HBF Paper on the Supreme Court Decision
Of 9th December 2009
Barratt Homes – v - Welsh Water

Introduction

Many Water and Sewerage Companies (WaSCs) have commented that this Supreme Court Decision was the catalyst for them to change their approach and policy in when requiring off-site foul/combined sewer network reinforcement. This 'sea change' in Policy stems from the views expressed by the Judges in paragraph 43 of the 'decision narrative'. Primarily, this is the ability of WaSCs to consider recourse to the Planning System in those instances when they believe the existing sewerage network is likely to be overloaded due to the impact of foul sewage discharge from a new development. However, of fundamental importance in this matter was the exclusion of any evidence and/or discussion specific to quantum when considering foul sewer discharge(s) from new developments. When compared to the capacity of existing public foul sewers the foul discharge from any new development represents a very small percentage increase. Moreover, with sites/land that have had a previous use redevelopment with housing can often create asset betterment through an increase in available capacity.

It is the HBF's contention that many WaSC's have taken a selective and narrow interpretation of the Supreme Court Decision. We feel that this judgement needs to be viewed in a wider context and the objective of this paper is to set out a number of substantive and relevant material considerations which many WaSC's are seeking to ignore.

In the context of the Decision it needs to be stressed that the Supreme Court was only required to make a judgement on two aspects of sewerage-related law. The supporting narrative to the judgement is in essence a preamble to the more substantive aspects of what the Court was being asked to rule upon. For some WaSC's to see this as an opportunity to rely on selective parts of the decision to justify subsequent policy we

would suggest is somewhat disingenuous. It also fails to give a reasonable and fair assessment of the Supreme Court Decision and all matters being considered, in a wider context.

We have therefore detailed below a number of issues and questions which we believe should be addressed by WaSC's, over and above the narrow emphasis that is being interpreted by some WaSCs as a legitimate means of using the Planning System to say that a new development will in fact overload their existing sewerage network. The logic and rationale of these questions and issues that they raise result from the HBF's analysis of the Supreme Court Decision - this is considered later in this document with a number of comments/observations specific to each paragraph of the decision. The reader is asked to consider each paragraph of the Supreme Court Decision as they work their way through this paper.

Questions and Issues Arising from the Supreme Court Decision

1. ***In relation to new development what is the WaSC's Policy's with regard to their statutory duties under s94 of the Water Industry Act 1991?In essence, the issue is; what does 'to cleanse and maintain those sewers to ensure that the area is and continues to be effectually drained,' actually mean? Under s94 are foul sewerage networks with excessive groundwater infiltration and/or surface water ingress deemed to have been maintained correctly bearing in mind the adverse effect that this has on sewer capacity? In what context can 'effectually drained' be applied with regard to new development?***
2. ***When a WaSC seeks to use the Planning System they apply the criteria of s98 or s185 of the Water Industry Act 1991 to get developers to fund off-site only sewerage network reinforcement. This must be questioned if developers are self-laying the on-site foul sewers accompanied by a formal s106 right to connect? (See OFWAT Information Notice 14/16 – Charging for New Connections).***
3. ***To expand on 2 above the judgement did not seek to explain what legal options WaSC's can apply if sewerage network reinforcement is actually required, by using the Planning System. If OFWAT have no jurisdiction as***

a result of WaSC's using the Planning System what powers do they have retrospectively on a planning condition/decision, if any at all? Can existing Sewerage Law be used when WaSC's use the Planning System? Paragraph 206 of the NPPF seems to imply not.

4. *What actually constitutes an existing foul/combined sewer being determined as being at capacity? This is a really important issue which was not explained in detail as part of the legal proceedings. How are issues relating to ground water infiltration or surface water ingress being addressed as a WaSC Policy? Should an existing foul only sewerage system that has ground water infiltration and or surface water ingress be deemed to be at capacity when it was originally designed to solely cater for foul sewage?*
5. *What design/assessment criteria should be used to determine the foul sewage impact of the new development? Is it fair and reasonable to factor into foul sewage discharges provision for ground water infiltration and/or surface water ingress?*
6. *Who should fund the initial assessment of the existing foul sewer network to determine whether it has capacity, or not? Does s94 place an obligation on the WaSC to know whether the existing network has, or has not, capacity?*
7. *On a specific and detailed matter it is noteworthy that there is no requirement in the Supreme Court Decision for WaSC's to model existing foul sewer for surface water rainfall events, yet this is what takes place at the moment. Why is this now deemed necessary when we are dealing exclusively with a foul sewer network?*
8. *Is the five year funding cycle an impediment to WaSC's being able to allow the right to connect?*
9. *To expand on 8 above, no mention was made in the judgement on the specific issue of WaSC's funding to plan for new development. Is this not a key aspect of determining what WaSC's should fund in this area?*
10. *What planning conditions may be applicable in relation to the National Planning Policy Framework's criteria or the necessity for any reinforcement works to be completed? Foul sewage has a minimal impact in hydraulic terms compared to the impact of ground water and surface*

water. Is it therefore acceptable to impose planning conditions requiring any network reinforcement to be in place before the first property is completed? If planning conditions are to be imposed how do these meet the legal test of being valid as defined by the NPPF, ref. paragraphs 203 to 206? (Note – the Supreme Court Decision would not have been able to consider this important aspect of established planning law but earlier decisions and judgements have been far from silent when it comes to the test of validity for planning conditions.

11. ***Does Guidance need to be given to WaSC's and Local Planning Authorities stating that foul sewer connections and pumping station criteria cannot be made conditional?***
12. ***What is the stated WaSCs Policy's on providing off-site network reinforcement for a development which has been in the Planning System for a period of time? It is worth noting that the Government has made it quite clear that time is running out for Local Planning Authorities to have in place their 5 year housing land availability requirements. For those Authorities who fail to meet the cut-off date, which is a little under a year from now, then Government will intervene. This is delivering the consistency and certainty, in terms of forward visibility, to facilitate effective investment decisions that all partner/stakeholder interests require. Ignorance of future development is no longer a credible or reasonable excuse.***
13. ***What are the Government and OFWAT doing with regard to taking forward the issues set out in paragraphs 57 and 58? With the Supreme Court Decision being made in December 2009. Over the last five years little seems to have been progressed in relation to the matter?***
14. ***There needs to be a greater understanding of what sewerage infrastructure charges should, or should not be funding in relation to foul/combined sewer off-site network reinforcement? Again the Supreme Court Decision has failed to investigate this issue in the narrative leading to the judgement on the two issues presented to the Court.***

<u>Paragraph 6 and Paragraph 23</u>

An important issue is raised in paragraph 23 about the burden of dealing with the consequences of the additional discharge.
On the evidence the HBF has to date, the issue of any additional discharge seems to be incidental to the existing foul sewerage network having surface water ingress or ground water infiltration - this has been well documented in the duty under s94 in paragraph 6.

A major issue which WaSC's fail to communicate to developers, and Local Planning Authorities, is what are their statutory duties under s94, i.e. to '**effectually drain**' and to '**maintain and cleanse**' foul sewers, including those that have excessive levels of ground water infiltration and/or surface water ingress.

We would contend that designated foul sewers in WaSC's existing sewer plans which have surface water ingress and/or ground water infiltration is not a material consideration in the modelling or determination of the capacity of the existing foul sewer network. For combined sewers the circumstances may well be different.

Paragraph 27

In this paragraph the legal interpretation of s98 of the Water Industry Act 1991 is stated.

The HBF are of the opinion that present practices employed by many WaSC who seek to use s98 as a means to fund offsite reinforcement, is illegal. When sewers are self-laid on a development, with a right to connect under s106, there is no legal mechanism open for a WaSC to use or to require a developer to fund any form of off-site network reinforcement. See OFWAT Information Notice 14/16.

In our opinion the only mechanism to fund this type of work is through sewerage infrastructure charges. There is no other way to fund off-site network reinforcement within the requirements of the existing legislation, in particular when a developer self-lays the on –site foul sewers and exercises a right to connect under s106. If the total revenue received by a WaSC is inadequate to fund reinforcement works within the catchment we see that is an issue between the WaSC and OFWAT. Moreover, in its

discussions with OFWAT, the HBF has been advised that all WaSCs have access to contingency funds to meet their S94 obligations, as and when appropriate.

Paragraph 38

The issue raised in this paragraph relates to the fact that in nearly a century and a half this this was the first time the right to connect had been taken to an English Court - it was not explained beyond that statement.

It is quite telling that the last sentence in this paragraph is clear in its conclusion that no evidence was produced to the Court showing that since 1936 it has led to any practical difficulties. Suffice to say, nor was the Planning System ever used to restrict the right to connect, therefore, why has it suddenly become an issue now?

One argument put forward by a WaSC is that funding constraints due to OFWAT's Price Determination does not allow them to sanction necessary network reinforcement to accommodate new development. This is exasperated by the fact that the Planning System does not give certainty to enable the appropriate investment in the correct location of their future resources. However we would state that the Governments 5 year land supply requirements will aim to take out that uncertainty in procuring development. See also earlier comments regarding WaSC access to a contingency funds.

Paragraph 41

The issues raised in this paragraph are subject to the need of a greater understanding of how capacity is fairly, reasonably and proportionately determined.

Even the extent of the how foul discharge from the new development is determined varies from WaSC to WaSC and this is further compounded by the inclusion of allowances for urban creep, surface water ingress and percentage additions for ground water infiltration. On new developments this will seldom occur with the Flood and Water management Act 2010 providing much greater synergy between the WaSC and Local Building Control Body to effectively reduce surface water ingress.

The way WaSC's are seeking to model and determine the capacity/resilience of the existing foul/combined sewer network is one of the major issues. The HBF is of the opinion that there is an urgent need to get a collective agreement on what is and is not permissible in this area.

Paragraph 42

The issue of funding was highlighted in our views of paragraph 38. Although certain WaSC's have told some HBF member's that the five year funding cycle is seen as an impediment to long term investment – we disagree and for the reasons stated in this paper.

Paragraph 43

This paragraph constitutes the narrow reading by WaSCs in terms of how they interpret their right to use the planning system – in many respects this emanates from the Court of Appeal. The views expressed in paragraph 45 and 58 seem more pertinent to how legislation or Planning Guidance needs to be introduced to overcome the perceived unsatisfactory set of circumstances we have at the moment.

With OFWAT unable to act or have an involvement in the Planning System it results in many WaSC's having a disproportionate effect within the planning process. Many WaSC's have gone further and asked Local Planning Authorities to insist on the imposition of Grampian Planning Conditions. More often than not this is without any justification or evidence to support the claim that an existing sewerage network is unable to accept what are nominal foul sewage loads from a property and/or number of properties.

Paragraph 45

The HBF would support the views set out in this paragraph and the stance OFWAT took in relation to this matter this is commented upon in the next paragraph.

Paragraph 46

There are a number of important issues expressed by OFWAT within this paragraph. It gives direction to the WaSC's, however, many do not recognise this when they use

the Planning System, or when they give advice to Local Planning Authorities on suitable planning conditions.

Firstly, OFWAT states that conditional connection criteria imposed by WaSC's are not permissible, yet many WaSC's require this as part of the planning condition.

Secondly, and most importantly, the planning history of a development is relevant to the obligations/duty that the WaSC is required to comply with under s94. Such information is never disclosed to the Local Planning Authority. The HBF sees that this as a fundamental principle of sewerage law conveniently disregarded by many WaSC's. The ability to provide foul sewerage capacity in a plan led system and being able to predict, plan and provide, is one of the foundation stones of a WaSC's duty. Yet, many WaSC's seek to ignore the views expressed in paragraph 43 and to circumvent their inability to provide the necessary network reinforcement for a new development.

Paragraph 47

The sentiments conveyed in this paragraph probably extend to the root of the problem with many WaSC's, although it could be construed that Welsh Water are also pointing the finger at OFWAT.

Paragraph 57 and 58

The issues raised in these two paragraphs are compelling in the way they highlight exactly what the problems are and the way they can be resolved. Considering it is five years since this decision the lack of collective direction by Government and OFWAT has created an opportunity for many WaSC's to exploit the situation for their own commercial interests by use of the Planning System. The Supreme Court Decision is totally correct in its conclusion that more thought needs to be given to the interaction of planning and water regulation but this needs to be based on fair, equitable and proportionate considerations.

Until issues like this are addressed the narrow view expressed in paragraph 43, without giving due consideration to (a) the statutory duty of the WaSC's under s94, (b) the planning history of a site, (c) what is or is not acceptable in the determination of

the capacity of the existing network and (d) what WaSC's should be funding (legally) via infrastructure charges, will perpetuate the hiatus that currently exists. Friction between WaSC's and developers will continue to persist, especially where onerous, unfounded planning or Grampian conditions are being used by Local Planning Authorities to stop developments connecting to existing foul/combined sewer networks.

Paragraph 59

In paragraph 59 the Supreme Court Decision is concluded, the scope of the judgements being specific to only two issues raised in the proceedings.

The structure of the supporting narrative is such that it did fit easily within the issues that the Supreme Court was asked to pass judgment on. As such we would conclude that they take the form of an opinion and/or informative view which facilitated the Supreme Court Judges to come to the decision on the two aspects raised.

Concluding Comment

The HBF would suggest that there is a complete imbalance of legal perspective when WaSC's focus their policies on selective parts of the Supreme Court Decision. In many respects a failure to consider matters from the whole to the part has created not only greater confusion but a means for WaSCs to remain somewhat derelict in the discharge of their statutory duty under s94. That said the Courts can only consider what is presented to them and hand down judgements on the basis of the facts and evidence as presented.

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