including pipe-laying works. And within the latter category the impact on relevant land is treated differently from the impact on other land. There is a hierarchy.

28. The same hierarchy can be seen in the principles of compensation for the compulsory purchase of land (section 7 of the Compulsory Purchase Act 1965) and for compensation for injurious affection of land that has not been compulsorily purchased (Section 10 of the 1965 Act) as a result of the exercise of compulsory purchase powers.

29. Therefore it is important that paragraph 2 of Schedule 12 makes a distinction between the entitlements for relevant land (paragraphs 2(1) and 2(2)) and for other land (paragraph 2(3)). If the claimants are right, that distinction is eroded because diminution in value could be claimed both under 2(1) and under 2(3); yet it would be absurd for the draftsman to have intended the same outcome from entirely different language, and the statute should be construed so as to avoid absurdity. Mr Goldberg KC's answer to this was to point out that even on his reading of the paragraph, relevant land has the additional entitlement to compensation for disturbance in paragraph 2(2); but he was unable to explain why paragraphs 2(1) and 2(3) should be worded differently if both enable a claim for diminution in value.

30. Ms Murphy KC argues, further, that underlying the provisions of paragraph 2 of Schedule 12 is the same public policy that can be seen at work in section 10 of the Compulsory Purchase Act 1965, namely that compensation is given as a substitute for damages in tort, and that the right to compensation only arises if the claimants would have had a claim in nuisance, but for statutory authority. Subject to the tort of nuisance, as against their neighbours landowners are entitled to do as they wish with their land; as Lord Hoffmann put it in *Wildtree* at 12 F-H "a reasonable use of land, with due regard to the interest of neighbours, is not actionable.". Hence the further principle that recovery should be for damage caused while work is going on rather than for the ongoing use of land; where Parliament intended there to be a claim for the ongoing use of public works it made express provision for that in the Land Compensation Act 1973 – and that provision is limited to cases where value is depreciated by physical factors caused by the use of the works , which is why the claimants cannot rely upon it.

31. As to the word "damage", Ms Murphy KC's preferred position was that it means the same as injurious affection. She argued that the two terms are used interchangeably in the cases, particularly in *Clift* (and the use of the term "damage" can be seen in the extract set out at paragraph 17 above). Alternatively, it is confined to physical damage.

Conclusions

32. We regard it as inescapable that "injurious affection" in paragraph 2(3) of the WIA 1991 has the same meaning as it has in section 10 of the 1965 Act. That meaning is too long-standing and well-established in the context of compensation for the exercise of statutory powers by public authorities for Parliament to have had anything else in mind when using the term in the WIA 1991. The express reference to other provisions in paragraph 3 does not shake that conclusion, because what is happening is not the importation of another statutory provision but the continuance of case law from one context to another; the respondent's argument is not that section 10 has effect, but that the word means the same in paragraph 2(3) as it does in section 10.

33. That being the case we can pass over much of the argument because injurious affection can be of no assistance to the claimants. We agree that injurious affection can include a claim for temporary diminution in value (*Wildtree*), but that is not what is claimed here and it remains the case that injurious affection is restricted to claims that would otherwise be available in tort and to claims arising from doing work rather than from the continued use of

an installation. We note that the words quoted by Mr Goldberg KC in his skeleton argument from Lord Hoffman's judgment in *Wildtree* at 12 BC were part of the explanation as to why claims for such damage are so rarely successful; it is because claims are restricted to damage caused by the construction of works, and because the damage must have been such that in the absence of statutory protection for the public authority it would have been actionable at common law, and discomfort caused during construction works is not. There is no escape from these principles in the operation of injurious affection.

34. That means that the claimants' only hope of success is the word "damage" in paragraph 2(3) – or rather, "damage to … any land". Does that expression take us outside the confines of injurious affection? It may well do, because as Mr Goldberg KC says if Parliament had wanted compensation to be available purely on the same basis as section 10 it would have simply incorporated section 10 which, however obscurely worded, has a well-known meaning.

35. We reject the idea that "damage to … any land" and "injurious affection" are synonyms in paragraph 2(3). Given the well-established use of the single term "injurious affection" in section 10 of the 1965 Act, it would be most surprising if Parliament then used two terms when it simply meant injurious affection. We appreciate that there are cases where the word "damage" is widely used when discussing injurious affection in the context of section 10, but that does not indicate that in a different statute the term "damage to .. any land" cannot have a wider meaning.

36. So it remains to determine whether "damage to … any land" in paragraph 2(3) can mean (whatever else it might mean) diminution in value caused by something entirely non-physical. We remind ourselves that the claim here is for diminution in value as a result of what purchasers might think about the reservoir and the access.

37. Mr Goldberg's argument that pipe-laying works include the retention of pipes on land is not of any assistance; the power is one thing, but the right to compensation is a separate idea and is set out in Schedule 12. The fact that pipes can be kept on land does not by itself generate a right to compensation. Equally unhelpful is the definition of accessories as being designed for use with pipes; of course they are, that is what makes them accessories, but that tells us nothing about the losses that can be compensated.

38. We regard it as inconceivable that "damage to … any land" in paragraph 2(3) could include diminution in value of the kind sought by the claimants, for a number of reasons. It would mean that paragraphs 2(1) and 2(3) would each confer the right to compensation for diminution in value, yet used completely different language. That would be absurd. It would also mean that the hierarchy of relevant and non-relevant land was disrupted, leaving only the claim for disturbance to distinguish them. It would be inconsistent with the public policy that is seen at work in the 1965 Act and in the case law surrounding injurious affection, that as against their neighbour landowners are entitled to use their land as they wish provided that it is not tortious. That is an important public policy and we see no reason why it should be disturbed in this limited context; very special reasons would be needed for doing so and none has been suggested.

39. Ms Murphy KC suggested that, if it is not synonymous with injurious affection, the expression "damage to … any land" is confined to physical damage. We accept that it refers to physical damage, but would widen that so as to include any physical factors affecting the land – thus including smells, noise or the obstruction of light. That is consistent with the wording of the sub-paragraph, which we think was carefully chosen. Whereas paragraph 2(2) speaks of "loss or damage" (which of course goes wider than physical damage, in the context of compensation for disturbance), paragraph 2(3) specifically says "damage to … **any land**" (emphasis added). The reference to land here is not casual and supports the view that the reference is to something that physically affects the land.

40. That would be entirely consistent with the 1973 Act, mentioned above (paragraph 30); it is worth setting out section 1(1) and (2):

> "(1) Where the value of an interest in land is depreciated by physical factors caused by the use of public works, then, if—
>
> (a) the interest qualifies for compensation under this Part of this Act; and
>
> (b) the person entitled to the interest makes a claim [after the time provided] by and otherwise in accordance with this Part of this Act,
>
> compensation for that depreciation shall, subject to the provisions of this Part of this Act, be payable by the responsible authority to the person making the claim …
>
> (2) The physical factors mentioned in subsection (1) above are noise, vibration, smell, fumes, smoke and artificial lighting and the discharge on to the land in respect of which the claim is made of any solid or liquid substance.

41. We do not need to decide whether such physical factors or physical damage would have to have occurred only during the construction work or might occur later while the reservoir is in use on the land. Arguably it might; compensation might be recoverable for a persistent smell, sufficient to amount to a nuisance. And that would make the provisions of paragraph 2(3) wider than those of section 10 of the 1965 Act, on a rational basis. But that is for another day. A diminution in value for purely intangible reasons with no physical basis cannot be compensated under paragraph 2(3).

42. Accordingly the preliminary issue is determined against the claimants, and the reference therefore comes to an end since they have abandoned claims for other heads of damage.

Judge Elizabeth Cooke — Mrs Diane Martin MRICS FAAV

25 November 2022

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for

permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.