Neutral Citation Number: [2008] EWHC 1936 (QB)

Case No: 8CF90302

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
CARDIFF CIVIL JUSTICE CENTRE
SITTING AT CARDIFF CROWN COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/08/2008

Before :

THE HONOURABLE MR JUSTICE WYN WILLIAMS

- -

Between :

	BARRATT SOUTH WALES A DIVISION OF BARRATT HOMES LIMITED	**Claimant**
	- and -	
	DWR CYMRU CYFYNGEDIG	**Defendant**

- -
- -

Mr Anthony Porten QC & Mr Steven Gasztowicz (instructed by Messrs Darwin Gray Solicitors) for the **Claimant**

Mr Maurice Sheridan (instructed by Messrs Geldards LLP Solicitors) for the **Defendant**

Hearing dates: 29-30 July 2008

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Judgment

Mr Justice Wyn Williams :

1. By a Claim Form issued under Part 8 CPR the Claimant seeks the following relief:-

   a. A declaration that it is entitled to have its development at Gypsy Lane, Llanfoist Abergavenny (and the drains and sewers therefrom) connected with the public sewers of the Defendant in accordance with a notice dated 29 May 2007 served by the Claimant under section 106 of the Water Industry Act 1991 and to thereby discharge foul water into the same.

b. An injunction requiring the Defendant to remove the concrete it has put in place to prevent the connection of such drains and sewers in accordance with the notice under the said section and a further injunction restraining the Defendant itself or through others from preventing or interfering with such connection.

2. The Claim Form was issued on 3 July 2008. As I understand it the Claimant sought an urgent hearing of its claim because, so it is said, there is an urgent need to make a connection between drains and sewers serving the Claimant's development and the public sewers controlled by the Defendant.

3. The Defendant denies that this claim is suitable for determination under Part 8. I deal with that proposition later in this judgment. The Defendant, however, has also put in extensive evidence upon which it relies in resisting the claim.

The relevant statutory provisions

4. Section 106 Water Industry Act 1991 provides as follows:-

"*(1) Subject to the provisions of this section –*

(a) the owner or occupier of any premises, or

(b) the owner of any private sewer which drains premises,

shall be entitled to have his drains and sewers communicate with the public sewer of any sewerage undertaker and thereby to discharge foul water and surface water from those premises or that private sewer.

(1A……)

(2)…………..

(3) A person desirous of availing himself of his entitlement under this section shall give notice of his proposals to the sewerage undertaker in question.

(4) At any time within twenty-one days after a sewerage undertaker receives a notice under sub-section (3) above, the undertaker may by notice to the person who gave the notice refuse to permit the communication to be made, if it appears to the undertaker that the mode of construction or condition of the drain or sewer –

(a) does not satisfy the standards reasonably required by the undertaker; or

(b) is such that the making of the communication would be prejudicial to the undertaker's sewerage system.

(5) For the purpose of examining the mode of construction or condition of a drain or sewer to which a notice under sub-section (3) relates a sewerage undertaker may, if necessary, require it to be laid open for inspection.

(5A) Where the sewer or drain satisfies the standard reasonably required by it, a sewerage undertaker, may, as a condition of permitting the communication to be made, require that the sewer…..be vested in it by virtue of a declaration under section 102 above.

(6) Any question arising under subsections (3) to (5A) above between a sewerage undertaker and a person proposing to make a communication as to –

(a) the reasonableness of the undertaker's refusal to permit a communication to be made;

(b) as to the reasonableness of any requirement under subsection (5) or (5A) above, may, on application of that person, be determined by [OFWAT] …………..

(7) ………………

(8) Where a person proposes under this section to make a communication between a drain or sewer and such a public sewer in Greater London as is used for the general reception of sewerage from other public sewers and is not substantially used for the reception of sewerage from private sewers and drains –

(a) the ground on which a sewerage undertaker may refuse to permit the communication shall be such ground as the undertaker thinks fit; and

(b) no application to [OFWAT] may be made under sub-section (6) above in respect of any refusal under that subsection

(9) ………………"

5. As I understand it until section 106 of the 1991 Act came into force section 34 of the

Public Health Act 1936 was the governing legislation in relation to the connection of private drains or sewers to public sewers. Although, as is obvious, section 34 is no longer in force, I set out salient parts of it for reasons which will become obvious.

"*34(1) Subject to the provisions of this section, the owner or occupier of any premises, or the owner of any private sewer……… shall be entitled to have his drain or sewer made to communicate with the public sewers ……… and thereby to discharge foul water and surface water from those premises or that private sewer: ……………..*

(2) ………

(3) A person desirous of availing himself of the foregoing provisions of this section shall give to the local authority notice of his proposals, and at any time within twenty-one days after receipt thereof, the authority may by notice to him refuse to permit the communication to be made, if it appears to them that the mode of construction or condition of the drain or sewer is such that the making of a communication will be prejudicial to their sewerage system, and for the purpose of examining the mode of construction and condition of a drain or sewer they may, if necessary, require it to be laid open for inspection:

Provided that any question arising under this subsection between a local authority and a person proposing to make a communication as to the reasonableness of any such requirement of the local authority, or of a refusal to permit a communication to be made, may on the application of that person be determined by a Court of summary jurisdiction."

6. Mr Sheridan, for the Defendant, also relies upon section 21 of the Public Health Act 1975 and a decision of the Court of Appeal to which I will refer as to its meaning. Again, of course, that section is no longer in force but its terms were:-

"*The owner or occupier of any premises within the district of a local authority shall be entitled to cause his drains to empty into the sewers of that authority on condition of his giving such notice as may be required by that authority of his intention so to do, and of complying with the regulations of that authority in respect of the mode in which the communications between such drains and sewers are to be made, and subject to the control of any person who may be appointed by that authority to superintend the making of such communication.*

Any person causing the drain to empty into the sewer of a local authority without complying with the provisions of this section shall be liable to a penalty not exceeding twenty pounds and the local authority may close any communication between a drain and sewer made in contravention of this section and may recover in a summary manner from the person so offending any expenses incurred by them under this section."

The Relevant Factual Background

7. The possibility of development at Gypsy Lane, Llanfoist, has existed for many years. As long ago as January 1999 land at Gypsy Lane South was allocated for residential development in a pre-deposit draft of the Monmouthshire Unitary Development Plan. By letter dated 14 April 1999 the Defendant objected to that allocation on the grounds that the then existing sewerage system and waste water treatment works servicing the vicinity of the land were overloaded. The Defendant asserted that improvements to those facilities might be included under its capital investment programme for the period 2000-2005 and it objected to any development in advance of the planned remedial works.

8. Despite this objection, as I understand it, the possibility of development remained real over the ensuing years.

9. On 18 August 2005, an application for planning permission was made on behalf of the Claimant. The application specified the location of the development as land adjacent to Gypsy Lane South Llanfoist and the development itself was described as residential development comprising 120 dwellings. In the application form the applicant specified that the issue of how foul sewerage was to be dealt with would be subject of further consideration.

10. Upon receipt of that application the Planning and Economic Development Officer of the local planning authority consulted the Defendant. It replied on 14 September 2005 in the following terms: -

"*Further to the above consultation we would provide the following comments:-*

SEWERAGE

The proposed development will overload the existing public sewerage system. No

improvements are planned in Dwr Cymru Welsh Water's Capital Investment Programme. We consider any development prior to improvements being undertaken to be premature, and therefore ***OBJECT*** *to the development. It may be possible for the Developer to fund the accelerated provision of replacement infrastructure or to requisition a new sewer under sections 98-101 of Water Industry Act 1991.*

REASON: To Prevent Hydraulic overloading of the public sewerage system, to protect the health and safety of existing residents and to ensure no detriment to the environment."

11. By letter dated 25 January 2006 a planning consultant acting on behalf of the Claimant sought the views of the Defendant upon a development on the same area of land but this time comprising residential development of around 99 properties and a primary school. The planning consultant specifically sought:

"………… *a written response on the location and capacity of the existing local public sewers plus confirmation of the availability of water supply and sewerage treatment for the proposed development."*

12. The Defendant replied on 21 March 2006. It observed that the public sewerage system "downstream" of the proposed development was known to be at capacity and that the significant increase in flows from the proposed development would overload the system. It suggested that the developer undertake a hydraulic modelling assessment. The purpose of undertaking such an assessment was that: -

> *"The conclusion of this study will determine the connection point and/or any improvement works required over and above our capital improvement work"*

13. Some months later the Claimant paid to the Defendant the sum of £13,321.25 in order that a hydraulic modelling assessment could be undertaken.

14. That assessment was produced in November 2006. It is to be observed that it assumed that a connection point between the drains and sewers of the development and the public sewers would be as indicated in Figure 1 contained within the assessment. (see page 55 of the exhibit of Mr Ian Wyatt). The assessment concluded that there was no discernible increase in flood risk as a consequence of the development being added to foul system. Spill volume analysis of a part of a sewerage system known as the CSO predicted an

increase in volume of the spill of the order of 29% when the development was added to the model. This was considered an unacceptable detriment.

15. The assessment suggested two possible alternatives to solve the problem identified above. One alternative was for a section of the public sewer to be improved. The second suggestion was that the connection point should be at a different location from that which the assessment had assumed.

16. As I have said the Claimant paid the Defendant the sum of £13,321.25 to commission the assessment on 7 July 2006. Just before that date, on 29 or 30 June 2006, the Claimant applied to the Monmouthshire County Council for planning permission to develop the land in question for 98 dwelling houses and a primary school complete with necessary infrastructure.

17. That application was considered by the Planning Committee of Monmouthshire County Council on 12 December 2006. At that committee a report had been tabled by officers of the planning authority which recommended that planning permission for the development be granted subject to 11 conditions and subject to the applicant entering into a planning agreement. The minutes of that meeting record the following:-

> *"…………. the Head of Planning and Regeneration explained that the site had been allocated within the Monmouthshire Unitary Development plan for housing development. Until work had been carried out to improve the drainage in the area, to Welsh Water standards, work on constructing the housing development could not take place."*

The same minutes suggest that the Head of Planning and Regeneration and the Head of Highways and Waste Management offered the opinion that the development of the proposed site would improve the drainage network in the area which was then operating at capacity according to the Defendant.

18. The Planning Committee resolved to approve the application subject to 11 conditions and subject to the conclusion of a suitable planning agreement.

19. The hydraulic modelling assessment seems to have been disclosed by the Defendant to the Claimant in early January 2007. I use those guarded words, obviously, because more

detailed evidence may show that it was disclosed at an earlier time. On 16 January 2007 Mr Tristin Willis, acting for the Claimant, sent an email to one of the Defendant's employees to this effect:-

> *"Sorry to chase-up, could you drop me a brief email confirming that the point of connection for the foul flows is man-hole reference SO2913220 as previously agreed, obviously subject to the necessary improvements being carried out."*

Email correspondence followed. At first blush and putting it as neutrally as possible it would appear that the Claimant and Defendant were intent upon reaching an agreement as to the point at which the drains servicing the development would be connected to the public sewerage system.

20. On 14 May 2007 Monmouthshire County Council granted planning permission to the Claimant for development comprising 98 dwellings and a primary school complete with all necessary infrastructure on the land adjacent to Gypsy Lane South. Condition 10 specified that no development should take place until a scheme of foul drainage and surface water drainage had been submitted to and approved by the local planning authority and it also specified that the approved scheme should be completed before the buildings were first occupied.

21. It seems likely that on 17 May 2007 details of that scheme were submitted to the local planning authority. Under cover of a letter dated 29 May 2007 the Claimant sent a number of documents to the Defendant one of which was a document entitled "Section 106, Water Industry Act 1991", and further entitled "21 Day Notice to communicate with a public sewer". The document specified that the Claimant was giving 21 days (minimum) notice of its intention to make a connection to the public sewer and it specified the location where the connection would be made as SO29131302 (point SO29131302).

22. On 19 June 2007 there was an internal email between employees of the Defendant in which a request was made that an employee by the name of Paul Brown should telephone Ms Faye Browning (an employee of the Claimant) regarding the connections at Gypsy Lane. There is no first hand evidence before me as to whether that call was made, and if so what was discussed.

23. On 25 June 2007 Mr Tristin Willis sent an email to Paul Brown referring to the connection and inquiring "……….. *when we can expect a response to the connection applications."* By letter dated 26 June 2007 the Defendant responded to the notice under section 106 of the 1991 Act. The letter reads as follows:-

> *"Thank you for your application to connect the foul and surface water flows from the above proposed development into the public sewerage systems.*
>
> *We are in a position to approve the connections, however, the foul water connections must be made into or downstream of man-hole SO29127901, as shown on the attached plan (ref CONF1).*
>
> *Please note that if you encounter problems with third party land owners you may requisition under section 98-101 of the Water Industry Act 1991, one of the following:-*
>
> - *A new sewer from the boundary of your site to this point of adequacy or,*
> - *The necessary improvement works as identified in the hydraulic assessment dated November 2006.*
>
> *If you would like to discuss the above further do not hesitate to contact us."*

24. The Claimant responded in a letter dated 9 July 2007. The relevant parts read:-

> *"With reference to the connection of foul flows to the public sewerage system, please can you provide us with the costs to progress the improvement works outlined in your report dated November 2006 …………"*

<u>The Claimant's Submissions</u>

25. It is submitted that:

(i) The Defendant's letter of 26 June 2007, properly interpreted in its context, constituted a conditional permission to the Claimant's notice to connect its drains to the public sewer.

(ii) Section 106 of 1991 Act does not authorise the grant of such a conditional permission.

(iii) In the absence of refusal of permission to connect the Claimant was and is entitled to connect its drains and sewers to the public sewer at point SO29131302.

(iv) The Defendant has not refused permission for that connection.

(v) If, as a matter of interpretation of the letter of 26 June 2007, the Defendant has refused to authorise the suggested connection such refusal did not take place within 21 days of receipt of the notice under section 106 of the Act. The statutory period imposes a deadline and any refusal issued after that time limit is invalid.

(vi) In any event, the Defendant refused to approve the connection for reasons which were not authorised by section 106 of the Act. Accordingly its refusal to authorise the connection was unlawful and remains unlawful.

(vii) Part 8 procedure is appropriate and I have no option but to grant the relief sought since the facts which are relevant to the issues I have identified are small in compass and either undisputed or not capable of sensible dispute.

26. The Claimant identifies the relevant factual circumstances as being: -

a. The Claimant served a notice under section 106 of the 1991 Act which notice identified the point of connection it proposed.
b. The Defendant did not give a notice of refusal under section 106(4) of the Act within 21 days or at any other time.
c. The Defendant wrote to the Claimant on 26 June 2007 stating that it approved the connection but purporting to require that the connection to be made at a different point to that specified in the Claimant's notice.
d. The Defendant now denies that the Claimant is entitled to make its connection at the point specified in the notice and has poured concrete into the Claimant's pipe with the express intention of preventing the proposed connection at that point.
e. The reason why the Defendant opposes the connection at point SO29131302 is because there would be increased overloading of the public sewer with a consequent increase in the risk of environmental harm if the connection was made and no improvement works carried out.

<u>The Defendant's Response</u>

27. The Defendant asserts and accepts that it has not authorised the connection to the public sewer at point SO29131302 because that would lead to an increased overloading of a system which is already unduly burdened unless appropriate improvement works are undertaken. It has suggested an alternative location (the point of adequacy) for connection because if a connection is made at this point there will be no extra overloading of the public

sewerage system. The Defendant also accepts that it has poured concrete in the vicinity of the Claimant's proposed connection; whatever its motivation in so doing the Defendant accepts that the concrete has the effect of preventing the connection at point SO219131302. Finally the Defendant accepts that its written communication of its refusal to authorise a connection at point SO219131302 was made more than 21 days after the notice under section 106 of the 1991 Act had been served upon it.

28. Nonetheless, the Defendant submits:-

i. The proper interpretation of its letter of 26 June 2007 is that it constituted a refusal to authorise a connection at point SO219131302. It was not and did not purport to be a conditional approval. Accordingly, the issue of whether it has power to grant a conditional approval does not arise.

ii. Although the letter was sent after the expiry of the 21 day period specified in section 106(4) of the 1991 Act that does not mean that it was not a valid refusal to permit the communication. Further and in any event by virtue of its conduct the Claimant cannot rely upon the expiry of the 21 day period as being a reason why the refusal was and is unlawful.

iii. Section 106(4) of the 1991 Act, properly interpreted i.e. in accordance with both EC Law and domestic principles of interpretation, permits the Defendant to refuse the connection at point SO219131302 for the reason relied upon by the Defendant namely that the connection at such a point without improvements will have the effect of significantly increasing the overload on the public sewerage system as a whole and cause detriment to the environment.

Discussion

29. I do not accept that the letter of 26 June 2007 constituted a conditional approval of the Claimant's proposal to connect to the public sewer.

30. In my judgment, the letter has to be seen very much in the context of the considerable history to this case (summarised above) and the actual terms of the notice under section 106 of the 1991 Act.

31. During the course of the hearing there appeared to be consensus that the location specified in the notice (point SO29131302) was in the same general location as the assumed connection point in the hydraulic modelling assessment. If there had been any doubt before that report was received, there was certainly no doubt afterwards that a connection at that point was unacceptable to the Defendant unless it was accompanied by works of improvement. Mr Willis on behalf of the Claimant clearly understood that – see his email of 16 January 2007. There was no suggestion in the argument before me that the Defendant altered its stance on that issue prior to the service of the notice under section 106.

32. The notice served by the Claimant specified a precise location – point SO29131302. As I have said it was in the same general vicinity as the location for connection assumed in the hydraulic modelling assessment. Having received the assessment some months before, the Claimant probably expected the Defendant would resist a connection at the point specified in the notice unless the Claimant agreed to undertake improvement work at its own expense. Clearly, in the light of the assessment, such an attitude on behalf of the Defendant was a distinct possibility.

33. In this context the reasonable and objective interpretation of the Defendant's letter is that it constituted a refusal of the permission sought in the notice. The fact that the letter used the phrase "*approve the connections*" in context did not mean that the Claimant's suggested communication point was being approved. The Defendant has never objected to the principle of connection at a point which it regards as appropriate or at point SO29131302 if appropriate improvement work is undertaken by the Claimant. As I understand it the Defendant has never objected to a practical solution being sought and obtained so as to facilitate this development. The Defendant has never said anything to the effect that there was no possible basis for a connection to the public sewer at any point. The issue has always been the location of the connection and, depending on the location, the nature of necessary works to accompany the connection.

34. To repeat, therefore, in my judgment the letter of 26 June 2007 amounted to a refusal to permit the communication to be made on the part of the Defendant. Accordingly, the issue of whether the power to grant conditional permission exist does not arise.

35. It is common ground that the refusal letter was made more than 21 days from the receipt of the notice under section 106 of the Act. Does that mean that the Defendant is now precluded from relying upon it? This issue obviously involves consideration of the proper interpretation of section 106(4) of the Act. However, it is at least properly arguable that it also involves consideration of facts which may be contested and/or important. Let me explain what I mean. One possible interpretation of the Act is that the period of 21 days is sacrosanct in the sense that after that period has expired and in the absence of a refusal of permission to make the suggested connection within the period the Defendant cannot lawfully prevent the Claimant from making a connection at the point it has specified in its notice. Another possible interpretation is the precise opposite namely that a notice refusing permission which is served after the expiry of the statutory period and before a connection is made nonetheless constitutes a valid refusal provided the refusal is made on grounds authorised by the 1991 Act. A third possibility is that although a person serving a notice under the Act is entitled to act upon it after the expiry of the statutory period he may, by his words or conduct, permit an extension of time for a response to his notice to be served. That interpretation might then give rise to a possible debate about whether such an extension, to be effective, needs to be granted before the statutory time period has expired or whether such an extension can be granted after the statutory period has expired.

36. It is also to be observed that the Defendant alleges in its Defence and Counterclaim that the parties reached an agreement before the notice was served. The substance of the agreement alleged is that the Claimant and Defendant agreed that a connection at point SO29131302 could not take place until necessary improvements had been undertaken by the Claimant at its expense. How does this alleged agreement impact upon whether the Claimant can rely upon the expiry of the statutory time period for responding to its notice?

37. I have reached the conclusion that the issues raised by the parties in relation to the 21 day period are not susceptible of complete answers in Part 8 procedure. In my judgment some of the issues, at least, are not pure points of law but, rather, somewhat intricate questions of mixed law and fact.

38. That being so I do not propose to make any decision about the pure interpretation issue in relation to the 21 day time period. Rather, if the Claimant wishes it, I will order that this action should proceed as if started under Part 7 and make directions accordingly.

39. There is one point, however, which it seems to me I should determine now. The point is one upon which it is desirable that there should be a decision of this court sooner rather than later.

40. The point for my determination relates to the proper interpretation of that part of section 106(4) of the 1991 Act which specifies the circumstances in which an undertaker can refuse permission for a connection. The relevant words are:-

> *"………. the undertaker may ……… refuse to permit communication to be made, if it appears to the undertaker that the mode of construction or condition of the drain or sewer -*
>
> *(a) does not satisfy the standards reasonably required by the undertaker;*
>
> *(b) is such that the making of the communication would be prejudicial to the undertaker sewing system."*

41. Mr Porten QC submits that the key to understanding this statutory provision is to focus upon the words *"the mode of construction or condition of the drain"* He submits, no doubt quite correctly, that the phrase "drain or sewer" is a reference to the private drain or sewer which its owner or occupier wishes to connect to the public sewer. He submits that no refusal is authorised under section 106(4) unless it relates to the way in which the sewer is to be constructed or the condition of the sewer after construction. If it fails to satisfy the undertaker's reasonable standards or prejudices the undertaker's sewerage system in that context it is legitimate to refuse permission. The statutory words are aimed, in effect, at ensuring the physical integrity and suitability of the sewer. They are not intended to permit a refusal which is based upon the location of the connection or the effect of the connection upon the capacity of the public sewer. On this basis an undertaker cannot refuse a connection because it believes that it would overload the system and cause environmental damage even if there was little if any doubt that such consequences would occur.

42. In making this submission upon the interpretation of the sub-section Mr Porten QC relies heavily upon the fact that this, in effect, has been the meaning attributed to the sub-section by OFWAT for some years and, indeed, until recently, this was the interpretation apparently accepted by the Defendant itself.

43. I deal first with the stance of OFWAT. On 11 August 1997 the Director General of

OFWAT issued a determination made by him under section 106(6) of the 1991 Act in a dispute between the Post Office and Yorkshire Water. The Post Office had served notice under section 106 of the 1991 Act of its intention to make a connection to a public sewer and Yorkshire Water had refused to give permission for the connection. The Post Office had referred the reasonableness of the refusal to the Director of OFWAT under section 106(6) of the 1991 Act as it was entitled to do.

44. In his determination the Director said this: -

> *"6.1 The Director understands that Yorkshire Water's sole basis for refusing to allow a connection to the …………… sewer is a lack of capacity in that sewer………"*
>
> *6.2 The undertaker may refuse to permit the connection if it appears that the mode of construction or condition of the drain or sewer is such that the making of the communication would be prejudicial to the undertaker's sewerage system.*
>
> *6.3 The Director does not consider that Yorkshire Water is able to refuse a connection solely on the grounds of lack of capacity in its own sewer. The Act refers only to the condition or construction of the private drain or sewer which is to be connected. This cannot, in the Director's view, extend to a consideration of the additional flows to be discharged into the public sewer, except in very specific circumstances (for example if the additional flows were to be discharged at such high pressure as to potentially cause damage to the receiving sewer).*
>
> *6.4 Since Yorkshire Water has identified no grounds other than capacity for the refusal to allow a connection……… the undertaker's refusal to permit a communication to be made was not reasonable. He therefore directs Yorkshire Water to allow communication to its sewer……*
>
> *6.5 It is accepted that connection of surface water from the site could lead to an increase of flooding or pollution and the Director agrees that this is an undesirable outcome. The Director notes, however, that the Post Office has had an interest in the site for some time and that outline permission for redevelopment was obtained from the Sheffield Development Corporation in 1991. Detailed drainage proposals were first put forward in October 1996.*
>
> *6.6 The Post Office is seeking to make a connection to sewers no later than 2 February 1998. This is some 15 months after the original proposal was put forward. The Director considers that this is sufficient time for Yorkshire Water to have taken account of the proposals and made arrangements to deal with surface*

water from the site………"

45. In his closing submissions in reply Mr Porten QC drew attention to a publication of the Defendant apparently issued in October 2006. In paragraph 6.6 of that publication the Defendant informs the public:-

    "For foul sewerage connections under section 106 of the Water Industry Act 1991 Dwr Cymru Welsh Water cannot refuse the connection on the grounds of a lack of capacity in our existing sewers as is explained in a determination by the Director General of OFWAT in November 1997".

    It then quotes from the determination in The Post Office v Yorkshire Water.

46. Mr Porten QC submits with a great deal of force that the issue under consideration in the instant case is, in reality, identical to the issue considered by the Director in The Post Office v Yorkshire Water. In that case Yorkshire Water was resisting a connection on the grounds of lack of capacity. In the instant case the Defendant is asserting that the connection should not take place at a particular location, in effect, because of a lack of capacity.

47. Notwithstanding the decision of the Director in The Post Office v Yorkshire Water and the views expressed by his own client in October 2006. Mr Sheridan does not accept the interpretation of section 106 of the 1991 Act which is put forward by the Claimant. He relies heavily on a decision of Walton J in **Beech Properties Ltd v GE Wallis and Sons Ltd [1997] EGCD 735**.

48. In this case Beech Properties Ltd sued GE Wallis and Sons Ltd for specific performance of a contract for the sale of an area of land. It was accepted by the parties that the contract was conditional and that the question for decision by Walton J was whether the contractual conditions had been performed by the date specified in the contract. Those conditions were: -

    " ….the execution of a deed or deeds of grant of easement giving to the purchaser the right in perpetuity to run from the development site all such foul sewers surface water drains electricity gas and water conduction media over so much of the land adjacent to the development site as may be necessary to bring all such services from the development site to the public supplies or outlets such deed or deeds of grant of easement to be executed by the freeholder or respective

freeholders of the land in question."

49. The Learned Judge held that the conditions had not been performed and, accordingly, the claim failed. By reason of the arguments addressed to him, however, it became necessary for the Judge to consider the ambit of section 34 of the Public Health Act 1936. In particular, the Learned Judge offered a view about its scope and meaning. He said this:-

> *"Now it is obvious that the right thereby given is not an absolute, but a qualified, right: "Subject to the provisions of this section". That refers principally to sub-section (3) ……….*
>
> *However it does appear to me that, wide as the words of sub-section (1) may be, and for the moment ignoring the opening qualification, they do not confer upon any individual the right to connect his sewer to the water authority sewer at any point which he may choose. In most cases, of course, the matter will be quite academic. There will be the water authority's sewer, going along with roads; a new house is built in the road; and quite obviously and clearly the owner will expect to have a right to drain in that sewer, and it would be very difficult, assuming that there are no problems under the proviso to sub-section (1) to imagine a set of circumstances where the water authority would be entitled to say that he must not connect to that sewer but to some other sewer. Even so, if the new house was built at a cross-roads and there were available sewers in both roads, I can see no reason why the owner should be entitled to drain into the sewer of his choice if the water authority required him to drain into the other, which might, for example well be a relief sewer expressly provided for the district because the other sewer was approaching capacity. Similarly, I see no reason why the owner is entitled to connect to point X rather than adjacent point Y, if the water authority requires him to connect at Y. I think that I am only saying here in less felicitous language what has already been said in very much more forthright terms by Romer and Stirling LJJ, particular the latter, in <u>Wilkinson v Llandaff & Dinas Powys Rural District Council [1903] 2CH 695</u>……."*

Later in his judgment the Learned Judge said:-

> *"…… I now proceed, however, to consider the implications of sub-section (3) of section 34. This sub-section of course requires notice of the intended connection to be given to the Water Authority ………. The sub-section provides, however, that the*

water authority may refuse to permit the connection to be made. It is, of course, perfectly true that such refusal can only be on a limited number of grounds, and that if such refusal is not based on reasonable grounds it may be overruled by a court of summary jurisdiction. In the present case, the grounds include the ground that the mode of construction of the sewer proposed to be connected to the water authority sewer is such that the making of the communication would be prejudicial to the Water Authority Sewer. Now I do not know what the Water Authority would have done if the application had been made to them to connect a 12 inch sewer to their existing 9 inch sewer and they had at the same time been in possession of the fact that what was proposed was of the same general nature as pouring a quart into a pint pot. I have the shrewdness possible suspicion that they would have objected violently, and none the less because the quart into a pint pot could have been solved by the expenditure of money by them enlarging the existing 9 inch sewer into a 12 inch. Since the question was never posed to the water authority it was never answered…………..”

50. Mr Sheridan, as I have said, strongly relies upon this decision. He submits that for all practical purposes the wording of section 34 (1) and (3) is the same as the wording used in the 1991 Act. He submits that Walton J has decided, authoritatively, that such wording is apt to permit an undertaker to refuse a connection on the grounds of its location if he can demonstrate, also, that such a connection would be prejudicial to the public sewerage system as a whole.

51. Mr Porten QC accepts that no sensible distinction can be made between the thrust of the wording used in the 1936 Act as compared with the wording used in the 1991 Act. He submits that Walton J simply was not grappling with a situation where a land owner has served a notice and the undertaker had refused permission. In the alternative, he submits that Walton J was wrong in his approach to section 36 and I should not follow his approach when I interpret section 106 (4) of the 1991 Act.

52. It does not seem to me that the context in which Walton J made his decision is important. Obviously the factual circumstances in which Walton J was making his decision are very different from the circumstances prevailing in this case. What is important, in my view, is that Walton J clearly thought that the statutory words permitted an undertaker to refuse permission on the grounds that the location of the connection was prejudicial to the public

sewerage system as a whole.

53. It may or may not be the case that the views of Walton J on the scope of section 36 were obiter. Clearly he found against the Claimants on other bases. Nonetheless, as it seems to me, Walton J obviously addressed the meaning to be given to the section with care. In these circumstances it seems to me that I should depart from his view of the meaning of a predecessor section expressed in essentially similar terms to the section which I am considering only if I think that his view was clearly wrong.

54. I do not hold that view. Indeed I share his view rather than disagree with it. I say that for these principal reasons. Firstly, as a matter of language the phrase *"mode of construction"* is apt to include the point at which the drain or sewer connects with or communicates with the public sewer. If the making of a connection at a particular point is prejudicial to the sewerage system as a whole I do not see why it cannot be said, as a matter of language, that the mode of construction of the drain or sewer has caused the prejudice. Secondly, I consider it objectionable that the statute should be interpreted in such a way that the undertaker cannot use the power of refusal to a connection so as to prevent potentially deleterious environmental consequences. If the interpretation contended for by the Claimant is correct it means that whatever the potential harm to the environment the undertaker cannot refuse to permit a connection on the grounds of location or capacity. While I accept that it may be possible through the system of planning control to seek to avoid environmental damage I simply do not see why this statute should be interpreted in such a way as would remove from the undertaker an important regulatory power of control for the benefit of the public at large.

55. It may be said in response to this latter point, of course, that the undertaker itself may carry out works so as to alleviate or remove any environmental damage consequent upon a connection at a particular location. That is true. I have borne that in mind in reaching my conclusion. However it is to be noted that a refusal by the undertaker does not mean, necessarily, that a connection cannot be made. I have already referred to section 106(6) of the 1991 Act which allows the owner or occupier of private drain to test whether the undertaker's refusal is reasonable.

56. The existence of the right to refer the reasonableness of any refusal to OFWAT, in my judgment, supports the view that section 106(4) should be interpreted as I have suggested.

The Director of OFWAT is ideally placed to judge the reasonableness of a refusal on the grounds of location and/or capacity. If he considers that a refusal is unreasonable he can direct that the undertaker should permit the connection.

57. In reaching my conclusion there is one aspect of the judgment of Walton J in **Beech Properties** with which I do not agree. He expressly relied upon the decision of the Court of Appeal in **Wilkinson v Llandaff and Dinas Powis Rural District Council** [1903] 2Ch 695 to support his interpretation of section 34 of the Public Health Act 1934. I accept the submissions of Mr. Porten QC that there are material differences between the wording of section 21 Public Health Act 1875 and the wording of section 34 of the 1936 Act. I have not reached my conclusion as to the correct interpretation of section 106 of the 1991 Act on the basis of anything said by the Court of Appeal in **Wilkinson**.

58. In the light of the views expressed thus far it is strictly not necessary to consider whether EC law and, in particular, Directive 91/271/EEC should influence my interpretation of section 106. Clearly the interpretation I have found to be the correct interpretation is consistent with the objective of the Directive as expressed in Article 1. Whether the contrary interpretation as advanced by Mr. Porten QC was so at odds with the Directive would take a great deal of time and space to consider and I am conscious that the parties wish me to give judgment as soon as possible. For that reason I decline to offer my view as to the effect the Directive might have had in the event that I was minded to adopt the interpretation advanced by the Claimant.

59. It will also be noted, no doubt, that this judgment contains nothing about how the Defendant funds improvement works. Having given the matter careful thought it does not seem to me that the issue of which party might fund any improvement works (assuming such works to be necessary) in the event that a notice under section 106 of the 1991 Act is served can be relevant to the interpretation of that section. It may have considerable relevance to the issue of the reasonableness of any refusal. About that issue I say nothing for the obvious reason that I have not been asked to do so.

60. It follows from the foregoing that I refuse the Claimant's application for the relief identified at the beginning of this judgment. I would be prepared to order that the action proceed as a Part 7 Claim on the issues which I have left undetermined. In the event that directions about that are sought I would be happy to deal with written submissions.

Alternatively I am sitting in London from August 11 for the rest of the month and I would be happy to convene a hearing to deal with such issues as may arise.

61. I will hand down this judgment on 1 August 2008 in the absence of the parties. I would be grateful for typographical corrections. A minute of order should include any directions about the further conduct of the proceedings and provisions as to costs. If costs are contentious each party should submit written representations to me by 4pm 8 August 2008. They should liaise with my clerk about that and the need for a directions hearing. If the parties agree about the issue of costs and any directions they can submit an agreed order without the need for further attendance.

62. If the Claimant wishes to seek my permission to appeal it can do so at a hearing if one is convened or otherwise by making written representations by 4pm 8 August 2008.