



Neutral Citation Number: [2023] EWCA Civ 28

Case No: CA-2022-002063

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING’S BENCH DIVISION, ADMINISTRATIVE COURT
MR JUSTICE BOURNE
CO/1978/2022

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/01/2023

Before :

LORD JUSTICE BEAN

Between :

THE KING on the application of WILD JUSTICE

**Claimant/
Appellant**

- and -

THE WATER SERVICES REGULATION AUTHORITY

**Defendant/
Respondent**

David Wolfe KC and Emma Foubister (instructed by Leigh Day) for the Appellant
Hanif Mussa KC and Natasha Simonsen (instructed by Gowling WLG) for the Respondent

Hearing date : 12 January 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Bean :

1. This is an application for permission to appeal from a decision of Bourne J at an oral hearing refusing permission to apply for judicial review.
2. The Claimant is a not-for-profit company set up to advocate on behalf of wildlife to further nature conservation in the UK, to encourage public participation in nature conservation issues and to ensure that UK laws, policies and practices protect wildlife. No issue has been taken as to its standing to bring this claim. The Defendant, commonly known as “OFWAT”, is the economic regulator and one of several environmental regulators of the water and sewerage industry in England and Wales.
3. By this proposed challenge the Claimant contends that OFWAT is not properly carrying out its environmental regulatory duties in relation to the planned and unplanned discharge of untreated sewage into rivers and other water bodies by water and sewerage undertakers.
4. Section 2 of the Water Industry Act 1991 provides:

"(1) This section shall have effect for imposing duties on the Secretary of State and on the Authority [ie OFWAT] as to when and how they should exercise and perform the powers and duties conferred or imposed on the Secretary of State or the Authority by virtue of any of the relevant provisions.

...

(2A) The Secretary of State or, as the case may be, the Authority shall exercise and perform the powers and duties mentioned in subsection (1) above in the manner which he or it considers is best calculated—

...

(b) to secure that the functions of a water undertaker and of a sewerage undertaker are properly carried out as respects every area of England and Wales;

... ."

5. Section 94(1) of the 1991 Act imposes a duty:

"(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 and any lateral drains which belong to or vest in the undertaker 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 further 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."

6. Section 18 of the 1991 Act empowers the Secretary of State and OFWAT to make enforcement orders to secure compliance by water companies with statutory and other requirements including those referred to above. Section 94(3) provides that the section 94(1) duty is enforceable under section 18 by the Secretary of State, or by OFWAT in accordance with a general authorisation given by the Secretary of State. Such authorisation has been given.
7. The Urban Waste Water Treatment Directive, which sets standards for the treatment of sewage across the EU, was implemented through the Urban Waste Water Treatment (England and Wales) Regulations 1994 ("the 1994 Regulations"). The 1994 Regulations remain in force as retained EU law.
8. Regulation 4(2) of the 1994 Regulations requires sewerage undertakers to ensure the provision of collecting systems, i.e. sewers, which satisfy the requirements of schedule 2, in certain places or in certain circumstances. Paragraph 2 of schedule 2 to the 1994 Regulations provides:

"The design, construction and maintenance of collecting systems shall be undertaken in accordance with the best technical knowledge not entailing excessive costs, notably regarding—

 - (a) volume and characteristics of urban waste water;
 - (b) prevention of leaks;
 - (c) limitation of pollution of receiving waters due to storm water overflows."
9. Regulation 4(4) imposes a duty to ensure that urban waste water entering collecting systems is, before discharge, treated in accordance with regulation 5, which imposes certain requirements on the treatment of urban waste water, and 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."
10. Regulation 4(1) provides:

"(1) This regulation supplements the duty imposed on every sewerage undertaker by section 94 of the Water Industry Act 1991 (general duty to provide sewerage system) and any

contravention of the requirements of this regulation shall be treated for the purposes of that Act as a breach of that duty."

11. The Claimant accuses the Defendant of failing to police the specific requirements arising under regulation 4. The claim is not directed at enforcement of the other, more general requirements under section 94.
12. Section 27(2) further imposes a duty on OFWAT, so far as appears practicable from time to time, to collect information with respect to the carrying on by companies of the functions of water and sewerage undertakers and of the carrying on by licensees of the activities authorised by their licences. The Claimant also contends that OFWAT is failing to perform that duty, in so far as it concerns the water companies' obligations under regulation 4, to whom I will refer collectively as "water companies". The present scale and the effect of such discharges have recently received considerable press and public attention.
13. On 4 February 2022, the Claimant made a request to OFWAT for information under the Environmental Information Regulations 2004 ("the EIR request"). The information requested included an explanation of OFWAT's function in monitoring and enforcing compliance with the obligations of water companies under Section 94(1) of the 1991 Act and regulation 4 of the 1994 Regulations. On the same date it also addressed targeted requests to DEFRA, the Environment Agency ("the EA") and all of the water companies in England.
14. OFWAT responded to the EIR request on 3 March 2022. Among other things, the response stated that, when monitoring and enforcing compliance with section 94(1) and regulation 4, OFWAT uses (1) information on compliance by companies with environmental permits and (2) information obtained from companies in the course of (a) setting regulatory price controls, under which companies explain what funding they need in relation to their assets to meet their legal obligations and (b) annual monitoring of performance commitments given in the price control process. It also referred to a current OFWAT investigation of non-compliance by the English water companies with permit conditions and the possibility that this would lead to enforcement action by OFWAT for breach of duties under section 94. It did not provide any internal documents discussing OFWAT's enforcement strategy.
15. On 9 March 2022, OFWAT commenced enforcement processes against five water companies, serving statutory notices which referred to breaches of duty under section 94. OFWAT's case is that these included breaches of regulations 4(4) and 5 of the 1994 Regulations.
16. On 19 April 2022, the Claimant sent a letter to OFWAT under the judicial review pre-action protocol ("the PAP letter"), referring to a "lack of action (including monitoring and enforcement action) in relation to the planned and unplanned discharge of untreated sewage into rivers and other water bodies" and alleged that "OFWAT is unlawfully taking an entirely passive stance... including taking no steps to obtain information relating to compliance".
17. OFWAT responded to the PAP letter on 17 May 2022. It explained the related functions of OFWAT and the EA in relation to waste water treatment works. It set out OFWAT's current general approach to monitoring and enforcement in relation to the obligations

of companies under section 94 and regulations 4 and 5 and denied that OFWAT was taking no steps to obtain information in relation to compliance. It also asserted that no useful purpose would be served by commencing a claim because (1) OFWAT was in fact currently investigating all of the water companies and (2) OFWAT was also developing the manner in which wastewater monitoring and compliance assessment takes place. It suggested that if the Claimant had specific points to make as to how monitoring and enforcement could be improved, it should raise those separately rather than bringing a claim, for example in the forthcoming consultation on its draft methodology for setting price controls for the next price control period.

18. The OFWAT response set out in great detail the monitoring activities which OFWAT carried out. These were stated to include the collection of information pursuant to annual monitoring of performance commitments given by companies during price reviews by OFWAT. As part of the annual performance reporting process each company is required to include information on specific performance commitments related to the companies' obligations under the 1994 Regulations. The letter argued that "although annual performance reporting against these performance commitments does not involve the submission or collection of site-specific data as such, it does provide OFWAT with relevant data to ascertain whether there is a potentially material problem with a company's performance which would warrant more specific intervention or data requests." The letter referred to the use of such data in OFWAT's investigation into Thames Water's leakage performance.
19. The letter also referred to the fact that OFWAT obtains data from the EA and Natural Resources Wales. Companies are also required to self-report any material non-compliance with obligations. It annexed a copy of a circular from the interim chief executive of OFWAT on 18 November 2021 to the chief executive of each water company. That circular referred to OFWAT's "significant concerns about the possible scale and extent of companies' non-compliance with the Flow to Full Treatment ("FFT") conditions set out in the environmental permits for their waste water treatment works in England." These concerns were stated to be based on ongoing analysis by the EA of flow data as well as information which companies themselves had shared with OFWAT. The letter stated:-

"It is for the Environment Agency and Natural Resources Wales to consider how they enforce compliance with individual environmental permits, including in relation to FFT and storm overflow conditions. OFWAT will be keeping abreast of that and any new information that becomes available, to inform the next steps we may need to take using our own regulatory tools. That includes but is not limited to enforcement action.

If we find that use of our enforcement tools is necessary, we will apply the principles set out in our published approach to enforcement, including taking appropriate action to secure compliance, and being proportionate and targeted in focusing our intervention on areas of greatest detriment. We expect companies to come forward if they consider a breach of their obligation(s) is occurring and to take action to remedy the damage that breach has caused. Failure to do so would be considered in our approach to any enforcement.

Alongside further information and steps that may come from the Environment Agency and Natural Resources Wales in due course, I want to hear urgently and directly from companies on this issue. Your response will inform what we do next. Therefore, I expect you to respond to the requests for information set out in Annex 1 and 2 of this letter as soon as possible.”

20. The request for information set out in Annex 1 to the circular required the addressee company to provide details of the extent of any potential non-compliance with FFT permit conditions of which it was aware and the key root causes of potential non-compliance with those conditions.
21. Having referred to the circular of 18 November 2021, OFWAT’s letter of 17 May 2022 went on to state that in March 2022 OFWAT had sent a notice to five companies pursuant to section 203 of the 1991 Act requesting further site specific information for enforcement purposes. The potential contraventions highlighted in each of these notices included the duty under section 94(1)(b) of the 1991 Act to make provision for dealing effectually by means of sewage disposal works or otherwise with the contents of the sewers in its sewerage system and including but not limited to breaches of regulations 4(4) and 5 of the UWWT Regulations. Each of the section 203 notices was said to set out further detailed site-specific questions. The letter also referred to a published decision of OFWAT in respect of its investigation into Southern Water.
22. The claim was issued on 30 May 2022. The challenge is stated to be against "the Defendant's failure to discharge its obligations under section 94 of the Water Industry Act 1991, as articulated in its Environmental Information Regulations 2004 response of 3 March 2022 and its pre-action protocol response letter of 17 May 2022".
23. The permission application in the Administrative Court was first considered in the usual way on the papers by Ellenbogen J. She referred it to an oral hearing. That hearing, which I am told occupied half a day, took place on 27 September 2022 before Bourne J. In a reserved judgment handed down on 18 October 2022 he refused permission for judicial review.
24. Ground 1 of the claim accused the Defendant of unlawfully taking a passive stance in relation to enforcement of the 1994 Regulations including taking no steps to obtain information relating to compliance with them from undertakers with specific obligations in relation to their sewage treatment works. As Bourne J observed:

“The accusation of a failure to act is put in a general or generic way, the Claimant has not identified any specific action which the Defendant should have taken and has failed to take. Rather it alleges a general failure to act and relies on an asserted lack of evidence of any such action.”
25. Bourne J continued at paragraphs 50-55 of his judgment:-

“50. It is clear that OFWAT's letter to water companies of 18 November 2021 (which included a requirement to state the causes of non-compliance with FFT permit conditions – which

logically could include issues arising from the design, construction or maintenance of treatment plants) related at least in part to compliance with regulation 4 and not merely with the generality of section 94. So does the enforcement action against five water companies which began before the PAP letter was sent (and therefore before this claim was issued) and the action against a sixth which has begun since.

51. That is very important, because the Claimant's case is put in such sweeping terms. What is alleged is the taking of an entirely passive stance and an entire failure to obtain information.

52. In light of these investigation and enforcement steps which have occurred and are continuing, it is simply not arguable that the Defendant has not turned its mind to compliance with its statutory duties or that it is guilty of an entire failure to perform those duties.

53. None of this means that OFWAT has necessarily discharged its investigation and enforcement duties in a sufficient or satisfactory way. This claim does not allege any specific, individual failure to do so (despite some more specific criticism in the supporting witness statements) but is expressed in general terms. This Court may not be well placed to assess, and has not been asked to assess, the merits or demerits of the specific action which OFWAT is taking. Instead, the claim is based on a lack of connection with the regulation 4 obligations but, as I have said, there is plainly a connection with those obligations.

54. Moreover, there is no proper basis on which this Court should go behind OFWAT's assertion that, rather than being purely passive, it gathers information in several ways and uses that information for enforcement purposes, as is demonstrated by the current enforcement action. The Claimant has not shown that each of those types of information (which are listed in the summary grounds) is irrelevant to the potential enforcement of the regulation 4 obligations.

55. For these reasons there is no real prospect that the Administrative Court at a substantive hearing will find that OFWAT is simply not performing its monitoring and enforcement obligations in respect of water companies' section 94 duties.”

26. When the application for permission to appeal came before me on the papers I directed that it was to be considered at an oral hearing.
27. In his oral submissions Mr Wolfe KC drew a distinction between the powers and duties of the EA on the one hand and OFWAT on the other. I asked what remedy would be available to a member of the public or a group of individuals who alleged that the water company in their area was performing its duties so lamentably that a local river had

become effectively an open sewer. Mr Wolfe responded that the EA could say that the company was in breach of its permit conditions, whereas OFWAT could say it was a breach of the company's obligations under section 94 and regulations 4 and 5.

28. Mr Wolfe said that "if OFWAT had satisfied themselves that the EA had imposed conditions on each permit which would effectively enforce regulations 4 and 5, we would have no complaint". He accepted that OFWAT has a discretion as to how it performs its statutory duties, but argued that the Authority has failed to show that it even addressed its mind to the enforcement of the obligations imposed by regulations 4 and 5 as opposed to the more general duty under section 94.
29. I accept the submissions of Mr Mussa KC for the Respondent that it is artificial to draw a distinction between duties under section 94 of the 1991 Act and those under regulations 4 and 5 of the 1994 Regulations. Section 94 of the parent Act is the section imposing obligations which OFWAT can enforce under its statutory powers set out in the Act. The duty under section 94 includes within it the substantive content of regulations 4 and 5. OFWAT's enforcement powers under section 94(3) also apply to the requirements imposed on water companies by regulation 4(2) and 4(4) (which also include the requirement to comply with regulation 5).
30. Part of Mr Wolfe's complaint is that OFWAT had been asked to make detailed disclosure of documents (even on a sample basis so as to avoid imposing a disproportionate burden) to demonstrate that it has actively addressed its collective mind to the requirements of the 1994 Regulations, but had declined to give such disclosure. When Bourne J said at paragraph 54 that "there is no proper basis on which this court should go behind OFWAT's assertion that, rather than being purely passive, it gathers information in several ways and uses that information for enforcement purposes" he was not, in my view, stating as a general proposition that a mere assertion by a defendant is enough to defeat a judicial review claim. Rather, he was saying that the detailed information given in OFWAT's letter of 17 May 2022 (which runs to 13 closely argued pages) is a sufficient response to the broad general allegation made by the Claimant.
31. I also do not accept that it is arguable that, even before the issue of section 203 notices to five companies and enforcement proceedings against a sixth, OFWAT's attitude was "merely passive". Such a contention overlooks, among other things, what seems to me to be a very significant feature of the regulatory regime, namely that OFWAT extracts performance commitments from the regulated companies in the course of its price reviews.
32. In short, I agree with all that Bourne J said about Ground 1.
33. Turning to Grounds 2 and 3 of the original claim: Ground 2 alleged that, in breach of section 27(2) of the 1991 Act, OFWAT has unlawfully failed to collect information in relation to the performance of the obligations under the 1994 Regulations. The statement of facts and grounds argued that "the Defendant does not appear to have even considered or decided how this duty will be exercised" in respect of the 1994 Regulations. It continues "It is not for the Claimant to specify what is required." The judge described this claim as "being, if anything put in even more general terms" than Ground 1. Similarly Ground 3 of the original claim alleged that in breach of section (2)(2A) of the 1991 Act, OFWAT has unlawfully failed to discharge its functions so as

best to secure that the obligations of water companies under the 1994 Regulations are properly carried out. Again, the allegation is of a wholesale failure rather than merely taking a passive stance. But again I agree with Bourne J, who dealt with this briskly as follows:-

“Neither of grounds 2 and 3 is arguable. OFWAT has collected information and has taken enforcement action. However well or badly it has done those things it is not arguable that it has simply failed to do them”.

34. The final ground for seeking permission for judicial review below was that insofar as OFWAT approached data passed on by the EA on the basis that such data discharged the separate obligations imposed by OFWAT under regulation 4 of the 1994 Regulations it acted unlawfully since the EA’s obligations are different and arise under regulation 6. This seems to me extraordinarily technical. Like the judge, I consider it plain and obvious that the data collected by the EA, and by the OFWAT enforcement action set in train by its circular of November 2021 and the subsequent section 203 notices, were and remain relevant to the obligations of water companies under the 1994 Regulations.
35. In the result I agree with the judge that no arguable case of unlawful action or inaction on the part of OFWAT has been shown. I do not consider that an appeal from his decision would have any real prospect of success or that there is any other compelling reason for such an appeal to proceed.
36. I therefore refuse permission to appeal.
37. Although I allowed Mr Mussa to make brief oral submissions, I consider that save in exceptional circumstances a Respondent who attends such a hearing should do so at its own expense; and Mr Mussa accepted that if permission to appeal were to be refused it should be with no order as to costs. I am grateful to counsel on both sides for their considerable assistance.