Bryn Chetwynd And Joanna Chetwynd v Barry Tunmore And Caroline Tunmore [2016] EWHC 156 (QB)

S 48A Water Resources Act 1991; Foreseeability And The "But For" Test

Abstraction of water today is, for the most part, a regulated activity; private rights exist in the interstices of what is permitted. Whether or not there is a right in nuisance or negligence where abstraction interferes with a neighbour's use of water will depend on the circumstances.

In the recently decided Chetwynd v Tunmore His Honour Judge Reddihough considered a claim for damages and injunctive relief brought by Mr and Mrs Chetwynd against their neighbours the Tunmores. They claimed that the Defendants who owned land adjoining theirs in rural Norfolk - had excavated lakes causing a diminution in the water reaching their own ponds used as a commercial fishery. This in turn caused problems for their business.

The facts of the case are complicated by the complex hydrology of the fenland location. Additionally, the Defendants had argued that there were a number of other possible causes of the variation in level in the ponds including climate variability, water levels in the nearby river, seepage from the ponds, change in neighbouring land use and drainage diversions.

Although the Defendants' lakes had been dug without planning permission, retrospective planning permission was then granted by the local council but the first Claimant had successfully challenged this decision by way of judicial review in 2010 and the permission was quashed by Collins J.

It was decided in the context of the judicial review that the construction of the Lakes gave rise to an abstraction of water from the underground strata and that any outfall or overflow of such water from the lakes amounted to an abstraction of water for the purposes of the Water Resources Act 1991.

The defendants accepted for the purposes of the present case that the lakes did give rise to such abstraction.

S 48A Water Resources Act 1991

Although the claimants brought their claim in negligence and nuisance, their main argument rested on breach of statutory duty.

Under s 48A (1) of the Water Resources Act 1991 (added by the Water Act 20030 a "person who abstracts water from any inland waters or underground strata (an "abstractor") shall not by that abstraction cause loss or damage to another person." Under subsection (2), " A person who suffers such loss or damage (a "relevant person") may bring a claim against the abstractor." Subsection 3 continues, "such a claim shall be treated as one in tort for breach of statutory duty".

The Defendants accepted that the construction of the lakes on their land gave rise to an abstraction of water within section 48A but denied breach of statutory duty. That was for two main reasons: firstly, the claimants failed to prove abstraction had caused any material loss or damage and, secondly, under section 48A, the defendants can only be liable for loss or damage that could reasonably have been foreseen by them – which was not the case here.

Foreseeability And S 48A

The defendants relied on the clarification of the "rule" in Rylands v Fletcher in Cambridge Water Co. -v- Eastern Counties Leather PLC [1994] A.C. 264. In that case, the claimants had sued under the rule in Rylands for contamination to a domestic borehole caused by chemical used in the defendant's tannery business.

Although the claimant had sought to rely on the principle of strict liability, it was held that foreseeability of damage of the relevant type was a prerequisite of liability in damages under the rule. In Cambridge, the plaintiffs could not establish the pollution of their water supply by the solvent was reasonably foreseeable, so the action failed.

In the present case, HHJ Reddihough agreed with the claimants that section 48A breach does not require a test of foreseeability. Although neither counsel had been able to find any reported case which assisted with interpretation of section 48A, HHJ Reddihough concluded with some lucidity that:

... "The words in sub-section (1) are clear: "An abstractor shall not by that abstraction cause loss or damage to another person." There is no limitation or qualification in relation to the loss or damage or its type. If Parliament had intended there to be any limitation or qualification to the loss or damage which could be claimed by reference to foreseeability or otherwise, then it could have been expressly provided for in the section. There is no reason in my judgment to override the clear words of the section and read into it a necessity for foreseeability of loss or damage on the part of the defendants. The abstraction of water may well cause loss or damage and so section 48A puts the risk on the abstractor: if his abstraction causes any loss or damage he takes the consequences and is strictly liable for all loss and damage caused whether he could have foreseen it or not".

"But For" Test

The second question related to whether, as the Cllaimant had argued, when considering causation, all that the Claimant would need to prove would be that the excavation of the lakes was a significant cause of or made a material contribution to the reduced water levels in the ponds.

However, the Defendant argued that the Claimants were required to meet a more rigorous test: In the context of the complex hydrology and a number of possible contributing factors to the reduction in water levels in the ponds, the Defendants argued that the claim would only succeed if it could be proven, on the balance of probabilities, that the defendants' abstraction was the effective cause of the damage upon which and that, "but for" the defendant's wrongdoing, the relevant damage would not have occurred.

HHJ Reddihough went on to consider a line of industrial disease cases which disapplied the "but for" test including Fairchild -v- Glenhaven Funeral Services Limited [2003] 1 A.C. 32. In that particular case the claimant had contracted mesothelioma as a result of exposure to asbestos. The evidence established that one fibre actually caused mesothelioma and so as a matter of fact only one of a number of employers would have caused the injury. The claimant could not, because of the inadequacies of medical science, establish which employer had been the source of the fibre. The House of Lords held that all of the employers who contributed to the risk of developing mesothelioma were liable.

However, these decisions had partly been made on policy reasons and did not apply to the present case:

"In my judgment the approach in the disease and clinical negligence cases of only having to establish a material contribution to the injury cannot properly be extended to a case such as the present, where the factual situation is very different. In my judgment the defendants are correct in submitting that the normal "but for" causation test should be applied. The essence of the claimants' case is that a reduction of the water levels in the Ponds caused their alleged loss and damage. Thus, in my judgment, the claimants must prove on the balance of probabilities that, but for the excavation of the Lakes, their loss and damage would not have occurred. If, therefore, for example, other causes would have resulted in the lowering of the water levels such that the loss and damage occurred in any event, then the Lakes would have made no difference to the outcome and causation is not proved. On the other hand, if other potential causes would only have lowered the water levels to a limited or insignificant degree at most and the claimants prove on the balance of probabilities that the Lakes caused additional lowering of levels such that the loss and damage resulted, they will succeed on causation. In short, I hold that the claimants must prove that it is more likely than not that, but for the excavation of the Lakes, the crucial lowering in the water levels of the Ponds and any consequent loss and damage would not have occurred".

The Judge went on to find that the case for statutory breach, negligence and nuisance failed on the basis of causation. He also went on to add that claims in negligence or nuisance would have failed anyway, applying Langbrook Properties Limited -v- Surrey County Council [1970] 1 W.L.R. 161 and Stephens -v- Anglian Water Authority [1987] 1 W.L.R. 1381 – the principle being that a landowner has a right to abstract ground water beneath his land regardless of the impact on his neighbours.

Comment

The invocation of section 48 (A) of the Water Resources Act 1991 may serve to circumvent the pitfalls of foreseeability in nuisance and negligence claims – and the defence based on the exception in Langbrook and Stephens. However, as with any nuisance or negligence case, proof of causation is still critical, though the rigid application of the "but for" rule is harsh in this case.

It is also worth noting that other possible remedies for the impact of abstraction on private rights exist within the Water Resources Act 1991 including s 55 (application for modification of licence by the owner of fishing rights) where there is an existing licence to abstract in combination with s 62 - which provides for compensation for an owner of fishing rights applying under section 55 in lieu of revocation or variation of a licence

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