

**Neutral Citation Number: [2008] EWCA Civ 1552**  
**IN THE SUPREME COURT OF JUDICATURE**  
**COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**CARDIFF CITY REGISTRY**  
**(MR JUSTICE WYN WILLIAMS)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: Friday, 28<sup>th</sup> November 2008

**Before:**

**LORD JUSTICE PILL**  
**LORD JUSTICE CARNWATH**  
and  
**LORD JUSTICE LAWRENCE COLLINS**

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**Between:**

	<b>BARRATT HOMES LIMITED</b>	<b>Appellants</b>
	<b>- and -</b>	
	<b>DWR CYMRU CYFYNGEDIG (WELSH WATER)</b>	<b>Respondent</b>

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**Mr A Porten QC and Mr S Gasztowicz** appeared on behalf of the **Appellants**.

**Mr M Sheridan** appeared on behalf of the **Respondent**.

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## **Judgment**

**Lord Justice Carnwath:**

### **Background**

1. This is an appeal against a decision of Wyn Williams J. It raises important issues as to the

nature and extent of the rights conferred by section 106 of the Water Industry Act 1991 to make connections to public sewers.

2. Barratt is a major house-builder. It is engaged in a development of a site at Llanfoist, Abergavenny. It has planning permission dated 14 May 2007 for 98 houses and a school. Dwr Cymru Cyfyngedig (“DCC”) is the sewerage undertaker for the area. It is the only water and sewerage company in England and Wales which is a not-for-profit organisation. Its operation and investment are funded through customer bills.
3. Barratt wished to connect the drains from the development to the public sewer at point X, in the road immediately adjoining the northern boundary of the development site. DCC objected to a connection at that point because of the risk of overspill in the stretch of sewer immediately downstream. It was willing to allow a connection at a location some 3-400 metres to the east, at point Y.
4. On 29 May 2007 Barratt served notice under section 106 of its proposal to connect at point X. DCC responded on 25 June 2007 purporting to approve the proposal, but stating that the connection must be at point Y. The letter indicated that the connection would need to be made either by laying a new sewer or by improving the existing sewer, and that the requisition procedure under section 98 of the 1991 Act could be used to overcome any problems with intervening landowners. The DCC later placed concrete round the sewer at point X to prevent any connection there.
5. Barratt began these proceedings against DCC for immediate relief (under CPR Part 8) by way of a declaration that it is entitled to have its development connected to the public sewer at point X in accordance with its notice, and an injunction requiring the removal of the concrete.
6. By the time the proceedings were begun 38 houses had been built and 31 had been sold. The school was opened in September 2008. Interim measures had been put in place for sewage to be stored and collected by tankers. Current market conditions have delayed the further progress of the development.
7. Three issues arise:
  - i) *Alternative location* Whether DCC was entitled to require the connection to be made at an alternative location, because of the prospect of sewer overload
  - ii) *The 21 day limit* Whether by serving its response outside the 21 day limit set by the Act, DCC lost the right to object to the connection at point X.
  - iii) *European law* Whether the answer is affected by the EC Directive on the treatment of Urban Waste Water (91/271/EEC).
8. The judge answered the first question in favour of Welsh Water. He held, following Walton J in Beech Properties Ltd v G E Wallis Ltd [1997] EGCD 75, that the statute permitted an undertaking to require the connection to be made at an alternative location in order to avoid prejudice to the system as a whole. He thought the second question relating to the 21 day limit was unsuitable to answer under Part 8 procedure, because it raised “somewhat intricate questions of mixed law and fact” (para 37). He found it unnecessary to rule on the issue of European law.

### **The statute**

9. Section 94 imposes a general duty on every sewerage undertaker to provide and maintain

a system of public sewers so as to ensure that its area is “effectually drained”. Section 98 requires an undertaker to comply with a requisition for the provision of a public sewer to be used for domestic purposes, but that is subject to payment by the person making the requisition.

10. Section 106, which is directly in issue, confers rights to connect to the public sewers. The relevant parts are:

“(1) Subject to the provisions of this section—

(a) the owner or occupier of any premises in the area of a sewerage undertaker; or

(b) the owner of any private sewer draining premises in the area of any such undertaker,

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

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

(3) At any time within twenty-one days after a sewerage undertaker receives a notice under subsection (2) 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 is such that the making of the communication would be prejudicial to the undertaker’s sewerage system

(4) For the purpose of examining the mode of construction and condition of a drain or sewer to which a notice under subsection (2) above relates a sewerage undertaker may, if necessary, require it to be laid open for inspection.”

11. Though not directly relevant to this case, I note that subsection (2) makes certain specific exclusions from the general right. For example, where separate public sewers are provided for foul water and for surface water, the section does not entitle any person “to discharge directly or indirectly—

(i) foul water into a sewer provided for surface water; or

(ii) except with the approval of the undertaker, surface water into a sewer provided for foul water...”

12. Section 106(6) enables a dispute as to the reasonableness of a refusal to be referred to the Director of the Office of Water Services (“OFWAT”). Although OFWAT was consulted in this case, no formal determination was sought. It is not suggested that this provision in any way limits the power of the court to rule on the legal issues.

13. Reference has also been made by way of comparison to subsection (8), which allows a wider discretion to refuse a connection in Greater London, where a sewer is used for the general reception of sewage from other public sewers. A private connection may be refused on “such grounds as the undertaker thinks fit”, and there is no right to apply to OFWAT to challenge the refusal.
14. I should also note section 107, under which the undertaker may give notice of its intention to make the communication itself rather than allowing the developer to make it; and section 108, which requires the person making the communication to give reasonable notice to the undertaker of the actual works. The standard form of a notice under section 106 used in this case provided for 48 hours’ notice.
15. We have also been referred to section 112 of the Act, which provides the means by which the undertaker can require that the proposed drain or sewer be constructed so as to form part of the general system. Under this procedure the undertaker may require the person to construct the drain in the manner which accords with the requirements of the undertaker, but by section 112(6) the undertaker must repay to the person constructing the drain the extra expenses reasonably incurred to comply with these requirements. In my view that section sheds no light on the construction of section 106.

### **Factual background**

16. Before returning to the legal issues, I need to fill in some of the factual history, in relation both to the planning proposal, and to the attempts to resolve the drainage problems.
17. The site had been considered suitable for housing development since at least 1999, when it was allocated in the draft Monmouthshire Unitary Development Plan. However, it was accepted that improvements to the public sewerage system (costed at that time at some £200,000) would be required to accommodate the development, and that in the meantime DCC would object to any proposal for such development.
18. Discussions with Barratt in 2005 and 2006 led in due course to their contributing some £13,000 for a hydraulic modelling assessment. This assessment highlighted the risk of increased spillage if the connection were made at point X. The existing system was designed to ensure that any such overflow would occur at the so called “combined sewer overflow” (CSO), located in open land to the east between points X and Y. It was calculated that the point X connection could lead to an increase of 29% in the incidents of overflow when the development was fully built. It was recommended that there should be either improvement to the relevant section of sewer, or a connection at an alternative location downstream. Discussions followed between Barratt and DCC on the alternative solutions.
19. The planning application for the present development was submitted to the County Council’s planning authority in June 2006. The planning officer’s report referred to the drainage issue, and the ongoing discussions with DCC. It was noted that, if off-site infrastructure improvements were required, they could be secured by a “Grampian” condition or a section 106 agreement. The application came before the planning committee on 12 December 2006. According to the minutes, the head of planning stated that work on constructing houses could not take place until the drainage had been improved to DCC’s standards, but that this would result in a general improvement of the drainage network in the area. It was resolved that conditional permission be granted subject to conclusion of a planning agreement. The permission was issued on 14 May 2007. Condition 10

provided:

“No development should take place until a scheme of foul drainage and surface water drainage has been submitted to and approved by the local planning authority and the approved scheme shall be completed before the buildings are first occupied.”

20. On 29 May 2007, as already noted, Barratt served its notice under section 106. It is to be noted that, even after the statutory 21 days had passed, Barratt continued to press for a response. Following that response on 26 June, Barratt sought further information about the cost of the sewer connection stipulated by that letter. There were also discussions about the use of the requisition procedure. It seems that at this stage DCC, with the support of the Environment Agency, had the assurance from the County Council that condition 10 would not be treated as discharged until its sewerage requirements had been met.
21. On 20 July Barratt confirmed that it would “underwrite (DCC’s) abortive costs in progressing a scheme for the improvement works to the public sewerage system”. This seems to have been treated by DCC as a formal request to initiate the requisition procedure under section 98. However, in September Barratt’s position began to harden. In a letter dated 11 September it took the point that the undertaker had no power under section 106 to set the point of connection. About this time it also seems to have sought advice from OFWAT.
22. OFWAT’s advice was not helpful to DCC. In a letter of 25 January 2008 they rejected DCC’s suggestion that initiation of the requisition procedure had resulted in loss of any rights under section 106. As the letter said: “Developers typically pursue both options for the sewerage of their sites in order to establish the most cost effective viable option”. They also expressed the view that, by failing to respond to the section 106 notice within 21 days, DCC had lost the right to object. They added that it would be for Barratt to confirm with the planning authority that it would satisfy planning condition 10.
23. On 20 February Barratt wrote to the County Council enclosing the OFWAT letter and an opinion of Anthony Porten QC (this apparently followed a meeting on 5 February, but there is no record of what took place). Barratt requested that condition 10 be discharged “as a matter of urgency” as they were investigating possible proceedings against DCC. On 3 March a notice was issued by the County Council, in the name of the Development Control Manager, confirming that the condition had been discharged. It appears that this was done under delegated authority, and without consulting DCC.
24. As already noted, DCC remained unwilling to accept that Barratt was entitled to make the connection at point X, and took steps to make it physically impossible for it to do so.

#### **Section 106 -- history and case-law.**

25. The development of the modern statutory scheme for sewage disposal and drainage was described by Lord Nicholls in Marcic v Thames Water Utilities [2004] 2AC 42 at paragraph 10. He described in particular the changes made by privatisation in 1989 and the role of the Director of Water Services (or OFWAT).
26. So far as concerns provisions for connecting public sewers, they have a long history.

Section 21 of the Public Health Act 1875 provided that an owner or occupier of premises was entitled to cause his drains to empty into the sewers of the local authority, subject to giving notice, and to 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...”

27. In Ainsley v Kirkheaton Local Board [1891] 60 LJ(Ch) 734, it was held that section 21 conferred a right to an owner to drain into an existing sewer without reference to whether it might cause a nuisance. The right was described as “an absolute right” in Brown v Dunstable Borough Council [1899] Ch 378, albeit one subject to the power to make “regulations” in respect of the mode of connection. In Wilkinson v Llandaff RDC [1903] 2 Ch 695, it was held by Stirling LJ that this power gave the authority the power “to define by regulation the particular sewer with which the communication is to be made” (p 703).
28. In 1936 the section was recast in a form substantially similar to what became section 106. Section 34 of the Public Health Act 1936 retained the right to connect, but without the provision for regulations. Instead, there was a proviso prohibiting certain categories of connection (as now in s106: see para 11 above); and the authority were given the right, within 21 days of notice of the proposals, to object on the grounds that the “mode of construction or condition” of the drain would lead to prejudice to the sewerage system. Any question as to reasonableness of a refusal would be determined by the magistrates’ court.
29. It is notable that the grounds on which connection may be refused under this section (as under section 106) are narrow. They relate solely to the mode of construction or condition of the connecting drain. This formulation is even narrower than under the 1875 Act, which allowed the authority to regulate “the mode of communication”. In Wilkinson, as we have seen, those words were interpreted by Stirling LJ as enabling the authority to direct the connection to a particular sewer, in order to avoid foul sewage being directed to a surface water drain. That potential problem is dealt with in a different way in the later Acts, by a specific prohibition in the proviso on particular types of connection.
30. It is, in my view, clear both from the wording of section 34, and from the history that the authority is not permitted to object to a connection on the grounds of overloading to the public sewer. This has been the generally accepted interpretation at least since Smeaton v Ilford Corporation [1954] 1 Ch 450. We have also been shown a decision by OFWAT to that effect, in a determination dated 11 August 1997 (Post Office v Yorkshire Water). That decision was circulated to the industry at the time, and as far as we know has not been questioned. Any remaining doubt on this issue was settled by the House of Lords in Marcic v Thames Water Utilities [2004] 2AC 42, where it was accepted without question that under section 106 the water undertaker was unable to prevent connections through its existing system, even at the risk of overload (see, for example, per Lord Nicholls para 34).
31. I should add that, although the requisition procedure under section 98 is now found in the same Act as section 106, it has a much shorter history. It was first introduced in 1973. The two sections are not in terms expressed as mutually exclusive. As OFWAT pointed out, there is nothing in the Act to prevent a developer exploring both options at the same time.

## **The issues**

### ***Alternative location***

32. This is the most important issue from the general point of view. This relates to the basis of DCC's refusal for a connection at point X. Even if, on the basis of the authorities I have referred, the outright refusal on grounds of overload would not have been permissible, Mr Sheridan submits that it was open to the authority to reject the particular location in favour of an alternative location which would not have the same adverse consequences.
33. The judge in effect accepted this submission. He thought (see para 54) that the phrase "mode of construction" was apt to include the point at which the drain connects with the public sewer; and that, accordingly, if the making of connection at a particular point is prejudicial to the system, it could properly be said that the mode of construction had caused the prejudice. He thought it objectionable that the statute should be interpreted in such a way that the undertaker could not use the power of refusal to prevent such deleterious consequences.
34. He gained support from observations of Walton J in the Beech Properties v G E Wallis [1977] EGCD 735. In that case this particular point did not arise and so the comments of the learned judge were obiter. What he said was this:

"...it does appear to me that, wise as the words of subsection (1) may be, and for the moment ignoring the opening qualification, they do not confer upon an individual the right to connect his sewer to the water authority's 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 the road; a new house is built in the road; and quite obviously and clearly the owner will expect to have a right to drain into that sewer, and it would be very difficult, assuming that there are no problems under the proviso to subsection (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 crossroads 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 at point X rather than an 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 LJ, particularly the latter, in Wilkinson v Dina Powis Rural District Council [1903] 2 Ch 695..."

35. I am unable with respect to accept the approach of Wyn Williams J on this point or his

reliance on the comments of Walton J. It is quite clear, as I have indicated, from the history of the section and the authorities, that there are strict limits to the extent to which the undertaker is able to avoid the deleterious consequences of a connection. If Parliament had intended to give the undertaker control over the *location* of the connection, as opposed to its condition and construction, it could easily have done so. It did not. (An example of a wider provision is found in the equivalent Scottish statute, discussed in Tayside RC v Secretary of State for Scotland [1996] SLT 473).

36. As to the comment of Walton J, the judge was right in my view to question his reliance on Wilkinson which related to a different form of wording. Taken at their highest, the examples given by Walton J bear no relation to the present case. He was referring to a possible choice between two drains at the same crossroads, or on a single sewer the choice between point X and “adjacent point Y”. That gives no support for the attempted imposition, as in this case, of a connection through a completely new sewer to a point some 300m away from the proposal.
37. Mr Sheridan also seeks support in a passage in the OFWAT decision (Post Office v Yorkshire Water) to which I have referred. Although the decision rejected a refusal based solely on lack of capacity, some consideration was given to the possibility of an alternative. Reference was made (at para 6.7) to a sewer being provided to another site in response to a requisition. This could be connected to the Post Office site by a further 170 metre sewer. It was suggested that Yorkshire Water could provide this extra length of sewer, and if so it would be reasonable for it to insist on the Post Office making the connection to it. However, it is clear that the extra sewer would have to be provided at Yorkshire Water’s expense. This is of no assistance to DCC which is not, as I understand it, offering to provide the connection to point Y at its own expense.
38. On this issue I would allow the appeal.

### **The 21 day limit**

39. Mr Porten argues that the 21 day time-limit is absolute, and that once it has passed the developer becomes “entitled” to make the connection. He relies on cases such as Petch v Gurney [1994] 3 AER at 731 (a case under the Taxes Management Act 1970), in which Millet LJ expressed the principle in clear terms:

“Where a statute requires an act to be done in a particular manner, it may be possible to regard the requirement that the act be done as mandatory but the requirement had been done in a particular manner as merely directory...But that is not the case with a stipulation as to time. If the only time limit which is prescribed is not obligatory, there is no time limit at all. Doing an act late is not the equivalent of doing it in time.” (p. 738 c-f)

As has been seen, Mr Porten’s position is supported by OFWAT.

40. Mr Sheridan on the other hand refers to more recent authorities, which indicate that the distinction is not so clear-cut, and that an assessment must be made of the Parliamentary intention, taking account of the context of the requirement and the consequences of non-compliance. He relies in particular on the exhaustive discussion in the speeches in R v Soneji [2006] 1AC 340, developing the approach first signalled in London & Clydeside

Estates v Aberdeen DC [1980] 1 WLR 182. In the present context, he argues, the power to refuse a connection is designed for the protection of the public. It cannot be intended that it should be lost by a limited delay which causes no harm to anyone. In this case the delay of a few days was of no possible prejudice to Barratt, as evidenced by their own conduct in continuing to press for an answer after the limit had passed.

41. Had I found it necessary to this point, I would see considerable force in Mr Sheridan's submissions. While I see the theoretical attractions of Mr Porten's argument, the context is very different from those of the cases to which he refers. Recent authority allows a more flexible approach. In this case, the public interest consideration seems to me to point strongly to allowing some flexibility where no prejudice is caused to the developer. However, I bear in mind that this view would conflict with that of the statutory regulator, from whom we have not heard specific argument. Since it is not necessary to decide the point, I would prefer to leave it open for further consideration in another case which may depend upon it.

### **European issues**

42. Mr Sheridan argues that section 106 must be interpreted in the light of the EC Directive on the treatment of Urban Waste Water 91/271/EEC, which has been given effect by the Urban Waste Water Treatment Regulations 1994. In general terms the Directive requires that it provide adequate collecting systems for urban waste water, including the prevention of leaks and pollution due to storm overflows. The argument, as I understand it, is that section 106 cannot be read in such a way as to require DCC to accept a connection which would result in a contravention of those regulations; or alternatively it must be read so as to avoid such consequences.

43. I accept that the provisions of the Directive and the Regulations may be of relevance in a planning context. We were referred to the relevant guidance in Planning Policy Wales March 2002, which requires local planning authorities to take account of infrastructure capacity and the effects on existing local communities and the environment. That much is not in issue, but the argument in the present case goes further, and suggests that somehow we can modify the provisions of the statute to give effect to that Directive and those Regulations.

44. An argument to similar effect was considered and rejected in Northern Ireland by Weathercup J in Re Friends of the Earth [2007] Env LR 7 para 39. He said:

“I do not interpret the measures required in respect of urban waste water “entering” collecting systems as requiring restrictions on entry. The obligations are to provide the required collecting systems and treatment and discharge standards. The result to be achieved is a compliant system and the wording and purpose of the Directive do not expressly or impliedly require restrictions on new connections in non compliant areas. It is not for the Court to introduce an obligation to prevent new connections in non compliant areas where that does not arise expressly or impliedly under the Directive or the Regulations.”

45. I respectfully agree. The argument in the present case is not about whether the sewers require improvement but who should pay for it. Nothing in the Directive or the

regulations seems to me to impinge on the allocation of that responsibility as between undertaker and the developer.

**Section 106 in context**

46. Finally I should comment on DCC's concerns about the general implications of our decision for sewerage undertakings. It is important to see section 106, and indeed section 98, in context. A developer is not given a free hand by the Water Authority to impose the burden of his drainage requirements on the water undertaker. He requires planning permission.
47. A responsible planning authority would normally refuse planning permission until satisfied that drainage requirements can be resolved to the satisfaction of the relevant authorities. If off-site works are required, it may impose a condition or require an agreement to ensure that they are carried out at the expense of the developer. That appears to be what was contemplated in this case. Condition 10 was apparently imposed to protect DCC's position. Until late 2007 it seems to have been accepted by the county council that it would not be discharged until ECC's requirements were met. The section 106 notice, even if DCC had lost the right to object under that Act, did not have the effect of overriding the condition. As was made clear in OFWAT's letter on January 2008, it was for Barratt to secure the release of the condition.
48. It is unclear what exactly led the county council to its decision that the condition had been discharged. It seems an odd decision at first sight. I find it hard to see how it could be said that the approved drainage scheme was "completed" until an effective connection was made to the public system (although Mr Porten would argue otherwise). In any event, it seems surprising that the county council, which apparently regarded the improvements to the drainage system as of benefit, did not do more to ensure they were carried out. It also seems regrettable, if it be the case, that the county council did not first consult DCC before agreeing to the discharge. We were told by Mr Sheridan that, since privatisation, drainage undertakers are not automatic statutory consultees for planning applications. However, it seems that that gap may have been filled by planning guidance. It may be that more thought needs to be given to the interaction of planning and water regulation systems under the modern law, to ensure that the different interests are adequately protected, given the significant changes since the days when the predecessor of section 106 first came into existence. But OFWAT itself does not seem to have concerns about the present arrangements. The fact that something may have gone wrong in this case does not throw any doubt on the efficacy of the whole system. Nor does it throw any light on the correct approach to construction of the statute.
49. In conclusion, for these reasons I would allow the appeal and would hear submissions on what relief should now be given.

**Lord Justice Lawrence Collins:**

50. I agree.

**Lord Justice Pill:**

51. I also agree. I too, on the time limit issue, would be inclined to the view that service of the counter-notice by Dwr Cymru Cyfyngedig, the respondent, a few days out of time did not prohibit reliance on it in these proceedings. I would have regard to the short extension

required; to the absence of any conduct of the appellants, Barratt Homes Limited, to their prejudice during the days before service; and in particular to the serious adverse effect upon health and the environment which could occur if a respondent was not able to challenge the validity of the notice as the respondent has done.

52. This is not a situation in which it follows necessarily from non-compliance with the express time limit that the claim to connect cannot be challenged. That is not to give anything other than every encouragement to respondents, on receipt of a notice from a developer, to issue a counter-notice promptly. It is not necessary to decide this point in this appeal.
53. On the construction of the statute, Mr Sheridan, for the respondent, submits that section 106 of the Water Industry Act 1991 (“the 1991 Act”) should not be given a liberal construction in the owner’s favour. Concerns for protection of the environment have grown in recent years. The court should have regard, it is submitted, to the practical workability of section 106 in that context. Connection should be allowed only to sewers that are capable of taking the additional flow, which is dependent on the availability of public funds. Common sense should prevail, it is submitted. The statute did not contemplate that the respondent would have to rely on the planning system to protect its position.
54. Persuasive though the appeal to common sense often is, I agree with the analysis of Carnwath LJ of the authorities and with the conclusion he has reached. I am unable to conclude that the expression “mode of construction and condition of the drain or sewer” in section 106(4), repeated in section 106(5) of the 1991 Act, has any bearing upon the location of the communication with the public sewer contemplated in section 106(1)(b) and section 106(4). Mode of construction has nothing to do with location.
55. The Sewerage (Scotland) Act 1968 expressly recognised the distinction. Section 12(3) provided that a permission to an owner to connect his sewer with the sewers of a local authority may specify “the mode and point of connection”, thereby distinguishing the two concepts. I would not go as far as to accept the submission of Mr Porten QC, on behalf of the appellants, that the owner or occupier described in section 106(1) can dictate the precise location of the connection. Circumstances may be such as to allow a modest discretion to the sewerage undertaker where good reason is shown, for example, that the precise location chosen by the applicant is not a feasible or a sensible location at which to connect. That, however, is very far from what the respondent has sought to do in this case. The respondent has sought to dictate a communication with the sewer at a point about 300m from that requested, and across land in third-party ownership and control. That, in my judgment, is outside any modest discretion which the authority may have.
56. I add words about the sequence of events which has led to the case coming before the courts, having regard to the strong arguments presented on behalf of the respondent by Mr Sheridan, that the result of the court’s conclusion is to leave a large gap in the protection which the public and the respondent, like other sewage authorities, need. The events have arguably led to the unsatisfactory situation of sewage from a substantial development potentially being discharged into an inadequate sewer, with possible implications for the environment and even for public health.
57. The permission sought was for a development of 98 houses and a primary school on a five-hectare site in the village of Llanfoist near Abergavenny. It would involve a doubling

in the size of the village. In context it was a substantial development in this rural area, in the consideration of which the availability of suitable infrastructure, including for sewage, would be expected to be considered.

58. The planning officer's report demonstrates that the respondent was consulted and its views were set out in the report to the appropriate committee of the Monmouthshire County Council as local planning authority. The planning officer recorded:

“The Environment Agency has confirmed they have no objection to the proposed development subject to drainage conditions. The applicants are in discussion with Dwr Cymru...whose formal comments on the application are awaited particularly with regard to sewage. If off-site infrastructure improvements are required, this could be addressed by ‘Grampian’ condition or by S.106 Agreement as appropriate and Committee will be informed of Welsh Water’s response.”

There is no doubt that the respondent did object to the proposal on sewage grounds.

59. In relation to an earlier proposal for a somewhat larger development of 120 dwellings, the respondent stated, by letter of 14 September 2005:

“The proposed development would overload the existing public sewerage system. No improvements are planned within Dwr Cymru[’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 the [1991 Act].

Reason:- to prevent hydraulic overloading of the public sewerage system, to protect the health and safety of existing residents and ensure no detriment to the environment”

60. That submission was set out in further detail in a letter of 21 March 2006. The minutes of the meeting of Monmouthshire County Council planning committee at which the application was considered and at which permission was granted, subject to conditions, show that the council’s Head of Planning and Regeneration stated in the course of discussion that:

“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...In addition, the new site would improve the drainage network in the area, which was currently, in Welsh Water’s opinion, at capacity, resulting in objections from that body to additional single dwellings utilising the existing drainage network.”

61. Permission was granted on 14 May 2007 subject to this condition (10) amongst others:

“No development shall take place until a scheme of foul drainage and surface water drainage, has been submitted to, and approved by, the Local Planning Authority and the approved scheme shall be completed before the building(s) is/ are first occupied.”

The reason given is “To ensure a satisfactory method of foul and surface water drainage”.

62. As to condition 10, the Environment Agency Wales, who clearly were also consulted, wrote to the local planning authority on 23 October 2007:

“We would recommend that the Local Planning Authority await finalisation of the foul discharge arrangements between the applicant, Barratt Housing Developments and Welsh Water prior to discharging condition 10 to ensure there is an agreed approach and sufficient capacity available to deal with foul flows from this site. Once the LPA is satisfied with foul water disposal arrangements, we can recommend discharge of Condition 10.”

63. The respondent repeated its objection on 21 November 2007:

“However, after seeing a copy of the planning committee report and the comments and recommendations made at the meeting it is evident that the planning condition imposed reflects the discussion which highlighted that improvement works are required to the public sewerage system prior to this development communicating”

64. Mr Porten submits that condition 10 relates only to drainage within the appeal site. It is not necessary to resolve that issue. It is certainly not a view the planning officer took or that the Environment Agency took or that the respondent took.

65. In the event, the condition was discharged by a letter of 3 March 2008. That followed representations made on behalf of the appellants on 19 and 20 February 2008.

“I can confirm that, further to receipt of the above correspondence, Barratt’s are in the process of investigating litigation of Welsh Water [that reference is to advice which leading counsel had prepared on the legal issue on which in the event this court has found in the appellants’ favour]. I would therefore respectfully request that condition 10 be discharged as a matter of urgency.”

66. Those were representations which the appellants were entitled to make. However, having regard to the background described, it was to be expected that the local planning authority would consider not only the legal point which had been raised but the underlying point on

the adequacy of sewers which had been raised. That was not resolved by resolution of the legal issue in the appellants' favour. I agree with Carnwath LJ that it is surprising that the local planning authority were, as I see it, distracted from consideration of the submissions of substance made, to some of which I have referred, by a consideration of a legal point which they apparently considered decisive.

67. However, my purpose is not to criticise the local planning authority who are not here to speak for themselves. It is to demonstrate that, in the planning process, procedures are available under which the position of the public and of sewage authorities can be protected. Several of the options have been mentioned in the documents which were before the local planning authority in this case. Protection may be sought in section 106. The respondent can expect to have protection in the planning process, as can the public interest. If there was a failure to provide that protection in this case, and I do not think it necessary to rule upon it, it does not demonstrate that there is a large gap in the system. Moreover, and perhaps more to the point, it does not demonstrate that section 106 should be construed in the way for which the respondent contends.

68. I too would allow this appeal on the basis indicated by Carnwath LJ.

**Order:** Appeal allowed.