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Case No: C1/2012/1752

**IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
QUEEN'S BENCH DIVISION**

**Mrs Justice Lang
[2012] EWHC 1643 (QB)**

Royal Courts of Justice
Strand, London, WC2A 2LL
16/05/2013

B e f o r e :

**LORD JUSTICE MOSES
LORD JUSTICE RIMER
and
LADY JUSTICE GLOSTER**

Between:

Environment Agency

Appellant

- and -

**The Queen on the Application of The
Manchester Ship Canal Company Limited and
Peel Holdings (Land and Property) Limited Respondent**

**Mr Gordon Nardell QC and Mr Christiaan Zwart (instructed by Environment Agency)
for the Appellant**

**Mr Peter Village QC and Mr James Strachan QC (instructed by Clyde & Co LLP)
for the Respondent**

Hearing dates: 18th-19th April, 2013

Lord Justice Moses:

1. Up and down the 36-mile long Manchester Ship Canal pass approximately seven million tonnes of freight per year, carried in ocean going vessels between Woden Street Footbridge in the centre of Manchester and Eastham on the Mersey Estuary. The Canal is separated into a series of five ponds by five sets of locks which lift ships a total of 19m above the tide level of the estuary.
2. The water level of the Upper Reaches of the Canal is regulated by four sets of locks with associated sluices and two weirs. At the Lower Reaches the water level between Latchford and Eastham locks is regulated by the Weaver sluices.

3. The Manchester Ship Canal Act 1885 was the first of the Manchester Ship Canal Acts and Orders 1885 to 2009 pursuant to which the Canal was constructed and maintained. The Canal allowed the heavy tariffs imposed by the Liverpool docks and railway companies to be avoided and, consequently, trade flourished in Manchester. The feature of its construction which is of particular significance in this appeal is that the river courses, particularly those of the Irwell and Mersey, were canalised. The Canal also intercepted or shared the flow of other rivers such as the Irk and the Medlock and, in the Lower Reaches, the Weaver.
4. The canalisation of the rivers gave the Canal another important role besides navigation. It enabled flood water to pass safely down the Canal to the Mersey Estuary and thus provided land drainage for the Manchester conurbation and beyond, a total catchment area of 3,000 km². Before the Canal was built there was a history of flooding in the Manchester to Warrington area (in 1729, Daniel Defoe described a bridge in Manchester built 'so high because floods could cause the river to rise four or five yards in a night'). Since 1894, when the Canal was completed, the canal structure and its associated systems have safely passed all flood flows to the Mersey Estuary. This success in flood prevention fulfilled and surpassed the statutory obligations of the undertaker, the Manchester Ship Canal Company Limited, to allow the passage, discharge and escape of flood waters from rivers and land, (see sections 71(13), 84(5), 84(16), 101(6), 114(1) and 118(2) of the 1885 Act). The width and depth of the channel formed by the Canal far exceeded the natural river channels it replaced; the Canal with its associated structures improved the flow of the rivers and thereby reduced the risk of flooding.
5. The sluices control the water level by enabling the waters which enter the Canal from rivers and other sources to pass down the Canal in a regulated manner. They are electrically powered and are normally operated automatically from a central control room, but can, as a back-up, be operated electrically, hydraulically or manually from equipment located on the structure of the sluices. The respondents emphasise the reliability of the sluices; the annual probability of all the sluices failing to operate in a 1% probability flood is less than 0.01%.
6. Both respondents are part of the Peel Group. The second respondent owns significant parcels of land, developed or ripe for development, adjacent to and in the vicinity of the Canal. Of particular significance in the instant appeal are 1,500 proposed dwellings on Pomona Island. They were originally allocated in the Trafford Core Strategy, published by the local planning authority. But the Environment Agency subsequently designated Pomona as falling within Flood Zone 3 on its Flood Map. The local planning authority then withdrew its proposed allocation, eventually substituting an allocation of only 800 houses.
7. It is the Agency's process of identifying which areas should fall within Flood Zone 3 which lies at the heart of this appeal. Pursuant to statutory functions assigned to it under the Environment Act 1995, and particularly under the Water Resources Act 1991, the Agency is required to survey areas in relation to which it has flood defence functions (s.105(2)). It is a statutory consultee for regional and strategic flood risk assessments carried out pursuant to former national planning policy in Planning Policy Statement 25 (PPS 25). The policy provides that local planning policies and individual planning decisions should follow a 'sequential test' for determining the suitability of land for development in ascending order of risk in flood risk areas. By this means development is steered away from land at the greatest risk of flooding. Preference is to be given to development in Flood Zone 1 with recourse to development in areas of greater risk only if there is no available land in an area of lesser risk. Flood Zone 3 identifies land where there is an annual probability of flooding of 1%, (1 in a 100 year flood event), and, for example, Zone 2 depicts a 0.1% risk (1 in a 1,000 years).
8. The Agency produces a national Flood Map depicting the different levels of risk by identifying on the map the different levels of Flood Zone. Under PPS 25, the presence of flood defences is to be ignored, for the purpose of assessing the level of Flood Zone:

“The Flood Zones refer to the probability of flooding from rivers, the sea and tidal sources and ignore the presence of existing defences, because these can be breached, overtopped and may not be in existence for the lifetime of the development” (footnote to para.17 and Annex D2).

In short, it must be assumed that flood defences will fail.

9. The Agency’s own policies require it, however, not to ignore all structures which contribute to the defence of land from flooding. In preparing the map showing the different grades of Flood Zones, a distinction is to be drawn between what are described as “formal defences” and those which are described as “*de facto* defences”. The flood map takes account of the effect of both types of defences for the purposes of identifying Areas Benefiting from Defences. But for the purposes of distinguishing between the different grades of Flood Zone, and thereby showing the areas at greater risk of flooding, formal defences are to be ignored, that is, it is assumed that they will fail. But *de facto* defences are to be taken into account, that is, they are assumed to operate normally.
10. It was the distinction between formal and *de facto* flood defences which led to the claim for judicial review. The Agency took the view, in its letter dated 21 December 2010, that the sluices adjacent to the locks on the Canal were formal flood defences. They were, accordingly, to be left out of account in grading the Flood Zones. In the result, land the respondents wished to develop, particularly on Pomona Island, was depicted as within Flood Zone 3. Had the Agency regarded the sluices as *de facto* defences, they would not have been ignored, the land would not have fallen within Zone 3 and the respondents would not thereby have been inhibited from their proposed development. The respondents sought to impugn the designation of the sluices as formal defences on the grounds, *inter alia*, that the Agency had misconstrued its own policies and reached an irrational conclusion. In a comprehensive judgement, ([2012] EWHC 1643 (QB)), which carefully sets out all the facts, and relevant policies, Lang J concluded that the sluices were not, on a proper construction of the Agency’s policies, formal defences ([101]-[102]). The Agency had failed properly to interpret, apply or have regard to its own policies [104] and it was irrational to conclude that the sluices were formal flood defences. The Agency appeals.

Government and Agency Policies

11. The Agency agrees that, pursuant to its own policies, it was required *not* to ignore the sluices for the purpose of depicting Flood Zone 3, unless they were to be regarded as formal flood defences. It is, therefore, necessary to see how the relevant policies describe the distinction between formal and *de facto* flood defences. This is not easy. The Agency has taken to heart the proposition that policy statements are not to be construed as if they were statutory provisions (Lord Reed in *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13 [19]). Its “*Guidance for Identification of Areas Benefiting from Flood Defences and Producing the Flood Map*” in July 2005 was promulgated when the predecessor to PPS25, PPG25 was in force, but nothing turns on the distinction between PPG25 and PPS25. The relevant parts of the Guidance read:

“7.2 Formal Defences

The terms “formal defences” and “formally designated defences”, used in the ABD Criteria, have the same meaning. They refer to structures that directly limit the spread of flooding, and, primarily because of this function, are owned and/or maintained by their respective owner...

The structures are likely to encompass those types that would, in accordance with the ABD Criteria, be added to the Flood Map, viz:

- Raised walls, including demountable walls
- Embankments, including coastal dune and shingle ridges
- Barriers and barrages
- Flood storage areas created by a structure or structures ...
- Land pumping stations.

These structures may exist in fluvial, tidal or lowland situations. Other than dune and shingle ridges, natural ground is not a defence.

7.3 De facto Defences

De facto defences are structures that perform the same basic function as formal defences, in that they directly limit the spread of flood water, but in their case flood defence is a secondary or indirect purpose. The structures would be thought of as part of the built infrastructure of an area. They are likely to encompass:

- Raised walls, such as alongside a highway where it borders a river, or as a boundary to property.
- Embankments, such as road and rail embankments
- Water supply reservoirs where a formal agreement for flood control is in place.”

12. The *Glossary* includes these definitions:

“*De facto defence* A structure that provides a flood defence function but for which flood defence is a secondary or indirect purpose.”

“*Formal defence* A formal defence asset that directly limits the spread of flood water and, primarily because of this function, is owned and/or maintained by its present owner, regardless of whether this is the Environment Agency, another authority or a private owner.”

13. The “*Criteria for Identification of Areas Benefiting from Flood Defences*” which the Agency published in 2005, reads:

“3.6 Mapping Flood Defences

Whilst de facto defences shall be incorporated into the assessment of areas benefiting from defences, they shall not be mapped in the Flood Map.

The flood defences that shall be shown on the Flood Map are those structures that are formally maintained as defences and whose purpose is to limit the spread of flood water over the land. As such, the structures will be:

- Raised walls, including demountable walls.
- Embankments, including coastal dune and shingle ridges.
- Barriers and barrages.

- Flood storage areas created by a structure of structures (here it is the flood storage area and the water retaining structure that shall be mapped as flood defences, not outlet control sluices and the like).
- Land drainage pumping stations.

...

Structures whose purpose is to aid normal operation rather than provide flood protection shall not be mapped as flood defences. Examples are weirs, **sluices controlling normal water levels**, locks, trash screens and offshore breakwaters.” (my emphasis)

14. The guidance and policies are set out fully in Lang J’s judgement ([58]-[64]). Subsequent policies appear to list those structures which are to be identified as formal defences and not to give them as mere examples. Policy number 131_06 (31 March 2006) entitled “Flood Map” provides:

“This policy defines what is included on the Flood Map.

The Flood Map comprises the following data:

1. Flood Zones

Flood Zones are areas which could be affected in the event of flooding from rivers ...

Flood zones ignore the presence of the following types of flood defence and structures:

- Raised walls and embankments
- Barriers, barrages and gates
- Engineered or controlled flood storage areas
- Pumping stations

Other infrastructure, including bridges, culverts, engineered channels and bypass channels, and embankments (e.g. railway or road embankments) that are not flood defences, is included in all modelling and mapping of flood zones (apart from our national generalised modelling produced in 2004).

The Flood Zones policy statement details the purpose and development of flood zones.

2. Flood Defences

The Flood Map shows the location of the following types of flood defences:

- Raised walls and embankments
- Tidal barriers and barrages
- Engineered or controlled flood storage areas
- Pumping stations

All other types of flood defences or structures, or natural or manmade infrastructure, including bridges, culverts, engineered channels and bypass channels, embankments that are not flood defences, and natural washlands, are not shown on the Flood Map.”

15. Policy number 541_05 (August 2007) entitled “*Flood zones*” provides:

“Policy

Flood Zones show areas of land that could flood from rivers and/or from the sea. They identify the extents over which flooding could occur, if the flooding is not constrained by flood defences.”

Purpose

Flood Zones are designed for strategic spatial and development planning purposes in England. The definition of each Flood Zone originates from... (PPS 25) ... We are not required to map the outer boundary of Flood Zone 3b...”

Objectives

1. To ensure a consistent approach to production, amendment and communication of Flood Zones.....
3. To ensure that Flood Zones meet the requirements of planning policy; in particular, that Flood Zones are:
 - Not constrained by formal raised flood defences
 - Consistent and reliable.....

Background

We interpret PPS25 to mean that flooding is not constrained by formal raised flood defences. Therefore the Flood Zones ignore the effect of defences in reducing the probability of flooding but do not underestimate the extents of flooding where defences *increase* the area potentially at risk.

Other types of flood defences or infrastructure (whether or not their primary purpose is flood alleviation) such as engineered river channels, bypass channels, culverts and bridges are considered as existing infrastructure for the purpose of Flood Zones. In principle this means they are included when modelling and mapping Flood Zones. This principle also applies to embankments that are not flood defences, although any pathways through the embankment should be taken into account.”

16. There was much debate, at least before the judge and in writing before us, as to the difference between function, purpose and intent. There was also controversy as to the weight to be given to the examples given in the Policy Guidance I have quoted. Nowhere does one find a specific reference to sluices as formal flood defences although Policy 131_06 refers to “barriers, barrages and gates” as flood defences whose presence was to be ignored for the purpose of assessing flood zones. On the contrary, the 2005 Criteria identify sluices controlling normal water levels as *de facto* defences.
17. Mr Village QC, on behalf of the respondents, drew attention to the Glossary in the Practice Guide to PPS25, published in December 2009. This defines a “flood defence” as:

“Flood defence infrastructure, such as flood walls and embankments, intended to protect an area against flooding to a specified standard of protection.”

“*Standard of protection*: The design event or standard to which a building, asset or area is protected against flooding, generally expressed as an annual exceedance probability.”

Mr Village contends that it is clear that sluices do not fall within that definition: no standard of protection has been specified for them. But these provisions are part of the Government policy. PPS25 made no distinction between formal and *de facto* defences, that is a distinction peculiar to the Agency’s own policies. PPS25, which emerged after the Agency’s own policies does not, in my view, preclude the Agency from including within the category of formal flood defence a structure in respect of which no standard of protection has been specified. That is not to say PPS25 is irrelevant to the distinction between *de facto* and formal defences. The Agency asserts, in Policy 541_05 and in the impugned letter dated 21 December 2010, that its own policies are consistent with PPS25. The reference to a specified standard of protection does provide some colour to the concept of a formal flood defence: it suggests a structure designed specifically to meet a particular standard of flood protection level as opposed to a structure designed for a different purpose which also contributes to protection against flooding.

18. This concept is consistent with a pervading theme running through all the Agency’s relevant guidance and policies: the distinction between ‘infrastructure’ which contributes to the normal operation of, for example, a Canal of which it forms a part, and structures built to prevent the escape of flood water. That distinction is demonstrated in those policies which exclude “existing infrastructure” (see Policy 541_05). It is reinforced by recalling that PPG25, in operation at the time the Agency published its 2005 Criteria and Guidance, recognised that canals may be a catalyst for development and regeneration because waterside development may not face the same flood risks as development alongside a river:
 - “37. Canals, as inland waterways, operate differently to rivers and other watercourses as defined under the Land Drainage 1991. While some will fall within river or coastal flood plains, others will be outside flood-risk areas. Generally, canals have a limited number of feeders, which are often controlled so that they can be diverted away from the canal at times of flood. Sluices are controlled to discharge excess water from the canal during periods of high inflow to insure that water levels do not exceed the freeboard and overtop to flood adjacent land. Canals also have some ability to store water before it is discharged, attenuating flood peaks and reducing the potential for flooding. In some cases, canals cross river catchment boundaries, and water could be accepted in one catchment and discharged in another.
 38. The implications for development are twofold. Firstly, since the concept of a flood plain is not applicable, waterside development or redevelopment of previously developed land may not face the same flood-risk constraints as development alongside a river. Canals may thus retain their potential to act as catalysts for urban and rural regeneration”

Apart from the fact, which the Agency stresses, that there are a large number of river feeders, this aptly describes the operation of the Manchester Ship Canal and its sluices.

19. It is important, in the welter of different descriptions seeking to make the same distinction between formal and *de facto* flood defences, not to lose sight of the fact that the Agency has itself chosen to confine the category of formal flood defences to those whose primary function is flood defence. Those structures whose primary function is not flood defence are outwith the category of formal flood defence. The paradigm of a formal flood defence is a structure whose sole function is to limit the spread of flood water; the paradigm of a *de facto* flood defence is a structure whose function is to aid normal operation (see the list at 3.6 of the 2005 Criteria) but which provides “secure barriers to the flow of flood water” (3.4 of the 2005 Criteria). Of course

there will be structures whose *primary* function is difficult to discern and where it might be said that they have no primary function but have two or more functions of equal importance. But the Agency has chosen, for the purpose of Flood Zone designation, to recognise only two categories. It must, accordingly, place the structure in one or the other; where a structure has no primary function as a flood defence it should not be regarded as a formal flood defence.

The Sluices

20. The sluices are an integral part of the Canal and essential to its normal operation. The Agency has never disputed the description of the operation of the sluices described in HR Wallingford's report on Operational Reliability and Flood Risk Assessment (November 2010):

"The water levels over the entire length of the Canal are controlled by the sluices which are operated principally to maintain prescribed water levels for a wide range of flows from the Irwin and Mersey catchments".

21. That the Agency shares this view is further confirmed in the *Manchester Ship Canal Company Water Level Control – Operational Protocol*, published after its decision letter, in January 2011. This is a protocol which "recognises the close working relationship" between the First Respondent and the Agency "as it affects the control of water levels" in the Canal (Introduction). The Protocol states that all five sets of sluices control the water level "by enabling the waters coming into the Canal from (the rivers identified) to be passed down the Canal in a controlled manner". Under the heading "Description of Normal Water Level Control" the Protocol says:

"4.1 Water Level

Under normal flow conditions in the Canal the sluice's automatic control system is designed to control the water levels within the Canal to enable safe navigation of vessels using the Port. In achieving this, water levels are maintained so that the risk of flooding is also minimised".

It would be hard to find a clearer description of a *de facto* flood defence. The sluices are an essential and integral part of the Canal and the means by which, through the control of water levels, ships may navigate up and down. But, if the Protocol is right, they may be described as *de facto* flood defences because they also minimise the risk of flooding.

22. The Agency, however, persists in contending that it was entitled to place the sluices within the category of formal flood defences. It asserts that their flood defence and navigational purposes are of "equal significance". They play a "vital" role in preventing "overtopping" of the Canal during high flows. The Agency's view is that they have a "dual primary purpose" and that there is nothing in their policies which prevents the Agency from identifying such a dual primary purpose since the "highly significant function of passing flood flows safely to the Mersey Estuary is not subsidiary to their important function of controlling "normal levels for navigation". It draws attention to the statutory provisions which imposed the obligation to put in place features designed to remove or ameliorate the risk of flooding. Section 84(5) of the 1885 Act refers to the Latchford locks and sluices as "lock and flood gates".
23. It is, of course, correct that it is for the Agency to determine into which category of flood defence the sluices fall, provided that in doing so it correctly construes and properly understands its own policies. It cannot alter or widen the two categories of flood defences beyond the limits it has specified within its own policies. Interpretation of those two categories and defining their limits is for the court. The distinction made between the two categories must be interpreted objectively in accordance with the language used to make those distinctions and in the context of the purpose for which the distinction is made. Once those categories are

properly defined and identified, whether a particular structure falls within one category or the other is a matter for the judgement of the experts, the Environment Agency. That judgement can only be challenged on *Wednesbury* grounds (*Tesco Stores Limited*, q.v.supra, [18] and [19]. Paragraphs [17]-[21]) are cited in full by Lang J at [69]).

24. There seem to me two reasons why the Agency was in error. First, it has created and relied upon a category of formal flood defence which is nowhere to be found within its own policies and guidance. It would, as I have already indicated, have been open to the Agency to create more than two categories of flood defence. As I have said [19] there may be structures where it is difficult, if not impossible, to say which of two functions is of greater significance or importance. This appeal affords an example of such a difficulty. The Agency plainly could not decide whether the sluices' normal operation in controlling water levels was more important than their ability to control flood water. The sluices were, in its view, equally effective in enabling navigation as in preventing flooding from the rivers which flowed into the Canal.
25. It was not open to the Agency to meet this difficulty by departing from its published policies (at least, without saying that is what it was doing and allowing the affected party the chance of arguing about it) and by creating a third category of flood defence which it would ignore when preparing its flood map. To place within the category of structures whose *primary* function was flood defence, a structure whose functions in enabling navigation and preventing flooding, were, in their view, of equal significance was, in my view, a misunderstanding or misconstruction of its own policy. It cannot escape the distinction between the two categories by the oxymoronic concept of two primary functions.
26. The Agency's difficulty in judging which of the sluices' functions were of greater significance underlines the second reason why I conclude the Agency was in error, even if, contrary to my view, it did not misconstrue its policies. As Mr Nardell QC, in his powerful submissions on behalf of the Agency, was at pains to emphasise, the very functions of the Canal itself are in opposition: on the one hand it must impound and confine the waters from the rivers which have been canalised, to create a navigable water course. On the other hand, the water flowing in must also be discharged into the estuary lest it overtop the Canal and flood onto the adjoining land. But every canal must enable the water it impounds to be discharged, since the rivers or other sources of water will continue to flow into the canal, and as PPS 25 recognises, inflow, whether it is flood water or not, if not discharged, by, for example, sluices or weirs, will lead to the water level exceeding the freeboard.
27. The operation of the Canal creates and at the same time attenuates the risk of flooding. It makes no sense to describe the Canal as a formal flood defence: it is designed and operates so as to permit sea-going ships to be navigated inland. The operation of the sluices is integral to the operation of the Canal. The sluices and their associated locks enable the Canal to achieve its purpose. It makes no more sense to describe the sluices as formal flood defences than the Canal itself. The Canal and its associated structure cannot operate unless it controls the flow of water from rivers and any other source. It controls the flow of all the water with which it is fed, whether it is water which would otherwise flood or not. The mere fact that it controls and regulates the flow of water cannot be a basis for placing either the Canal or its associated structure within the category of formal flood defence. In short, the Agency's argument proves too much. Either the whole of the Canal and the structures by which it is operated are a formal flood defence or none of them are.
28. That the Canal and its structures cannot be regarded as formal flood defences sits happily with the passages dealing with canals I have cited above from PPG25. This was recognised by one of the authors of the July 2005 Guidance, Mr Hunt:

“As usual I am rushing and have not read everything you have sent but I have always considered canals as infrastructure and therefore should remain in place and operated in

whatever way they are normally to determine the flood zone. The five defence types listed in the ABD guidance (cited above[11]) are the only ones that should be removed to determine flood zones and put back in to help to determine ABD. I guess you are in a bit of a grey area here so if the structures are primarily flood defence structures even though they are related to infrastructure then perhaps these should be removed, anything that has a de facto flood defence purpose, i.e. not its primary purpose, should be regarded as infrastructure and left in the flood zone modelling” (e-mail 7.4.2010).

29. I cite this e-mail not because it demonstrates that different experts at the Agency had different views; that is of no significance and, in matters of judgement, likely to occur. Rather, it shows the difficulty, appreciated at least by that expert, in regarding the “infrastructure” of a canal, by which I understand him to mean the structures by which it operates, as being primarily performing the function of flood defence. For the reasons I have given I do not think it is possible, consistent with the correct meaning of the policies, to reach that conclusion. The Agency’s judgement was outwith the range of reasonable conclusion.
30. For those reasons, which do no more than draw from the exposition and conclusions of Lang J, I would dismiss this appeal. The respondents’ alternative ground for upholding the judgement, accordingly, does not arise.

Lord Justice Rimer:

31. I agree.

Lady Justice Gloster:

32. I also agree.