Neutral Citation Number: [2018] EWCA Civ 2795

Case No: A3/2018/0689

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
Mr Daniel Toledano QC (Sitting as a Deputy Judge of the High Court)
[2018] EWHC 53 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/12/2018

Before:

LORD JUSTICE LEWISON
LADY JUSTICE KING
and
LORD JUSTICE DAVID RICHARDS

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Between :

BOOTS UK LIMITED	**Claimant/ Appellant**
- and -	
SEVERN TRENT WATER LIMITED	**Defendant/ Respondent**

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- -

Jonathan Davies-Jones QC and Christopher Bond (instructed by **DLA Piper UK LLP**) for the **Claimant/Appellant**
Simon Colton QC (instructed by **Eversheds Sutherland (International)**) for the **Defendant/Respondent**

Hearing date : Wednesday 5th December 2018

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Approved Judgment

Lord Justice Lewison:

1. Boots UK Ltd operates a factory at Beeston where it manufactures medical, toiletry and cosmetic products. The site is bordered by the Beeston Canal to the south east; and stands on a flood plain some 500 metres from the river Trent. There are three designated surface water outlets from the site. One discharges into a brook and thence into the river Trent. The second discharges via a dyke into the Beeston Canal. The third passes through a surface water sewer.

2. The manufacturing processes give rise to trade effluent which is discharged into a private sewer. Before the effluent is discharged into that private sewer it is metered. There has been two metering points. One is called the "D-sump" discharge pipe; and the second was a chemical trade effluent discharge pipe. However, it is to be assumed for the purposes of this appeal that before the trade effluent reaches the meter it is mixed with surface water consisting principally of rainwater, which has not been discharged via the three discharge points for surface water. The meter measures the mixed liquid which is then discharged into a public foul water sewer. Severn Trent Water Ltd is the supplier of water and sewerage services. It levies charges in two ways. First, it applies a charge to the metered volume of mixed liquid passing through the meter. Second, it levies a charge for the drainage of surface water by rateable value or area. It claims to be entitled to levy trade effluent charges on the entirety of the mixed liquid either (i) because the total volume of that liquid is "trade effluent" as defined by statute; or (ii) because it is deemed to be so in consequence of Severn Trent's charging scheme; or (iii) because it is deemed to be so under contractual arrangements between it and Boots. Boots alleges that it is not entitled to levy metered charges on the whole of the mixed liquid, but only on that part which is trade effluent; and claims reimbursement of what it alleges to have been substantial overpayments stretching back over many years. Mr Daniel Toledano QC gave summary judgment in Severn Trent's favour; but gave Boots permission to appeal. His judgment is at [2018] EWHC 53 (Comm), [2018] PTSR 1245.

3. The appeal potentially raised two issues:

    i) Is the mixed liquid "trade effluent" as defined by section 141 (1) of the Water Industry Act 1991?

    ii) If not, is it deemed to be trade effluent as a consequence of the charging scheme or contractual arrangements between Boots and Severn Trent?

4. In order to succeed on this appeal, Boots needed to win on both points. We heard argument on the first of these issues; at the conclusion of which we announced our decision to dismiss the appeal with reasons to be given later. These are my reasons for joining in that decision.

5. Between [16] and [26] the judge set out the history of legislation relating to the supply of water and sewerage services, culminating in the legislation passed in 1991. Severn Trent's power to fix, demand and recover charges is limited to doing so either (i) under an agreement with its customer or (ii) under the relevant annual Charges Scheme. From 1999 until 2015, such a Scheme had to be approved by the Water Regulation Authority ("OFWAT") before it can take effect. Although Boots' claim in part predates the Water Industry Act 1991, that Act was a consolidation Act which did

not change the previous statutory law in any material way. It is convenient, then, to deal with the statute in its current form.

6. Section 106 (1) gives an owner or occupier of premises the right to connect his drains or sewers to the public sewers and thereby to discharge foul water and surface water from those premises. Section 106 (2) provides that:

> "(2) Subject to the provisions of Chapter III of this Part, nothing in subsection (1) above shall entitle any person—
>
> (a) to discharge directly or indirectly into any public sewer—
>
> (i) any liquid from a factory, other than domestic sewage or surface or storm water, or any liquid from a manufacturing process; or
>
> (ii) any liquid or other matter the discharge of which into public sewers is prohibited by or under any enactment; or
>
> (b) where separate public sewers are provided for foul water and for surface water, to discharge directly or indirectly—
>
> (i) foul water into a sewer provided for surface water; or
>
> (ii) except with the approval of the undertaker, surface water into a sewer provided for foul water."

7. Chapter III is the part of the Act that deals with trade effluent. Section 118 provides that the occupier of trade premises may discharge trade effluent into a public sewer with the consent of the relevant undertaker; and disapplies section 106 (2) (a) and (b) to the lawful discharge of trade effluent. An application for consent to discharge trade effluent is made by notice: section 119. Section 121 gives a sewerage undertaker wide powers to impose conditions on a consent. If a person is aggrieved either by a refusal to grant consent, or by conditions attached to a consent, he may appeal to OFWAT: section 122. OFWAT has wide powers to review conditions and to substitute its own. "Trade effluent" is defined by section 141 (1) which provides:

> "trade effluent" –
>
> (a) means any liquid, either with or without particles of matter in suspension in the liquid, which is wholly or partly produced in the course of any trade or industry carried on at trade premises; and
>
> (b) in relation to any trade premises, means any such liquid which is so produced in the course of any trade or industry carried on at those premises,
>
> but does not include domestic sewerage"

8. This definition has formed part of the statutory scheme for regulating sewerage services since 1937: Public Health (Drainage of Trade Premises) Act 1937 s. 14.

9. As the judge correctly said, the question on this issue is whether a liquid which contains a mixture of the product of trade or industry and surface water constitutes trade effluent within the meaning of the statutory definition. At [53] the judge set out the approach he would adopt to the interpretation of the statute. Mr Davies-Jones QC, on behalf of Boots, did not criticise anything that the judge had said in that respect; although he showed additional materials which would support the judge's distillation of principle. Since it is common ground that the judge was correct in setting out the principles, it is not necessary to do more than to repeat the relevant parts of his summary:

> "(1) In construing the definition, the court must strive to give it a "fully informed construction". (2) That requires the court to have regard to the "context" of the statutory provision as well as to its terms. (3) The "context" of a statutory provision includes its legislative history, its statutory purpose and other Acts in *pari materia*. (4) The court must also have regard to the consequences of rival constructions. (5) The court should presume that the legislator did not intend a construction which would operate unjustly or anomalously and did intend one which promotes consistency in the law."

10. Mr Davies-Jones argued that the judge had adopted a literal interpretation of the definition, rather than an informed or contextual interpretation. He had not correctly applied the principles that he said he would adopt. Since the 1930s the statutory scheme for regulating sewerage and drainage has maintained a clear distinction between three distinct and mutually exclusive types of effluent: domestic sewage, surface water and trade effluent. Until 1937 a person had a right to discharge foul water and surface water into public sewers; but had no right to discharge trade effluent (although a local authority had a limited duty to permit the discharge of trade effluent into public sewers). The 1937 Act was designed to confer a right to discharge trade effluent which had not existed before. It was not designed to alter the law as regards foul water or surface water. Since then trade effluent has been treated as a separate category of effluent. Each of these mutually exclusive categories gives rise to separate rights of discharge.

11. This threefold classification is replicated in the 1991 Act. Section 106 (1) gives the owner or occupier of premises the right to have his drains or sewer communicate with a public sewer and thereby to discharge "foul water and surface water". However, section 106 (2) (a) provides that that right does not entitle any person to discharge "any liquid from a factory, other than domestic sewage or surface or storm water, or any liquid from a manufacturing process." These two sub-sections mirror that threefold classification. It follows from this threefold classification, he said, that the mixed liquid should be treated as composed in part of trade effluent and in part of surface or storm water. Boots already had a right to discharge surface water into the public sewer under section 106, and section 141 should not be construed so as to remove that right. The only purpose of the regime for the discharge of trade effluent was to create a "carve out" from what had been the prohibition on the discharge of trade effluent now contained in section 106. It was not intended to remove the pre-existing right to discharge surface water.

12. The definition of trade effluent was concerned with liquid "produced in the course of any trade or industry". That meant directly produced. Rainwater or surface water is not produced in the course of trade or industry: it is simply a fact of nature. Although the definition uses the words "wholly or partly", that is designed to capture an industrial process using water which is supplied to the factory in question, where some of that water ends up in the discharge.

13. The consequences of the judge's interpretation, he submitted, were unjust. Boots had been charged both for the drainage of surface water by reference to the area of the site; and again for part of that surface water at trade effluent rates in so far as it formed part of the mixed liquid discharged into the foul sewer.

14. In my judgment this involves a misreading of the definition. First, the definition in section 141 does not expressly exclude surface or storm water, whereas it does expressly exclude domestic sewage. So the threefold classification is not reproduced in the definition. Second, section 106 refers to at least three (and possibly four) different types of sewer. Three are expressly mentioned: a foul water sewer, a surface water sewer and a storm-water overflow sewer. The fourth is a combined sewer which is implicit in the provision in section 106 (2) (b) which applies "where separate public sewers are provided for foul water and surface water". If there are no separate sewers, then necessarily there must be a combined sewer. So that classification does not replicate the threefold division. Third, the definition expressly includes liquid partly produced in the course of trade. That part of the definition which contemplates a liquid partly produced in the course of trade thus contemplates a mixture. Moreover, the definition also contemplates a different kind of mixture, viz. a mixture of liquid and suspended particles of matter.

15. Fourth, Boots' argument is contrary to authority. In *Yorkshire Dyeing and Proofing Co Ltd v Middleton BC* [1953] 1 WLR 393 the Divisional Court considered the predecessor definition in the 1937 Act. That case concerned mixed trade effluent, some of which came from one building and some from another. Lord Goddard CJ, giving the leading judgment said:

> "For my part, I think that the words "wholly or in part" relate to the composition or constitution of the trade effluent, and that "trade effluent" for the present purpose means a fluid which is partly composed, or may be partly composed, of the product of the trade or business and of something else which in the ordinary course would be water. It is not to be said, therefore, that the effluent is not a trade effluent because part of it is water. It must be wholly or in part produced in the course of the business carried on at trade premises, and in relation to any trade premises it means any liquid which is wholly or in part produced in the course of a trade or industry carried on at those premises."

16. There is no suggestion in this passage that Lord Goddard was restricting himself to any particular kind of water. Lynskey J quoted the statutory definition and said:

> "That is the definition of "trade effluent," an effluent in part produced by the trade operation and in part coming from other sources."

17. Again, there is no suggestion that the "other sources" to which he referred were limited. This case, and in particular the judgment of Lord Goddard CJ, distinguishes between the composition of the liquid on the one hand and the place where it was produced on the other. This distinction is, in my judgment, carried through more clearly into section 141. Limb (a) of the definition deals with the composition of the liquid ("partly produced in the course of any trade or industry"); whereas limb (b) deals with the question whether that liquid is produced at particular trade premises or elsewhere. Limb (b) was the whole issue in the *Yorkshire Dyeing* case. The point in the case was not what was being discharged; but what were the premises at which it was produced. In this case all the mixed liquid is produced at Boots' factory.

18. *Thames Water Authority v Blue and White Launderettes Ltd* [1980] 1 WLR 700 concerned the discharge of soapy water from washing machines in a launderette. This court rejected the argument that because that water had the same characteristics as soapy water produced by a domestic washing machine it came within the exemption for "domestic sewage". Eveleigh LJ said:

> "Upon trade premises one would expect there to be a source of effluent that is not related to the trading or industrial process carried on there. The establishment will have its domestic side as well as its truly business side. The words "wholly or in part produced in the course of any trade" are almost wide enough to include anything which comes from the premises used by people working there. "In the course of" is a phrase often considered by lawyers and has been shown to have a wide embrace. Washing room activities for personal cleanliness might well be said to give rise to effluent in the course of trade or industry carried on at the premises. In my opinion the exclusion of domestic sewage is intended to relate to the household activities on the premises, the domestic activities of those who work there as opposed to the effects of the business activities. I would, therefore, conclude from the words of section 14 itself that the water discharged from the washing machine in a launderette is trade effluent within the meaning of the section, and not domestic sewage."

19. There was some debate about precisely what Eveleigh LJ meant by "anything which comes from the premises used by people working there". For my own part I consider that he was referring to *premises* used by people working; and that (but for the exclusion of domestic sewage) anything that came from *those premises* would fall within the definition. This ties in with the first sentence of the citation. There will be sources of effluent from trade premises unrelated to the trading process; but such effluent is only exempt if it is domestic sewage.

20. Stephenson LJ described the issue as being whether the soapy water was all domestic sewage or whether either in whole or in part it was not. Counsel for Thames Water argued the latter as justification for the whole of the trade effluent charges which had

been levied. It seems to be inherent in that argument that Thames Water was contending that the whole of the trade effluent charge would be justified even if only part of the mixed liquid was trade effluent. Stephenson LJ said:

> "… I feel free to decide that everything directly produced in the course of the trade or business of a launderette, whether for the trade purpose of washing or laundering clothing or for the trade purpose … of hiring out washing machines and providing soap and water-softener, is a trade effluent, except the effluent from any lavatories or wash basins or water closets or baths provided as ancillary to the trade use of the launderette. And that exception is domestic sewage.
>
> The exception is made in order to prevent domestic effluent, *if separately discharged*, being classed and charged as trade effluent because it might be considered to be produced in the course of the trade carried on at trade premises. But it does not follow that because all liquid discharged from particular trade premises is not trade effluent none of it is." (Emphasis added)

21. Brandon LJ agreed with both judgments. Again, there was some debate about whether the second paragraph of the citation was part of the *ratio decidendi* or merely *obiter*. Having regard to the way in which that case was argued, I was persuaded by Mr Colton QC, for Severn Trent, that it was part of Stephenson LJ's *ratio decidendi*. If the mixed liquid had been treated as partly domestic sewage and partly trade effluent it is difficult to see how Thames Water could have recovered the charges levied in full.

22. That case seems to me to be strong support for the proposition that a mixed liquid is to be treated as a single mixture, and not separated into what had been its former parts. Both these cases were decided before the passing of the Water Industry Act 1991 which, as I have said, was not intended to change the law. In *Barras v Aberdeen Steam Trawling and Fishing Co Ltd* [1933] AC 402, 411 Lord Buckmaster said that:

> "It has long been a well established principle to be applied in the consideration of Acts of Parliament that where a word of doubtful meaning has received a clear judicial interpretation, the subsequent statute which incorporates the same word or the same phrase in a similar context, must be construed so that the word or phrase is interpreted according to the meaning that has previously been assigned to it."

23. Fifth, Boots' construction of the definition pays scant regard to the laws of physics. The operation of entropy tells us that once two liquids mix, they cannot be separated. Once you have added milk to your coffee or tonic to your gin, even though you can identify the sources from which the components of the mixed liquid originate, you have created a new and different liquid.

24. Sixth, Boots' interpretation does not fit comfortably into the scheme of the 1991 Act. Absent both a consent to discharge trade effluent and also an approval by the undertaker under section 106 (2) (b) (ii) to discharge surface water into a foul sewer, a

mixed liquid cannot be discharged into the public sewers at all. Chapter III fills that gap. It makes little sense to have two separate but concurrent approval regimes for a single body of mixed liquid.

25. Seventh, at least in principle the remedy for any perceived injustice lies in the hands of the discharger. It is in control of the arrangement of its own internal infrastructure. It has chosen to construct its factory so that effluent produced by its manufacturing activities is mixed with rainwater before the mixed liquid enters the drain. The evidence adduced on behalf of Boots is that because of the combination of the topography of the site and the physical location of the drainage infrastructure, it would now be impractical or prohibitively expensive to retrofit the drainage. But I cannot see any reason in principle why it should not have arranged matters originally so that rainwater was separately discharged. Moreover, the facts of this particular case cannot affect the correct interpretation of section 141 of the Act.

26. Although Mr Davies-Jones placed a lot of weight on the purpose of the provision, it seems to me that there is an entirely rational purpose for treating a mixed liquid as falling within the definition of trade effluent. The essential point is that a mixture of trade effluent and surface water is still contaminated water; and will need to be treated in a different way from surface water. It may also be necessary to arrange for its eventual discharge in a different way. Whereas pure surface water could be discharged into a canal or a river, contaminated water cannot. The difference in treatment between surface water and foul water is also the reason why approval is needed under section 106 (2) to discharge pure surface water into a foul sewer.

27. Mr Davies-Jones also argued that the construction that the court should adopt should be one that promotes consistency in cognate Acts of Parliament; and in particular the Water Resources Act 1991 which deals with pollution. Section 85 (3) of that Act prohibits the discharge of trade effluent into controlled waters. The argument was that surface water was excluded from the definition of "trade effluent" in section 221 (1) of that Act; and therefore the discharge of a mixed liquid consisting partly of trade effluent and partly of surface water only amounted to an offence as regards that part of the mixture which originated as trade effluent. Since Mr Davies-Jones accepted that in that scenario an offence *would* have been committed, it seems to me that the gravity of the offence would go only to the question of sentence. So the supposed anomaly does not, in my judgment, exist. Moreover, the submission begs the question whether what had once been surface water remained "surface water" for the purposes of that definition after it had been contaminated by trade effluent, such that the mixed liquid could not be "unmixed".

28. Mr Davies-Jones also submitted that the interpretation that the judge adopted would have the consequence that conditions of consent to discharge trade effluent might be very difficult if not impossible to comply with. A consent to discharge trade effluent can (and almost always will) impose maximum limits on the flow rate at which such effluent can be discharged, as well as limits to the maximum volume. If those totals are augmented by rainfall over which the manufacturer has no control, he may find himself in breach of condition for reasons which are not his fault. It is no answer that the problem may be solved by agreement with the sewerage undertaker, since the sewerage undertaker has no obligation to enter into such an agreement. In my judgment Mr Colton had the answer to this point. It is for the court to decide what is lawful; but it is for the regulator (OFWAT) to decide whether a lawful condition is a

fair condition. If the conditions imposed by a consent to discharge trade effluent are unfair, then the occupier may appeal and OFWAT may intervene. Since the right of appeal to OFWAT is an integral part of the statutory scheme, it is plainly legitimate to take it into account when interpreting the statutory scheme as a whole.

29. Mr Davies-Jones placed some reliance on documents produced by Severn Trent itself. I cannot see that documents of that nature have any bearing on the interpretation of a public general Act of Parliament.

30. I therefore joined in the decision to dismiss Boots' appeal on the interpretation of section 141. The second issue did not, therefore, arise.

Lady Justice Eleanor King:

31. I agree.

Lord Justice David Richards:

32. I also agree.