Sewer requisitions: a foul business?

Gateley Plc

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Associate Will Cursham explores whether compensation is available for a sewerage undertaker's failure to lay a public sewer following a sewer requisition within the statutory six month period.

The provision of foul and surface water drainage to a development is critical, and at some point those drains will need to be connected to the public sewers.

If a pipe has to be laid over third party land to make the connection to the public sewer, the developer can request that the local sewerage undertaker lays a public sewer crossing that land. This is known as a sewer requisition. If the developer serves a formal notice on the sewerage undertaker making the requisition, then the undertaker comes under a legal duty to provide it, as long as the developer pays a financial contribution [1].

The sewerage undertaker must lay the necessary public sewer within six months of the developer paying the financial contribution [2]. The six month period can be extended by agreement between the undertaker and the developer or, where there is a dispute about whether the period should be extended, by reference to OFWAT [3].

The developer may well program construction of its development around the provision of the requisitioned sewer, so if the undertaker fails to lay the pipes within the six month period, the construction program may well become delayed, with knock-on financial consequences for the developer.

So if the undertaker fails to lay the sewer within the six month period (and provided that an extension hasn't been agreed), it would seem fair for the developer to have recourse to the undertaker in respect of the delay costs it suffers. Unfortunately, however, the statutory framework governing sewerage undertakers, the Water Industry Act 1991, does not provide specific compensation for delay or loss caused by such a failure.

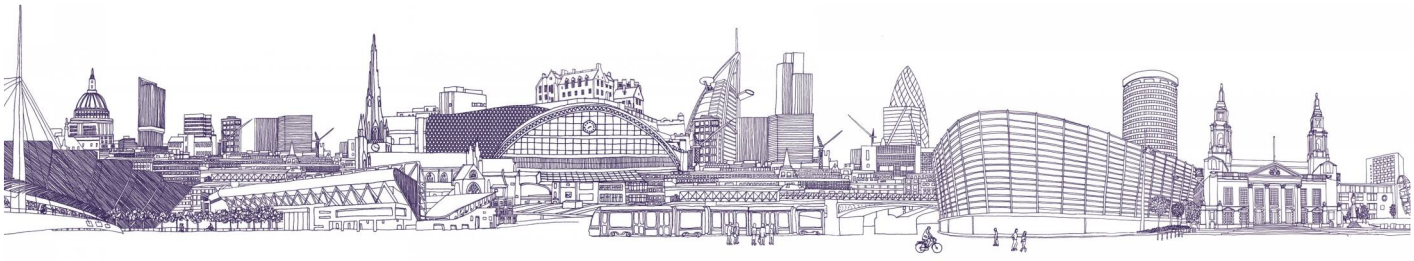
In the absence of such statutory compensation, does the developer have any other recourse to claim its losses from the undertaker? For example, could it make a claim for breach of contract or negligence for the undertaker's failure to comply with its obligation to provide the connection within six months?

At first glance, the answer to this seems to be no. The widely held legal view is that where there is a breach of statutory duty (e.g. a duty under the Water Industry Act 1991), a party cannot pursue alternative claims in contract or negligence. This is known as the Marcic principle (after a well-known House of Lords case [4]). The thinking behind this is that these duties were imposed by statute, and if it was intended that there should be remedies for breach of those duties, then they would be provided for in the statute. If they are not provided under statute, they should not be provided anywhere else.

If this is correct, then a developer will not have financial recourse to a sewerage undertaker for the sewerage undertaker's failure to provide the requisitioned sewer within the six month time frame laid down by the Water Industry Act 1991.

There are, however, a number of reasons why a sewerage undertaker's failure to provide a requisitioned sewer within the six month time period may not fall foul (excuse the pun!) of the so called Marcic principle. This is because:

1. Section 98(4) of the Water Industry Act 1991 clearly envisages that 'loss or damage' sustained by a person by reason of breach of the duty to provide a requisitioned sewer is 'actionable at the suit of that person'.
2. Other case law suggests that if the breach of statutory duty relates to an operational issue rather than a general or strategic issue, then an alternative remedy may be available. It could be argued that provision of a requisitioned sewer is an operational issue [5].
3. Where the statutory duty is imposed for the protection of a limited class of the public and was for a limited function, then there may be an alternative remedy for breach of that duty [6].



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Conclusion

It is at least arguable that a developer can make a claim in contract or negligence for a failure by a sewerage undertaker to lay a requisitioned sewer within the statutory six month timescale. However, as yet, this has not been tested in the courts, and until it is, there will be no certainty on the point.

Footnotes

[1] Sections 98 to 99 of the Water Industry Act 1991

[2] Section 101(1) of the Water Industry Act 1991

[3] Section 101(2) of the Water Industry Act 1991

[4] Marcic v Thames Water Utilities Limited (2003) UKHL 66

[5] Dobson v Thames Water Utilities Limited (2007) EWHC 2021 [TCC] and Bell v Northumbrian Water Limited (2016) EWHC [TCC]

[6] X (Minors) v Bedfordshire County Council (1995)

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