Neutral Citation Number: [2024] EWCA Civ 842

Case No: CA-2023-002165

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
HHJ KLEIN (SITTING AS A HIGH COURT JUDGE)
2023] EWHC 2410 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 July 2024

Before:

LORD JUSTICE PETER JACKSON
LORD JUSTICE LEWIS
and
LADY JUSTICE ELISABETH LAING

- -

Between:

THE KING (on the application of) NORTHUMBRIAN WATER LIMITED	**Appellant**
- and -	
WATER SERVICES REGULATION AUTHORITY	**Respondent**

- -
- -

Thomas de la Mare KC, **David Lowe** and **Christopher Leigh** (instructed by **KPMG Law**) for the **Appellant**
Kieron Beal KC, Ajay Ratan and **Thomas Lowenthal** (instructed by **Gowling WLG (UK) LLP**) for the **Respondent**

Hearing dates: 18 and 19 June 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 23 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE LEWIS:

INTRODUCTION

1. This appeal concerns the question of whether the appellant, Northumbrian Water Limited ("NWL"), is entitled to exclude the impact of interruptions to water supply arising out of the effects of a storm, known as Storm Arwen, when calculating its performance levels for the purpose of assessing the amount of charges that it may levy on customers under the applicable price control regime. The appellant contends that it is entitled, under the terms of its licence and relevant guidance, to an exception on the basis that the storm was a civil emergency. The paragraphs of the relevant guidance provide as follows:

> "**Exclusions**
>
> The default position is that the water company manages the risk of supply interruptions and there are no exclusions. This measure covers planned and unplanned interruptions. The cause of the interruption is not relevant to the calculation of the reported figure. That is, asset failure caused by third parties would be treated the same as the failure of the company's assets and planned or unplanned interruptions are the same.
>
> Companies may make a representation to Ofwat for an exception to be granted on the basis of a civil emergency under the Civil Contingencies Act 2004, where the supply interruption is not the cause of the emergency."

2. The respondent is the Water Services Regulation Authority ("the Authority"). It is often known as Ofwat. It is the statutory regulator for water supply. It contends that the relevant guidance, properly interpreted, means that the appellant may request that the respondent grant an exception and gives the respondent a discretion to determine whether, and to what extent, to grant an exception. In a final determination dated 15 November 2022, the respondent decided that the appellant should be granted a partial exception and should be entitled to exclude 50% of the water supply interruptions arising out of the storm, when calculating its performance levels for the purpose of assessing the amount of revenue it was allowed to receive from customers.

3. HHJ Klein, sitting as a judge in the High Court ("the judge") dismissed the appellant's claim for judicial review of that decision. The appellant has permission to appeal against that decision on the following grounds:

> "Ground 1(a). The judge erred in his findings as to the meaning and effect of the CE Exception. The CE Exception does not give Ofwat a wide-ranging (or any) discretion as to whether to relieve NWL from reporting underperformance. Rather, on its true construction, the CE Exception requires Ofwat, in assessing NWL's performance… to exclude all [supply interruptions] that were caused by a qualifying emergency (and not by NWL's fault).

> Ground 1(b) Alternatively, if the CE Exception confers any discretion on Ofwat, the judge erred in finding that it allows Ofwat to take account of matters other than performance in relation to [supply interruptions]. As a matter of the CE exception's true construction and purpose, especially in the light of Condition B12.7 of NWL's Licence, Ofwat was not entitled to take account of other wider factors.
>
> Ground 2. In the further alternative, if the CE Exception does grant Ofwat a broad description, the judge erred in finding that the duty of prescription does not apply in that context. The duty does apply, and Ofwat's failure to produce a policy as to its exercise of the CE Exception (before PR19 or at all) means Ofwat cannot take into account the general discretionary factors that it did rely on with respect to NW, as a reason not to apply the CE Exception."

THE LEGAL FRAMEWORK

The Statutory Framework

4. The supply of water and the provision of sewerage services are governed by the Water Industry Act 1991 ("the 1991 Act"). Section 1A creates a body corporate, the Authority, to carry out the functions conferred on, or transferred to, it. Section 2(1) provides:

> "2.— General duties with respect to water industry.
>
> (1) This section shall have effect for imposing duties on the Secretary of State and on the Authority as to when and how they should exercise and perform the powers and duties conferred or imposed on the Secretary of State or the Authority by virtue of any of the relevant provisions."

5. "Relevant provisions" include those in Part II of the Act which deal with the appointment of water undertakers. Section 2(2A) provides:

> "(2A) The Secretary of State or, as the case may be, the Authority shall exercise and perform the powers and duties mentioned in subsection (1) above in the manner which he or it considers is best calculated–
>
> (a) to further the consumer objective;
>
> (b) to secure that the functions of a water undertaker and of a sewerage undertaker are properly carried out as respects every area of England and Wales;
>
> (c) to secure that companies holding appointments under Chapter 1 of Part 2 of this Act as relevant undertakers are able (in particular, by securing reasonable returns on their capital) to finance the proper carrying out of those functions;

> (d) to secure that the activities authorised by the licence of a water supply licensee or sewerage licensee and any statutory functions imposed on it in consequence of the licence are properly carried out; and
>
> (e) to further the resilience objective."

6. The consumer objective is to protect the interests of consumers (see section 2(2B) of the 1991 Act). The Secretary of State and the Authority are to have regard to the interests of vulnerable people, pensioners, those on low incomes or living in rural areas and others (see section 2(2C) of the 1991 Act). The resilience objective is defined in section 2(2DA) of the 1991 Act as being:

> "(a) to secure the long-term resilience of water undertakers' supply systems and sewerage undertakers' sewerage systems as regards environmental pressures, population growth and changes in consumer behaviour, and
>
> (b) to secure that undertakers take steps for the purpose of enabling them to meet, in the long term, the need for the supply of water and the provision of sewerage services to consumers, including by promoting—
>
> (i) appropriate long-term planning and investment by relevant undertakers, and
>
> (ii) the taking by them of a range of measures to manage water resources in sustainable ways, and to increase efficiency in the use of water and reduce demand for water so as to reduce pressure on water resources."

7. Section 2(3) and (4) of the 1991 Act impose the following duties:

> "(3) Subject to subsection (2A) above, the Secretary of State or, as the case may be, the Authority shall exercise and perform the powers and duties mentioned in subsection (1) above in the manner which he or it considers is best calculated–
>
> (a) to promote economy and efficiency on the part of companies holding an appointment under Chapter 1 of Part 2 of this Act in the carrying out of the functions of a relevant undertaker;
>
> (b) to secure that no undue preference is shown, and that there is no undue discrimination in the fixing by such companies of water and drainage charges;
>
> (ba) to secure that no undue preference (including for itself) is shown, and that there is no undue discrimination, in the doing by such a company of—

(i) such things as relate to the provision of services by itself or another such company, or

(ii) such things as relate to the provision of services by a water supply licensee or a sewerage licensee;

(c) to secure that consumers are protected as respects benefits that could be secured for them by the application in a particular manner of any of the proceeds of any disposal (whenever made) of any of such a company's protected land or of an interest or right in or over any of that land;

(d) to ensure that consumers are also protected as respects any activities of such a company which are not attributable to the exercise of functions of a relevant undertaker, or as respects any activities of any person appearing to the Secretary of State or (as the case may be) the Authority to be connected with the company, and in particular by ensuring–

(i) that any transactions are carried out at arm's length;

(ii) that the company, in relation to the exercise of its functions as a relevant undertaker, maintains and presents accounts in a suitable form and manner;

(e) to contribute to the achievement of sustainable development.

(4) In exercising any of the powers or performing any of the duties mentioned in subsection (1) above in accordance with the preceding provisions of this section, the Secretary of State and the Authority shall have regard to the principles of best regulatory practice (including the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed)."

8. Section 6 of the 1991 Act provides for the appointment of a company to be the water undertaker or sewerage undertaker for any area of England and Wales. Section 11 provides a power to impose conditions on the appointment. It provides, so far as material:

"**11. Power to impose conditions**

(1) An appointment under this Chapter may include—

(a) such conditions as appear to the Secretary of State or, as the case may be, the Authority to be requisite or expedient having regard to the duties imposed on him or it by Part I of this Act;

(b) conditions for the purposes of section 7(4)(c) above; and

> (c) conditions requiring the rendering to the Secretary of State of a payment on the making of an appointment, or payments while such an appointment is in force, or both, of such amount or amounts as may be determined by or under the conditions."

The Licence

9. The appellant was appointed by the Secretary of State for the Environment as a water and sewerage undertaker. Its current instrument of appointment, commonly referred to as a licence, includes certain conditions. The relevant condition is Condition B which enables the respondent to make determinations setting price controls in respect of charges to be levied by, or revenue allowed to, the appellant for the supply of water and sewerage services. Price controls are fixed for a defined period. There is provision for periodic reviews to determine whether the price controls should be changed. The relevant provisions are paragraphs 9.4 and 9.6 which provide, so far as material, that:

> "9.4 1) In respect of the Appointed Business's Water Resource Activities, Bioresource Activities, Network Plus Water Activities and Network Plus Water Activities …the Water Services Regulation Authority shall determine separate Price Control in accordance with this sub-paragraph (having regard to all the circumstances which are relevant in the light of the principles which apply by virtue of Part I of the Water Industry Act 1991 in relation to the Water Services Regulation Authority's determinations including, without limitation, any change in circumstance which has occurred since the last Periodic Review or which is to occur).
>
> …..
>
> 9.6 Each Price Control determined under sub-paragraph 9.4 pursuant to a Periodic Review shall be set:
>
> (1) for the five consecutive Charging Years starting on 1 April 2020; and
>
> (2) thereafter for each period of five consecutive Charging Years starting on the fifth anniversary of the first day of the period in respect of which the immediately preceding Periodic Review was carried out."

10. There is provision under the licence for the appellant to have the price controls determined each five-year period referred to the Competition and Markets Authority.

11. It is by means of these provisions in the licence that the respondent is able to impose price controls limiting the amount of charges that the appellant may levy on customers for the services that it provides. The amount of the charges is linked to the prescribed levels of service. If the appellant exceeds the prescribed levels, it is able to charge more. If it does not meet the prescribed levels, it recovers less. This is referred

to in the industry as an outcome delivery incentive or "ODI". There is also provision for a water company such as the appellant to propose additional commitments in relation to performance which, if met, enable it to recover higher charges from customers. In the present case, the relevant service levels relate to three performance commitments fixing targets in relation to interruptions in water supply as described below.

12. Part 3A of Condition B deals with adjustments to the performance measures during each year of the price review period (referred to as an "in-period determination"). Paragraph 12.1 of Condition B provides:

> "12.1 This Part 3A applies where the Water Services Regulation Authority has notified the Appointee by 31 December in the Charging Year before the Review Charging Year that a Price Control determined under sub-paragraph 9.3 in respect of the Appointee's Retail Activities or sub-paragraph 9.4 in respect of the Appointee's Water Resources Activities, Bioresources Activities or Network Plus Activities may be adjusted to reflect the Appointee's performance in relation to a specific Performance Commitment."

13. A performance commitment is defined in paragraph 12.8 and means "a target or other measure of the performance of the Appointee in relation to the carrying out of the Regulated Activities".

14. Paragraphs 12.2 to 12.4 of Condition B provide for the appellant to request a determination or for the respondent to make a determination on its own initiative. Those paragraphs also provide a timetable for making a request and for the respondent to make a determination. Paragraphs 12.5 to 12.7 contain the substantive provisions governing a determination and provide as follows:

> "12.5 Under this Part the Water Services Regulation Authority may determine the question of whether there should be a change to the revenue allowed under, or, as the case may be, the level of, any Price Control determined under sub-paragraph 9.3 in respect of the Appointee's Retail Activities or sub-paragraph 9.4 in respect of its Water Resources Activities, Bioresources Activities or Network Plus Activities for the following and any subsequent Charging Year and, if so, the amount of such change.
>
> 12.6 The Appointee shall furnish to the Water Services Regulation Authority such Information as the Water Services Regulation Authority may reasonably require for the purpose of making a determination pursuant to this Part.
>
> 12.7 In making a determination pursuant to this Part, the Water Services Regulation Authority shall:
>
> (a) consider the Appointee's performance in relation to each relevant Performance Commitment in the period for which

> performance is being assessed and, in deciding for which Charging Year or Charging Years an adjustment to a Price Control should be made, shall consider both that and the Appointee's expected performance in the current year or one or more future years up to, but not including, the next Review Charging Year; and
>
> (b) take account of the adjustments to the relevant Price Control which the Water Services Regulation Authority notified to the Appointee under sub-paragraph 12.1 above in relation to each relevant Performance Commitment in question."

15. There is no provision for the appellant to have a determination referred to the Competition and Markets Authority under paragraph 12.5 of Condition B.

The Performance Commitments

16. The price controls governing the 2020 to 2025 period are contained in a document known as Price Review 19 Final Determinations ("PR19"). Extracts from that document are to be found in the judgment below at paragraph 8 and it is not necessary to reproduce them here. There are three performance commitments relating to water supply interruptions contained in an appendix to PR19. One is a general commitment. Two concern bespoke commitments made by the appellant and setting targets for water supply interruptions lasting more than 12 hours, and water supply interruptions lasting between one and three hours. Each type of performance commitment is accompanied by reporting guidance. The relevant document in this case is entitled "Reporting Guidance – Supply Interruptions" ("the Reporting Guidance"). Put crudely, the reporting guidance sets out a formula by which the performance of the appellant can be calculated (essentially, based on the number of properties experiencing an interruption to water supply for defined periods of time). That is then used to determine the amount by way of charges that the appellant may recover from customers. The material parts of the Reporting Guidance provide as follows:

> "**Objective**
>
> The purpose of this document is to derive a metric for supply interruptions that consistently calculates the performance of water companies in terms of the average number of minutes lost per customer for the whole customer base for interruptions that lasted 3 hours or more.
>
> This guidance seeks to enable companies to monitor and compare consistently derived and common performance measures for Supply Interruptions.
>
> **Key Principles**
>
> There are several key assumptions made in the compilation of this guidance:

- Reporting of supply interruptions shall be subject to each company's assurance process which is applied to all measures reported annually.

- Companies have a methodology or procedure in place for reporting on supply interruptions. This procedure is reviewed as part of their assurance process.

- There is an assumption that there will be continued improvement by all companies in the short and medium term through innovation, new technology, data quality improvements and staff training:

- The measure assumes a clear and simple approach that can be understood by customers and regulators.

- The essential reporting requirements for reporting on supply interruptions are set out.

- The focus of the guidance is on annual reporting of supply interruptions. It is not intended as a definitive guide to managing the risk of supply interruption.

- The company shall apply the precautionary principle, using the start and finish times and the properties affected that will give the highest supply interruption value in the event of uncorroborated or conflicting data.

Applying this guidance is likely to mean that comparisons of historical performance between companies, and of individual company's previous performance, may not necessarily be valid.

The adoption of this metric across the industry does not preclude any company electing to have other supply interruption Performance Commitments with company specific definitions or continued reporting against the previously reported DG3 or KPI Dashboard (post 2011) metrics.

Exclusions

The default position is that the water company manages the risk of supply interruptions and there are no exclusions. This measure covers planned and unplanned interruptions. The cause of the interruption is not relevant to the calculation of the reported figure. That is, asset failure caused by third parties would be treated the same as the failure of the company's assets and planned or unplanned interruptions are the same.

Companies may make a representation to Ofwat for an exception to be granted on the basis of a civil emergency under

> the Civil Contingencies Act 2004, where the supply interruption is not the cause of the emergency.
>
> **Measure Definition**
>
> Calculation of the Performance
>
> ∑ (properties with interrupted supply ≥ 180 mins) × Full duration of interruption
>
> Total number of properties supplied (year end)."

17. In view of some of the submissions, it is necessary to note that the Reporting Guidance had its origins in a report prepared by UK Water Industry Research Ltd. in 2017. There had been a project steering group established comprising representatives of water companies, the Authority and consumers. Based on research undertaken and following consultation with the project steering group, consultants prepared the report. The executive summary noted that the Authority had confirmed that the report was intended to form the basis of public reporting from 2020/2021 and inform the development of PR19. The report indicated that work had been done to assess consistency of reporting for, amongst other things, water supply interruptions. Amongst its objectives were to "identify specific and exceptional defined circumstances (if any) where derogations from the standard approach and technical parameters may be appropriate". In the body of its report, this paragraph appears:

> "4.2.3. Exclusions
>
> A key area of simplification was the reduction or elimination of circumstances which would be acceptable as exclusions. Exclusions are to be kept to a minimum and shall be consistent with the reasonable expectations of an affected customer."

THE FACTUAL BACKGROUN

The Storm

18. Storm Arwen struck England on 26 and 27 November 2021. The parties agree that in the north east of England, which includes the appellant's northern supply area, the storm met the definition of a civil emergency in section 1 of the Civil Contingencies Act 2004. That storm led to severe interruptions to the water supply in the appellant's northern supply area.

The Determination

19. On 15 June 2022, the appellant made representations as to the effect of the storm on its ability to meet its performance commitments. In essence, the appellant wished to exclude water supply interruptions arising from the storm from the assessment of performance when calculating the revenue it was allowed to recover from customers. Its covering letter referred to the exemption in relation to civil emergencies and said that the "exemption allows for representations to be made where a civil emergency is triggered" and enabled the Authority to "make an informed decision, flexibly, on the strength of the evidence".

20. The executive summary section of the representation document referred to the fact that Storm Arwen was "an abnormally destructive storm, which was particularly damaging to the North-East of England and the East coast of Scotland". It said that the overall impact of the storm "meets the criteria for a civil emergency" and the exemption (in the Reporting Guidance) "appears to have been designed for precisely this type of event and would allow us to reasonably exclude the full impact of the storm". However, the submission indicated that the appellant considered that "there is room for us to improve in some specific instances and propose a partial penalty". It identified that almost 25,000 properties (including 5,500 without supply for more than 12 hours) were affected by Storm Arwen. It submitted that these incidents should be exempt under the civil emergency exemption from the assessment of performance. It accepted that interruptions which were prolonged, or could have been avoided altogether, because the appellant had failed to take particular action, should be included in the calculation of the amounts payable due to underperformance. On that basis, the appellant would only lose revenue of £3.75 million. If the normal price control formula were used without excluding water supply interruptions resulting from the storm, it would lose £25.787 million of revenue.

21. In the course of its representations to the respondent, the appellant also referred to its performance generally in respect of water supply interruptions. It also said that applying a penalty would set an incentive for companies to focus on uneconomic investment in order to mitigate risks arising from rare events rather than using that investment to make other improvements to the service.

22. In October 2022, the respondent published its draft determination on the extent to which the price controls needed to be adjusted to reflect performance for the 2021-2022 charging year under Part 3A of Condition B of the licence. The respondent's draft decision was that it would not intervene to exclude the impacts of Storm Arwen from the assessment of the appellant's performance. The appellant, and others interested in the water industry, were given the opportunity to make submissions on the draft determination. The appellant did make detailed submissions as did others.

23. On 15 November 2022, the respondent published its final determination. That document noted that:

> "This document provides notice of our final determination on the extent to which the price controls set by the Competition and Markets Authority (CMA) redetermination, are to be adjusted to reflect Northumbrian Water's performance for the 2020-2021 charging year, under Part 3A of Condition B of the company's licence (Performance Measure Adjustments, referred to in this document as 'in-period' determinations".

24. The respondent noted that it had originally decided not to intervene to exclude "the impact on ODI payments of Storm Arwen" that would ordinarily flow under the price control arrangements in place. It had considered that that approach "ensured that the company bore the appropriate level of risk and remained incentivised to deliver for customers and the environment". The final determination then reviewed the submissions made by the appellant, and others, on the draft determination. It noted that the periodic reviews "specify the costs that we allow companies to recover from customers and the service that we expect them to deliver". It said:

> "The determinations specify performance commitment measures and performance commitment levels that we expect companies to attain for several areas of service, based on business plans that companies put forward. Performance commitments are linked to outcome delivery incentives (ODIs). If companies fall short of their performance commitment levels, they incur underperformance payments which are calculated using the specified ODI rate. This incentivises them to deliver the service levels expected of them. We also encourage companies to push themselves to provide even better service by providing outperformance payments where they go beyond performance commitment level.
>
> Where a company does not deliver the expected level of service this means customers are affected. A company's customers bear the impact of a reduction of service, in this case can interruption to supply, no matter what the cause or reason for that service failure.
>
> Companies have a significant level of control over the delivery of the outcomes that we specify when defining performance commitments. However, in some cases external factors an also have an effect on the ability of companies to meet their performance commitment levels. Where appropriate, we maintain incentives on companies to mitigate the impact of external factors on customers through how they prepare and respond to such events. For example, in dry weather, mains may be more likely to burst and cut off supply to customers, but companies can reduce the likelihood of this happening through the way they monitor and maintain their assets, and if supply is cut off, they can mitigate the impact on customers by repairing the fault quickly."

25. The final determination continued by saying that:

> "Our regime does not, therefore, aim or profess to insure companies against all risks outside of their control. Just like in a competitive market, there will be some risks that regulated companies bear the consequences of, even if the cause was not their fault. However, the flip side of the regime is that there are instances where companies benefit from improved performance when the circumstances are more favourable and may gain outperformance payments as a result. For example, if there is a wet summer, per capita consumption, one of the performance commitments we measure, will be lower than normal, even without any company action, as people tend to water their garden less.
>
> Our price review determinations recognise that companies bear risk, including some external risk, and so have a degree of variability in their returns that is outside of their control. What

> is important is that the upside and downside risks for an efficient company are broadly balanced so that it anticipates a "fair bet" on a forward-looking basis.
>
> Although we consider companies should bear some risk, we limit the extent of this through a range of protection mechanisms. This includes cost sharing, which means that customers bear a portion of any company overspend (generally 50%). It also includes collars on ODI payments to protect companies against large underperformance payments on specific performance commitments, as well as caps to protect customers against unexpectedly high payments…"

26. The final determination then addressed the impact of the price controls on the wider regime, including returns and incentives to invest. It noted that it did not consider that the approach it proposed to take would lead to companies bearing any more risk than it assumed they would bear when PR19 was determined. Nor did the respondent consider that the decision in the final determination would affect companies' incentives to invest. The final determination then set out its approach to the civil emergencies exception and its approach to assessing whether an intervention was required.

27. The final determination then recorded the respondent's decision. It noted that the Reporting Guidance did not require an automatic exclusion of the impact of Storm Arwen but "we recognise that a qualifying emergency is a significant event and we need to consider whether an intervention is warranted when one has occurred". The decision and the reasoning were essentially expressed as follows:

> "Northumbrian Water attributes £25.787m of underperformance payments to the impact of the storm associated with the qualifying emergency across its three performance commitments. This is equivalent to -1.59% return on notional regulatory equity (of £1,691m in 2021-2022 in 2017-2018 prices) at an appointee level for a single year. Because we assess and allocate risk over a five-year period, this would lead to an impact on the company's return on notional regulatory equity of -0.32% before accounting for any other performance across the period.
>
> Overall, therefore, although Storm Arwen's impact on ODI payments averaged over the period is within the expected risk and return range in the company's overall price review package, we recognise that it was relatively significant, particularly viewed in terms of the single year figure (-1.59%). This requires further consideration. Taking together the fact that there was a qualifying emergency, which the performance commitments expressly refer to, and that the size of impact on the company was relatively significant, we have considered the appropriate level of underperformance payment.

> We considered the proposal Northumbrian Water made, in its APR submission and again in its draft determination consultation response to pay a £3.375m underperformance payment. Northumbrian Water said that this "partial penalty" reflected that there was some room to improve in its performance in some specific instances.
>
> ..…
>
> We agree with the company that an ex-post exercise of discretion as to the level of intervention should maintain the incentives on the company. This means that during any event there should remain a strong incentive on the company to strive to perform as well as possible. However, we are not convinced that it should only bear the risk for factors reasonably within its control, with the remainder being borne by customers, is appropriate in view of the PR19 policy intent. The company referred to the way events that companies considered to be outside of management control had been dealt within in earlier price reviews. But it is important that those statements related to a different regime – the PR19 regime focuses on customers and the environment.
>
> …..
>
> We do not consider a test based on whether maters were within the company's control is appropriate in light of our duties and our clear underlying policy intent at PR19. We have considered carefully and weighed the points made by the company, including those about the extreme nature of the impact of Storm Arwen and the steps the company took to mitigate its impacts on water customers; the potential impact on the overall PR19 package of risks and incentives; and the need to ensure that there are continuing incentives on companies to respond and mitigate adverse impacts on customers even in the face of a qualifying emergency. We have also borne in mind that the in-period regime generally operates annually and is not intended to be as burdensome as a full price control. In this case, we have reviewed evidence from the company that demonstrated that it worked hard to mitigate the impact on customers.
>
> We have set out above our reasons why we do not consider Northumbrian Water's proposal on the size of the underperformance would be appropriate in the light of all of the above considerations, we consider it appropriate and proportionate to exercise our discretion in favour of a broad sharing of risk (risk-sharing being an approach we adopt in other parts of our regime such as totex, to maintain incentives while sharing burdens between companies and their customers). In our judgement, in the specific circumstances of this case, the

> appropriate share for the financial impact of the event is 50:50 between customers and the company.
>
> This means for each of the three performance commitments in question we are excluding 50% of the impact on reported ODI payments. As such, customers will still receive some underperformance payments, which acknowledges customers' services were severely disrupted.
>
> We consider this achieves an appropriate balance between the interests of customers and the company, retaining incentives on the company to continue to strive to deliver the best possible service and response to supply interruptions and is in line with the risk and reward package. It recognises the particular circumstances set out above and the steps the company took to mitigate the impact of the storm."

The Judgment in the Court Below

28. The appellant brought a claim for judicial review of the final determination. That claim was dismissed by the judge. He concluded that, on a proper interpretation, the Reporting Guidance conferred a discretion on the respondent. At paragraph 70 of his judgment, he said:

> "70. Turning then to the main question of construction, as Mr de la Mare accepted, the CE exception does not expressly set out how Ofwat is to respond to a representation for a reporting exception to be granted. Inevitably, how Ofwat can respond is a matter of implication."

29. The judge considered the various submissions made on behalf of NWL. Save for one submission, the judge considered that the submissions either favoured the interpretation that he considered correct, or were neutral. The one submission that he considered favoured NWL's case was that there was no right to have an in-period determination referred to the Competition and Markets Authority for redetermination. The judge's final conclusion at paragraph 92 was that:

> "For all these reasons, I have concluded that there is a CE exception discretion, that Ofwat did not misconstrue the CE exception and did not make an error of law, and that this ground must be dismissed."

30. The judge rejected the submission that condition B12.7 limited the respondent to considering only NWL's performance in relation to the storm and said at paragraph 102:

> "… I have already rejected Mr de la Mare's construction about the reach of licence condition B12.7 and, when doing so, I have explained that, in making an in-period determination, Ofwat must comply with all its duties under s.2 of the Act, which require Ofwat to further objectives much broader than might

> justify a single-minded focus on NWL's performance during Storm Arwen. So this … ground … must fail."

31. Finally, the judge rejected the argument that there was in this case what was referred to as a "duty of prescription", that is an obligation derived from the common law to adopt a policy setting out guidance on the circumstances in which the respondent would exercise is discretion.

GROUND 1 – THE PROPER INTERPRETATION OF THE REPORTING GUIDANCE

Submissions

32. Mr de la Mare KC, with Mr Lowe and Mr Leigh, for the appellant, submitted that the exception in the Reporting Guidance required the respondent to exclude all supply interruptions that the respondent assesses were caused by a civil emergency, and were not the fault of the appellant, when assessing the appellant's performance against its performance commitments. He submitted that the exception did not confer any, still less any wide-ranging, discretion, on the respondent to determine whether to relieve the appellant from the impact of the storm when assessing performance. He submitted that that is apparent from the language of the Reporting Guidance and the wider context of the regulatory scheme of which it forms part.

33. In relation to the language used, Mr de la Mare submitted that the exception appears under the heading "exclusions", i.e. the exclusions to the formula used for calculating performance. It set out the limited circumstances in which an exception is granted, that is where the water supply interruptions arise "on the basis of" a civil emergency, rather than because of fault on the part of the water companies, and excludes such interruptions when calculating performance.

34. He submitted that the context supported such an interpretation. The general scheme of the price control mechanism was to determine policy for a five-year period and to give water companies the right to challenge those policy decisions before the Competition and Markets Authority. The exception was not intended to give the Authority a discretion on what it would do in relation to supply interruptions arising from a civil emergency – had it been intended to do so, those discretionary decisions would have been subject to challenge before the Competitions and Market Authority. Rather, the exception was intended to operate as a clearly defined exception which operated as mechanism to exclude certain supply interruptions when calculating performance. The judge was right to regard that as a factor pointing in favour of the appellant's interpretation but wrong to regard that as outweighed by other factors. Further, paragraph 12.7 of condition B of the licence, on its proper interpretation, provided that only performance related matters could be taken into account in an in-period determination and that indicated that the exception did not confer a discretion. The history and purpose of the Reporting Guidance also indicated that the exception was not intended to confer a discretion. It was based on the report of UK Water Industry Research Ltd. That indicated that the aim was simplification by the reduction or elimination of circumstances acceptable as exclusions. They were to be kept to a minimum and were to be consistent with the reasonable expectations of affected customers. The exception was one of the exclusions that was recognised as being appropriate to maintain. It was not intended to confer a discretion. Further, the

purpose of performance commitments was to provide incentives for water companies to minimise interruptions to water supply. They were not intended to encourage inefficient investment intended to guard against the very rare situations when interruptions arise out of events amounting to a civil emergency.

35. Mr Beal KC, with Mr Ratan, for the respondent, submitted that the exception conferred an entitlement to make representations that an exception should be granted on the basis of a civil emergency. It was implicit that the respondent was under an obligation to consider those representations. The respondent would then decide whether to grant an exception and thereby to relieve the water company concerned of the consequences of failure to meet its performance commitments. The wording of the exception, therefore, did not create an automatic exception but rather conferred a discretion on the respondent. Further, that interpretation was consistent with the context. The price control arrangements provided that water companies would be assessed by reference to all water supply interruptions regardless of whether they were caused by the water company or not. That was reflected in the words of the first paragraph of the exception which provided that the default position was that the water company managed the risk of supply interruptions and the cause of the interruption was not relevant to the calculation. Against that background, the exception operated to enable a water company to request that underperformance arising from a civil emergency be excluded. It was for the respondent then to determine whether or not to relieve the water company of the consequences of the underperformance.

Discussion and conclusion

36. This ground of appeal depends upon the proper interpretation of the words in the Reporting Guidance. The parties are agreed on the proper approach to be taken. The task of the court is to ascertain the meaning of the relevant words. That involves consideration of the words used, read in context, and having regard to the underlying purpose. In that regard, the process is analogous to statutory interpretation as explained by Lord Hodge DPSC in *R (O) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255 at paragraphs 29 to 31. Further assistance is provided by the judgment of Lord Carnwath in *Lambeth London Borough Council v Secretary of State for Housing, Communities and Local Government* [2019] UKSC 33, [2019] 1 WLR 4317 dealing with the interpretation of a planning permission, a process which the parties agree involves a similar exercise. Referring to the decision in *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2015] UKSC 74, [2015] 1 WLR 85. he said:

> "16. In the leading judgment Lord Hodge JS, at paras 33–37, spoke of the modern tendency in the law to break down divisions in the interpretation of different kinds of document, private or public, and to look for more general rules. He summarised the correct approach to the interpretation of such a condition, at para 34:
>
> > "When the court is concerned with the interpretation of words in a condition in a public document such as a section 36 consent, it asks itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a

> whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense."
>
> ……
>
> 18. In my own concurring judgment, having reviewed certain judgments in the lower courts which had sought to lay down "lists of principles" for the interpretation of planning conditions, I commented, at para 53:
>
> > "… I see dangers in an approach which may lead to the impression that there is a special set of rules applying to planning conditions, as compared to other legal documents, or that the process is one of great complexity."
>
> Later in the same judgment, I added, at para 66:
>
> > "Any such document of course must be interpreted in its particular legal and factual context. One aspect of that context is that a planning permission is a public document which may be relied on by parties unrelated to those originally involved … It must also be borne in mind that planning conditions may be used to support criminal proceedings. Those are good reasons for a relatively cautious approach, for example in the well established rules limiting the categories of documents which may be used in interpreting a planning permission … But such considerations arise from the legal framework within which planning permissions are granted. They do not require the adoption of a completely different approach to their interpretation."
>
> 19. In summary, whatever the legal character of the document in question, the starting point—and usually the end point—is to find "the natural and ordinary meaning" of the words there used, viewed in their particular context (statutory or otherwise) and in the light of common sense."

37. The context here is the statutory regulation of the water industry. The statutory regulator, the Authority, grants licences to water companies setting out conditions governing their activities. The licence in this case contains conditions providing for a system of price controls governing the charges that the appellant may levy on customers for the service it provides. The controls are fixed for a five-year period. The system includes performance commitments on the part of the appellant in relation to matters including water supply to customers. Failure to meet the targets set in the performance commitments will result in the appellant being entitled to recover less revenue from customers to reflect that underperformance. That system represents the Authority's view of the appropriate balance between the risk to be borne by the

customer on the one hand and the water company on the other in relation to interruptions to supply. The appellant was entitled to challenge that price control system by having it referred to the Competition and Markets Authority.

38. Paragraph 12.5 of Condition B provides for an adjustment to the revenue allowed under the price control regime during the course of the five-year period. One of the situations in which an adjustment may be made is where interruptions in water supply are excluded from the calculation of performance levels for the purpose assessing the revenue that a water company may receive. The relevant paragraphs of the Reporting Guidance address the situation when that may occur.

39. Dealing first with the words used in the relevant part of the Reporting Guidance, it is clear from the opening sentences of the first paragraph that the default position is that the water company is responsible for the management of risk of supply interruptions and there are no exclusions. The cause of the interruption is not relevant to the calculation of the reported figure. Pausing there, that reflects the system which was established whereby supply interruptions are reported to the Authority and the consequences of underperformance are calculated by reference to a formula.

40. The final words of the relevant part of the Reporting Guidance provide that "Companies may make a representation to Ofwat for an exception on the basis of a civil emergency … where the supply interruption is not the cause of the emergency". The actual words used simply say that a water company "may make a representation … for an exception to be granted". There is nothing in the words used to indicate that a request must be granted if the Authority is satisfied that the interruptions are due to a civil emergency. Rather, the natural and ordinary meaning of the words used is that the water company may ask the Authority to make an exception. It is implicit, as the respondent accepts, that it will then have to consider the representation and decide whether or not to grant an exception. The Reporting Guidance, therefore, provides for a procedural mechanism whereby a water company may request an exception. Such an exception may only be granted if the interruptions arise as a result of events constituting a civil emergency (and provided that the supply interruption is not the cause of the civil emergency). Whether or not to grant an exception remains, however, a matter for decision by the Authority.

41. I consider that interpretation to be consistent with the context as a whole. The regulatory framework, and the price control mechanism, involve performance commitments. A water company will receive less revenue if it fails to meet the targets set out in those commitments, and more if it exceeds them. In the context of performance commitments setting targets in relation to interruptions in water supply, it is irrelevant what caused the interruption and, in particular, whether the water company is at fault. The water company bears the risk of supply interruptions occurring, not the customer. Where a civil emergency arises, a water company may request an exception and ask to be relieved of all, or some, of the consequences of the underperformance. It is a more natural fit with the regulatory framework to read the words of the Reporting Guidance in accordance with their natural and ordinary meaning, as providing a means by which a water company may ask the Authority to depart from the structure of price controls established under the licence. The grant of an exception is not automatic. It depends upon the Authority considering that it is appropriate in the circumstances to depart from the structure of price controls established under the licence.

42. Given that the meaning of the paragraph in the Reporting Guidance is clear, it is possible to deal relatively briefly with the principal submissions of the appellant. I do not accept Mr de la Mare's submission that the reference to a request for "an exception to be granted" means, or implies, that the only matter that the Authority must be satisfied about is whether the events amount to a civil emergency. The more natural reading of the words is that they refer to something being "granted", i.e. that an exception is being made from the normal operation of the price control mechanism following the appellant's request. Nor do I accept that the words "on the basis of a civil emergency" mean that the system is based on an assumption that where there is such an emergency, and where the water company is not at fault, then an exception must automatically be granted. In my judgment, the words "on the basis of a civil emergency" indicate the condition that must be met before the Authority can agree to an exception. If there is no civil emergency, no exception may be granted. If there is, then the Authority must decide whether or not to grant an exception.

43. I doubt that the views set out in the UK Water Industry Ltd. Report are sufficiently clear to indicate that an automatic exclusion must be granted in cases contemplated by the Reporting Guidance as being possible exceptions. In any event, even if I were to consider that they point in that direction, they are not sufficient to outweigh the clear wording of the paragraph in the Reporting Guidance itself. I also doubt that a court is in a position to judge whether or not a system providing for a discretion, rather than an automatic exception, would lead to inefficient capital investment. I note that the Authority, which is the statutory body responsible for assessing such matters in this context, did not consider that to be so as appears from its final determination. In any event, I do not consider that this particular factor would outweigh the clear wording of the Reporting Guidance.

44. Nor, unlike the judge, do I consider that the fact that an in-period determination, cannot be the subject of a reference to the Competition and Market Authority is a factor that favour's the appellant's interpretation. The system that was established involved price controls based in part on performance commitments in relation to water supply. The system operated on the basis that water companies would report supply interruptions and that data would be used in the calculation of performance for the purpose of assessing revenue, but with the possibility of a departure from that system by the grant of an exception to the appellant so that water supply interruptions are excluded from the calculation of performance. That is done by way of adjustment under paragraph 12.5 of Condition B of the licence. The fact that such a determination could not be referred to the Competition and Market Authority does not seem to me to be a factor which assists in determining the proper interpretation of the Reporting Guidance. In any event, even if that factor were, for some reason, a pointer indicating that the Reporting Guidance should be interpreted differently, I do not consider (in agreement with the judge) that it would outweigh the clear wording of the Reporting Guidance.

45. I would therefore dismiss ground 1A.

GROUND 1B – THE EXERCISE OF DISCRETION

Submissions

46. Mr de la Mare submitted that the respondent was only entitled to take into account the appellant's performance in respect of the interruptions to water supply and was not entitled to have regard to other matters. He submitted that that followed from the wording of paragraph 12.7 of Condition B of the licence which provided that in making a determination the respondent "shall" consider the appellant's "performance in relation to each relevant performance commitment". He submitted that it was not open to the respondent, therefore, to consider other matters including its statutory duties under section 2 of the 1991 Act. He submitted that the judge erred in reaching a different conclusion.

47. Mr Beal submitted that it could not logically be the case that the only issue for the respondent is to consider the performance of the water company when exercising its discretion. By definition, the possibility of exercising a discretion only arises where a water company has failed to meet its performance commitments. The respondent must therefore be entitled to have regard to other matters and is not limited by paragraph 12.7 of Condition B to considering only performance.

Discussion and Conclusion

48. The starting point is that the Reporting Guidance provides a mechanism whereby a water company may request an exclusion, so that water supply interruptions arising from a civil emergency are not included in the calculation of performance (as they otherwise would be).

49. On the facts of this case, the central issue is whether the decision of the respondent to grant a partial exception was lawful. The basic reason for its conclusion was its assessment of the impact of including the interruptions on the revenue that the water company was entitled to receive. The inclusion of the water supply interruptions arising out of the storm would result in a reduction in the return for the appellant on its investment over the five-year period of 1.59%, or a reduction of 0.32% a year. That, it considered, was well within the range of risk and return that it was expected that a water company would bear. On that basis, the respondent could, legitimately, have decided as it did in the draft determination, to make no exception for the impact of Storm Arwen. Nevertheless, the respondent did accept that the impact on the appellant was significant, particularly if the reduction of 1.59% was viewed in terms of a single year rather than over the whole five-year period for which prices were fixed. For those reasons, the respondent considered it appropriate to make some adjustment to the calculation and, in effect, to exclude 50% of the impact from the burden to be borne by the appellant. That meant that the customers would still receive some recognition that their supplies were severely disrupted.

50. The process of adjustment under paragraph 12.5 of Condition B, and consideration of the exercise of the discretion recognised in the Reporting Guidance must, in my judgment, allow the respondent, as a minimum, to have regard to the impact on the water company of the consequences of failing to meet the performance commitments. On any analysis, it seems to me that paragraph 12.7 of Condition B must entitle the respondent to consider the impact *either* as part of its consideration of the company's performance in relation to its performance commitment *or* because paragraph 12.7 of Condition B does not limit the respondent solely to considering the water company's performance. The respondent would, therefore, be entitled to have regard to the financial consequences for the appellant in this case in any event.

51. In terms of the proper interpretation of paragraph 12.7 of Condition B, however, I do not consider that that paragraph limits the respondent to considering *solely* the water company's performance in relation to its performance commitments. Paragraph 12.5 of Condition B provides that the respondent "may determine the question of whether there should be a change to the revenue allowed". In determining that matter, paragraph 12.7 provides that the respondent must consider the water company's performance in relation to its performance commitments. In the language used in public law, that is a mandatory material consideration, something that the respondent must take into account. There may, however, be other considerations which the respondent might properly consider are material to the exercise of its discretion under paragraph 12.5 of Condition B5. The purpose of paragraph 12.7 of Condition B is not to prevent other relevant considerations from being taken into account; it is to ensure that the water company's performance is one of the things that is taken into account.

52. The respondent will also need to consider its duties under section 2 of the 1991 Act when exercising and performing its duties conferred by Part II of the Act. Those powers include the appointment of water undertakers and the imposition of licence conditions. Similarly, it will need to have regard to its duties under section 2 when exercising powers conferred by the licence, which in turn are derived from the exercise of the powers conferred by section 6 and 11 of the 1991 Act. Indeed, paragraph 9.1 of Condition B dealing with the adoption of price controls expressly refers to the Authority having regard to the principles applicable by virtue of Part 1 of the 1991 Act. It is also implicit that the Authority will need to have regard to its duties under section 2 of the 1991 Act when exercising powers in paragraph 12.5 of Condition B which deals with adjustments to the system of price controls.

53. In the circumstances, therefore, I consider that the decision reached by the respondent in the present case did not involve any consideration of impermissible matters. In particular, the appellant had to consider the appellant's performance in relation to the performance commitments and it was entitled to take account, amongst other things, of the impact that including the supply interruptions in the calculation of performance would have on the appellant, both over the five-year review period and during a single year. The approach taken by the respondent, while generous to the appellant, was one that it was entitled to take.

54. I would therefore dismiss ground 1B.

GROUND 2 - THE DUTY OF PRESCRIPTION

Submissions

55. Mr de la Mare submitted that the judge erred in finding that what was referred to as "the duty of prescription" did not apply in the context of any discretion to grant an exception in this case. He submitted that this duty was a common law duty. It was based on the need for consistent and non-arbitrary decisions in relation to in-period determinations. He relied upon the decisions of *R (ZLL) v Secretary of State for Housing, Communities and Local Government* [2022] EWHC 85 (Admin), *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2011] 1 AC 245, *R (Kambadzi) v Secretary of State for the Home Department* [2011] UKSC 23, [2011] 1 WLR 1299, and *Mandalia v Secretary of State for the Home Department* [2015]

UKSC 59, [2015] 1 WLR 4546 as establishing the existence of that common law duty.

56. Mr de la Mare submitted that the present case was one where a duty of prescription applied and it required the respondent to adopt a policy governing the exercise of its discretion in relation to water supply interruptions arising out of a civil emergency. The need for consistent and non-arbitrary decision-making in relation to in-period determinations as to price controls, the ability to make informed decisions, representations and challenges to decisions, and the importance of the issue to the water companies all indicated that such a duty existed in the present case. The respondent had breached that duty as it had failed to adopt a policy setting out how it would exercise its discretion. In terms of the consequences of that breach, Mr de la Mare submitted that the absence of a policy meant that the exception had to be treated as not providing a discretion or that the only criterion relevant to the exercise of discretion was that set out in paragraph 12.7 of Condition B, i.e. a water company's performance in relation to its performance commitments, as no other criterion had been fairly identified.

57. Mr Beal submitted that the cases said to establish what was called the duty of prescription were, on analysis, concerned with cases where a policy existed but had not been published. They did not establish a common law duty to adopt a policy where a public authority had a discretion. The question was whether a decision-maker could not rationally decline to adopt a policy. That was not the case here given the nature of the discretion involved.

Discussion

58. By way of preliminary observation, the issue that arises in this case is whether the final determination was lawful. That determination involved the respondent deciding to adjust the applicable price controls by exercising its discretion to grant an exception so that a certain percentage of water supply interruptions were disregarded when calculating performance. The issue is whether that exercise of discretion was lawful. That is to be determined by the application of the established principles of public law. I turn then to the question whether there is an additional common law duty of the sort alleged here.

59. First, the cases relied upon do not establish that there is a duty at common law to adopt a policy setting out criteria as to how a discretion will be exercised. The decision in *ZLL* where, it seems, the language of a "duty of prescription" was first used, did not in fact concern any duty to adopt a policy. The relevant ground of judicial review was that the Secretary of State had acted in "breach of a public law duty by adopting an unpublished position in non-conformity with published Government policy" (see paragraph 4 of the judgment). It was that issue that the judgment dealt with at paragraphs 44 to 53. Indeed, the judgment recognised that there was already a well-established framework of legislation and guidance, together with a body of relevant case law, in place. The issue of whether or not a common law duty to adopt policies where a discretion is conferred by legislation or other public law instruments did not arise for decision. The observations of Fordham J on the existence or otherwise of a common law duty of prescription are therefore obiter.

60. In *Lumba*, the position was that there was a published policy governing the criteria to be applied when deciding to detain immigrants pending removal. That policy provided for a presumption in favour of not detaining individual. The Secretary of State adopted a policy in relation to the detention of foreign national prisoners, which he did not publish, which in effect admitted of exception to detention only on compassionate grounds. In that regard, Lord Dyson JSC considered that a policy, if unpublished, must not be inconsistent with any published policy and, if there is a policy in place, it should be published (see paragraphs 20 to 31, and the issues identified by Lord Dyson at paragraph 10). The decision does not establish that there is a common law duty to adopt a policy setting out the criteria governing the exercise of discretion.

61. It is correct that, at paragraph 34, Lord Dyson JSC referred to the fact that the rule of law called for a transparent statement of the circumstances in which the broad statutory criteria governing detention by the executive will be exercised. That discussion arose in the context of case law dealing with the compatibility of detention with the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). Where there was a clear risk of arbitrariness in the exercise of such a discretion, the law needed to indicate with sufficient clarity the scope of the discretion or, otherwise, detention would not be in accordance with law for the purposes of the Convention: see the discussion at paragraphs 32 to 33. It is right that Lord Phillips PSC expressed the view at paragraph 302 that it was necessary under principles of public law for the Secretary of State to have policies in relation to the exercise of her powers of detention of immigrants and those policies had to be published. As indicated, however, the issue of any obligation under common law to adopt a policy did not arise in that case. The decision is not, therefore, authority that there is a common law duty to adopt a policy whenever a discretion is conferred upon a public body.

62. Similarly, the decision in *Kambadzi* deals with a situation where there was a published policy governing detention which required periodic review of detentions. The issue there was whether failure to comply with the published policy rendered the detention of an individual unlawful for the purposes of the tort of false imprisonment. In the course of considering that question, the Supreme Court considered that a failure to adhere to published policy without good reason would render the detention unlawful (see per Lord Hope DPSC, with whom Lord Kerr JSC agreed, at paragraphs 41 and 51, and per Baroness Hale PSC at paragraph 73). Again, the other decision relied upon, namely *Mandalia*, holds that where a public body has adopted a policy setting out how it would act in a given area, the body must act in accordance with that policy unless it has good reason for not doing so. Neither decision established that there is a common law obligation to adopt a policy setting out the criteria or the circumstances in which a discretion is to be exercised.

63. Statute may impose a statutory obligation on a public body to issue guidance. Furthermore, it may well be good practice for a public body in appropriate circumstances to adopt guidance setting out the criteria for exercising discretionary powers. That would enable those affected to know how the discretion is to be exercised, enabling them to make informed representations, and would encourage consistency and transparency in decision-making: see the observations of Baroness Hale in *Nzolameso v Westminster City Council* [2015] UKSC 22, [2015] PRTS 549

at paragraphs 39 to 40 that "ideally" local authorities would have a policy for allocating housing to homeless persons and identified the advantages of having such a policy. That falls short, however, of holding that there is a duty at common law to adopt such policies.

64. Furthermore, there would in any event be no proper basis for finding that there was any common law duty in the present case whereby the respondent was obliged to adopt a policy indicating how it would decide whether to grant an exception from including water supply interruptions arising in circumstances amounting to a civil emergency. The ability to apply for an exception may be financially important to an appellant. The rarity of supply interruptions resulting from a civil emergency, the range of circumstances that might need to be considered in whether, and to what extent, to grant an exception are, however, likely to vary. It cannot be said that there is any common law obligation to adopt a policy in those circumstances.

65. Secondly, the language of a common law "duty of prescription" is unhelpful and, potentially, misleading. The appellant here, and water companies generally, will not in truth be seeking a mandatory order to compel the performance of a duty to adopt a policy setting out the criteria governing the exercise of the discretion. This case, and cases more generally, will involve a challenge to a particular decision involving an exercise of discretion, here granting only a partial exception in respect of water supply interruptions when making a determination adjusting the system of price controls under the licence. The issue is whether that exercise of discretion is lawful. That is to be determined by the application of the well-established principles governing the exercise of discretionary power. The mere fact that the Authority had not adopted a policy in advance to indicate how the discretion will be exercised does not of itself determine whether the decision is lawful or unlawful.

66. The inappropriateness of seeking to rely on an alleged common law duty of prescription becomes more apparent when the particular remedy sought by the appellant in this case is considered. Mr de la Mare submitted that the difficulties generated by the absence of a policy governing the exercise of a discretion meant that the Reporting Guidance should be interpreted instead as if it had conferred an automatic exception if interruptions arose out of a civil emergency. But that is to use the fact that a policy has not been adopted to negate the fact that the Reporting Guidance, properly interpreted, does confer a discretion and does not create an automatic entitlement. Alternatively, Mr de la Mare submitted that the absence of a policy should result in treating paragraph 12.7 of Condition B as the only relevant criterion as that was the only criteria that had been identified in advance. Again, that is to allow the absence of a policy to dictate, or limit, the considerations that may be taken into account when exercising the discretion in a way not contemplated on a proper interpretation of Condition B of the licence.

67. Finally, it was suggested that there was unfairness as the final determination itself determined the policy that would be used to decide whether to exercise the discretion and the appellant should have been able to know in advance what the policy was. That suggestion is wrong for a number of reasons. First, the determination did not involve the adoption of a policy. It was a decision on whether to adjust the system price controls in a particular case. It involved considering whether a particular request for an exception to the system of price controls should be granted. It may be that, in future, if similar circumstances arose, other water companies might request an

exception and might urge the respondent to take a similar approach to that adopted in this case. But that, however, does not convert a determination of an individual request into the adoption of a policy. Secondly, there was no procedural unfairness in the present case. The appellant was able to make representations that an exception be granted and those representations were considered by the respondent. That, in general, is sufficient to ensure fairness. In the present case, however, the respondent went further. It considered the representations, it published a detailed draft determination, it invited further representations on that draft from the appellant and other interested bodies, and reviewed its draft determination in the light of those representations. There is no legitimate basis for concluding that the absence of a policy led to any procedural unfairness in this case.

68. For those reasons, I would dismiss this ground of appeal.

CONCLUSION

69. The Reporting Guidance does not confer an automatic exception entitling a water company to exclude water supply interruptions arising out of the circumstances amounting to a civil emergency. Rather, it establishes a procedural mechanism whereby a water company can make representations requesting that an exception be granted. The Authority will then have to determine whether to grant an exception, in whole or in part, guided by its overriding statutory duties Further, in considering whether to make an adjustment to the system of price controls pursuant to the power conferred by paragraph 12.5 of Condition B, the Authority must have regard to a water company's performance in relation to its performance commitments, its duties under section 2 of the 1991 Act and may have regard to other relevant considerations. The Authority is not under any common law duty to adopt a policy indicating how it would exercise the discretion recognised by the Reporting Guidance. The final determination in the present case was lawful. I would, therefore, dismiss this appeal.

LADY JUSTICE ELISABETH LAING

70. I agree.

LORD JUSTICE PETER JACKSON

71. I also agree.