

Project Report 25

December 95

Infiltration drainage – Legal aspects

Prepared under contract to CIRIA by
HR Wallingford, University of Wales at Aberystwyth

Professor William Howarth BA LLM
University of Kent at Canterbury and

Alastair H R Brierley BA Solicitor
Garrard Mitchell & Co, Shrewsbury

Both formerly of the University of Wales at
Aberystwyth

Environment Agency
Information Centre
Head Office

ENVIRONMENT AGENCY



099748

Summary

Infiltration drainage systems may be used to dispose of surface water runoff from urban and highway areas by recharge into the ground. These systems allow stormwater to infiltrate into the soil over a period of time and also provide some detention storage during the storm event. Examples of such infiltration systems include individual and linked soakaways, infiltration trenches, infiltration basins, swales, infiltration pavements and infiltration blankets.

Infiltration should be seen as one of a number of methods of controlling surface water runoff. The use of infiltration drainage systems reduces the quantity of the water that has to be disposed of through surface water drains or sewers to local watercourses or treatment works. It may be especially useful in the on-site drainage of small new developments which would otherwise need to have new surface water sewers built to accept the additional runoff.

There are situations, however, in which the use of infiltration will not be appropriate. This may be because the nature of the ground does not allow sufficient infiltration, the quality of the water infiltrating may pose a threat to groundwater resources, geotechnical problems may be too severe or the natural water table may be too close to the surface.

Until recently the most common form of infiltration drainage system used in the UK was the soakaway. This was normally used to provide drainage for a single house or small development. More recently soakaways have been used for a wider range of applications, some of which involve larger and more sophisticated structures than those used in the past. This has required a greater degree of understanding in the design of such systems. Despite their widespread use outside the UK, however, infiltration systems other than soakaways have not yet been so widely used here.

The CIRIA reports R123 and R124 on the 'Scope for control of urban runoff' (CIRIA 1992a and 1992b), identified the potential for and benefits of using infiltration systems to reduce/attenuate storm flows before they enter piped drainage systems. It was in the context of a growing awareness of the potential importance of infiltration systems that this later project was conceived.

The project has produced one manual and five reports in support of the manual. The reports contain detailed information obtained during the course of the project and provide the background to the recommendations given in the manual.

For ease of reference, brief summaries of the manual and the five reports are given below. (The manual and report titles and the summary of this report are in bold)

Report 156 Infiltration drainage – Manual of good practice for the design, construction and maintenance of infiltration drainage systems for stormwater runoff control and disposal

This report also constitutes NRA R&D Report 26 produced through NRA Project 333.

The manual provides a stand-alone guide to good practice for those involved in the planning, economic and financial appraisal, approval, design, construction and maintenance of infiltration drainage systems who wish to use infiltration drainage as a method to control and dispose of stormwater. The manual discusses the advantages and disadvantages of such systems including water quality aspects and provides the information to assist practitioners to decide whether in given circumstances, infiltration techniques are appropriate. The legal aspects are discussed as they apply to England and Wales.

Project Report 21 Infiltration drainage - Literature review

This report identifies published information relevant to the manual, collates references, reviews key publications, and comments on the development of practice and knowledge identified in the literature.

This report also constitutes NRA R&D Report 484 produced through NRA Project 333.

Project Report 22 Infiltration drainage - Case studies of UK practice

The report presents a summary of the main types of infiltration system used in the UK, based on an inspection of these systems and the experiences gained in their use. Thirteen case studies are presented under standard heads: title, location, client, date of construction, design, contact, description, design method, construction, maintenance/present performance, design/maintenance, and lessons for future practice.

This report also constitutes NRA R&D Report 485 produced through NRA Project 333.

Project Report 23 Infiltration drainage - Hydraulic design

The report describes a theoretical study of the flow from a soakage pit and an analytical approach based on this. Procedures are developed and described which allow the designer to conduct field tests and to dimension infiltration systems of various types.

This report also constitutes NRA R&D Report 486 produced through NRA Project 333.

Project Report 24 Infiltration drainage - Appraisal of costs

The report identifies the costs and benefits pertinent to the economic and financial analysis of alternative drainage schemes, develops procedures for estimating the capital and recurrent costs, and shows how economic and financial cost comparisons may be made.

This report also constitutes NRA R&D Report 487 produced through NRA Project 333.

Project Report 25 Infiltration drainage - Legal aspects

The reports presents a balanced and comprehensive coverage of the key (but often complex) legal issues involved in urban drainage as they apply to England and Wales and summarises these at a suitable level of detail for readers seeking an overview of the subject.

This report also constitutes NRA R&D Report 488 produced through NRA Project 333.

Application of report on legal aspects

Many of the areas of law dealt with are of some complexity, and it would take a very much longer document to provide a comprehensive coverage of all the matters which might arise in practical situations. However, it is hoped that the following account has been pitched at an appropriate level for those engaged in the planning, implementation and maintenance of infiltration drainage systems without assuming a particularly specialised legal background.

The authors have endeavoured to state the law as at 1 August 1992, but account has been taken of the judgement in the House of Lords in the Cambridge Water Company Case on 9 December 1993.

Although every effort has been made to provide an accurate and up to date statement of the law, no liability can be accepted by the authors or their employers for any incorrect or misleading information contained in this report.

Further information on the water quality aspects of drainage systems can be found in:

- * Design of flood storage reservoirs
M.J. Hall, D.L. Hockin & J.B. Ellis
CIRIA Book 14, 1993
- * Control of pollution from highway drainage discharges
CIRIA Report 142, 1994
- * Design and management of constructed wetlands for the treatment of wastewater
CIRIA Funders Report FR/CP/34, 1996
- * Use of industrial by-products in road construction: Water quality effects
CIRIA Funders Report FR/IP/11, 1996

As from April 1996, the function of Her Majesty's Inspectorate of Pollution (HMIP), the National Rivers Authority (NRA) and the waste regulatory authorities will be taken over, in England and Wales, by the Environmental Agency and, in Scotland by the Scottish Environment Protection Agency.

Reference

Howarth, W and Brierley, A H R
Infiltration drainage – Legal aspects
Construction Industry Research and Information Association
Project Report 25, 1995

© CIRIA 1995

Keywords	Reader interest	Classification
Urban drainage, stormwater, surface water sewer, runoff, infiltration drainage, soakaways, infiltration trenches, infiltration basins, infiltration blankets, swales, water quality, groundwater pollution, hydraulics, capital and current costs, law, geotechnical aspects.	Drainage engineers, house builders, developers, local authorities, water companies, sewerage undertakers, National Rivers Authority, water quality regulators, planning authorities, building control authorities.	AVAILABILITY Unrestricted CONTENT Review/advice/guidance STATUS Committee guided USER Developers and drainage engineers

A CIRIA Project Report contains the results of a research project carried out by CIRIA. It is usually supplementary to the main project output (CIRIA Report or Special Publication). Its technical content has been approved by a CIRIA Steering Group. The report has been checked for technical accuracy, and received limited editing and formatting

Published by CIRIA 6 Storey's Gate, Westminster, London SW1P 3AU All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, including photocopying and recording, without the written permission of the copyright holder, application for which should be addressed to the publisher. Such written permission must also be obtained before any part of this publication is stored in a retrieval system of any nature.

Acknowledgements

Research Contractor

HR Wallingford accepted responsibility for carrying out the work under contract to CIRIA. As indicated below, some work was subcontracted by HR Wallingford to other persons and organisations.

HR's Project Supervisor was Dr W R White and HR's Project Managers were Mr David Watkins (October 1991-September 1992); Ms Amanda Davis (September 1992-July 1993); Dr Roger Bettess (July 1993- March 1995).

The studies and reports were prepared by:

Manual of good practice Funders Report FR/IP/5	Dr Roger Bettess – HR Wallingford
Literature review Project Report 21	Mr David Watkins – University of Exeter*
Case studies of UK practice Project Report 22	Professor Chris Pratt – Coventry University
Hydraulic design Project Report 23	Dr Roger Bettess - HR Wallingford Ms Amanda Davis* Mr David Watkins - University of Exeter*
Appraisal of costs Project Report 24	Mr John Roberts – Ove Arup & Partners
Legal aspects Project Report 25	Professor William Howarth – University of Kent at Canterbury Mr Alastair Brierley – Garrard Mitchell & Co
Survey of practice (Project record)**	Mr David Watkins – University of Exeter* Professor Chris Pratt – Coventry University
Geotechnical aspects (Project record)**	Professor Tom Hanna – Consultant
Water quality aspects (Project record)**	Mrs Yvonne Walden*

* *formerly HR Wallingford*

** *available from HR Wallingford*

Foreword

The manual and the supporting reports were produced as a result of CIRIA Research Project 448. The objective of the project was to produce a manual of good practice for the design, construction and maintenance of infiltration systems for the on-site control and disposal of stormwater runoff from small-scale residential or commercial development upstream of an area with existing sewers.

The manual was compiled from information obtained from studies of various aspects of infiltration drainage. In addition to this report these included: a literature survey; a survey of current practice; case studies of existing systems in the UK; a study of water quality aspects and methods for the control of pollution; development of hydraulic analysis and design methods; a study of geotechnical aspects; appraisal of costs; and a study of the legal implications of infiltration drainage. Reports are available from CIRIA on each of these aspects, apart from the work on a survey of current practice, a study of water quality aspects and a study of geotechnical aspects which are available from HR Wallingford in the form of project records.

The project was developed jointly by CIRIA and HR Wallingford. CIRIA had completed the 'Scope for control of urban run-off' project (published in 1992 as Reports 123 and 124) which among other matters had identified the potential for and benefits of the more widespread use of infiltration techniques for stormwater control and disposal. HR Wallingford had completed a research project on the hydraulic performance of soakaways which modelled the dispersal of water from cylindrical soakaways and determined the effects of scale between field tests and prototype performance. A proposal was prepared and submitted jointly by CIRIA and HR Wallingford to the Department of the Environment.

The work was carried out by HR Wallingford under contract to CIRIA in the period October 1991 to March 1995. The various studies were carried out either by HR staff or by other persons or organisations under sub-contract to HR Wallingford. The names of those responsible for these studies and preparing the reports are given in the Acknowledgements.

The Project Steering Group which guided the work at HR was representative of a broad range of interested organisations. The names of its members and those who contributed financially to the work are given in the Acknowledgements.

As from April 1996, the function of Her Majesty's Inspectorate of Pollution (HMIP), the National Rivers Authority (NRA) and the waste regulatory authorities will be taken over, in England and Wales, by the Environmental Agency and, in Scotland by the Scottish Environment Protection Agency.

Project Steering Group

CIRIA and HR Wallingford wish to express their appreciation to the members of the Project Steering Group which guided the work and agreed the text of the manual and reports. Excluding those involved with the work as research contractors, the Project Steering Group comprised:

Mr B H Rofe (Chairman)	Rofe Kennard & Lapworth
Mr R Addison	Anglian Water
Mr P J Allen	Department of Transport (from February 1993 to July 1993)
Mr D Askew	Northumbrian Water
Mr I Bernard	Thames Water
Mr R E Boots	Department of Transport (from September 1993)
Mr G Brennan	Concrete Pipe Association
Mr R Cook	Hydro Research and Development Ltd
Mr M J H Davis	formerly Tewkesbury Borough Council (from February 1993)
Mr R Farley	Severn-Trent Water
Mr P Freckleton	Yorkshire Water (from May 1992)
Mr D Homer	Derek Homer Associates
Mr P E Johnson	Department of Transport (until February 1993)
Mr P Myerscough	Yorkshire Water (until February 1992)
Dr A T Newman	NRA South Western Region
Mr J J M Powell	Building Research Establishment
Mr A Proctor	Welsh Water (until July 1993)
Mr N J Price	TBV Consult (successor to PSA Specialist Services)
Mr C R Rees	Albion Concrete Products Ltd
Mr R B Rosbrook	Southern Water Services (until February 1993)
Dr H R Thomas	University of Wales College of Cardiff
Mr R Tyler	Wessex Water
Mr P B Woodhead	Department of the Environment
Dr J A Payne (Secretary)	CIRIA (to December 1992)
Dr D E Wright (Secretary)	CIRIA (from January 1993)

Corresponding members

Mr I Davis	National House Building Council
Mr B R Fossett	CIN Properties Limited
Mr M Price	University of Reading

Dr David Wright

Dr David Wright was the CIRIA Project Manager for this study from January 1993 until his untimely death in April 1995. The report was substantially complete before his death and owes much to the industry and vision which he brought to all his work. It is hoped that this work will act as a small tribute to him and his long devotion to the subject of stormwater drainage and control.

* affiliations correct at February 1994. Dates in brackets refer to membership of PSG.

Financial contributions

The project was funded entirely by special contributions. CIRIA and HR Wallingford wish to express their gratitude to the following organisations:

Government/agency

Department of the Environment
Department of Transport
(via Transport Research Laboratory)
National Rivers Authority

Industry

CIN Properties
Derek Homer Associates
National House Building Council
Concrete Pipe Association
Hydro Research and Development

Water companies

Anglian
Northumbrian
Severn Trent
Southern
Thames
Welsh
Wessex
Yorkshire

Others who assisted in the production of the report on legal aspects

The following persons have been especially helpful in making comments on a draft of this report and providing information about particular points. Whilst the authors of the report would like to express their gratitude for this invaluable assistance, any errors which remain are attributable to the authors alone. Although every effort has been made to provide an accurate and up to date statement of the law, no liability can be accepted by the authors or their employers for any incorrect or misleading information contained in this report.

Mr R. Addison, Anglian Water Services Ltd.

Mr M.J.H. Davis, Chief Engineer, Tewkesbury Borough Council.

Professor J.F. Garner, Emeritus Professor of Law, University of Nottingham.

Dr A.T. Newman, Water Resources Planner, Wessex Region, National Rivers Authority.

Dr J.A. Payne, Research Manager, Construction Industry Research and Information Association.

Mr J.D. Roberts, Ove Arup and Partners.

Mr D. J. Sewell and N.C. Mayhew, Legal Department, Department of the Environment.

Mr I.C. Sinclair, formerly Secretary and Solicitor to the Severn Trent Water Authority.

Mr A.Stewart, Treasury Solicitor's Department, on behalf of the Department of Transport.

Mr D.C. Watkins, Groundwater Section, Rivers Group, Hydraulics Research Ltd.

Contents

Enactments referred to	xiii
Overview	xv
1 PLANNING LAW	1
1.1 Planning law and development control	1
1.1.1 Introduction	1
1.1.2 The concept of development	1
1.1.3 Operational development	1
1.1.4 Building operations	2
1.1.5 Engineering operations	2
1.2 Planning authorities	3
1.2.1 Local administration of the planning system	3
1.2.2 The role of the Secretary of State	4
1.3 Development planning	4
1.4 Planning permission and the general development order	5
1.5 Applications for planning permission	6
1.5.1 Application procedure	6
1.5.2 Environmental assessment	6
1.6 Publicity requirements and consultation procedures	7
1.6.1 Publicity requirements	7
1.6.2 Statutory consultees	7
1.7 Planning guidance and determination	8
1.7.1 Procedure for determination of applications	8
1.7.2 Official planning policy	8
1.7.3 Circular 17/82	9
1.7.4 Other material considerations	9
1.7.5 Effects and duration of a planning determination	10
1.8 Appeals and the Secretary of State	10
1.8.1 Judicial and statutory review	11
1.9 Planning law and other legislation	11
2 THE DRAINAGE OF BUILDINGS	12
2.1 The Building Act 1984 and building regulations	12
2.2 Passing or rejection of plans	12
2.3 Breach of building regulations	12
2.4 Appeals	13
2.5 Construction of drains	13
2.6 Caselaw on the drainage of buildings	14
2.7 Private drains	14
2.7.1 Proper arrangements for drainage	14

2.8	Repair of drains	15
2.8.1	Use and ventilation of soil pipes	15
2.8.2	Repairs to underground drains	15
2.8.3	Power to alter drainage system	15
2.8.4	Overflowing cesspools	16
3	THE PROVISION OF SEWERAGE SERVICES	17
3.1	Introduction	17
3.2	General functions of sewerage undertakers	17
3.3	Provision of sewerage services	18
3.3.1	Requisition of a public sewer	18
3.3.2	Adoption of sewers by vesting declaration	18
3.3.3	Agreements to adopt sewers and drains	18
3.4	Appeals with respect to adoption	19
3.5	Communication of drains and private sewers with public sewers	19
3.6	The meaning of 'sewer' and 'drain'	19
3.6.1	<i>Meader v. West Cowes local board</i>	20
3.7	Provisions protecting sewerage system	22
3.7.1	Restrictions on use of public sewers	22
3.7.2	Construction requirements for a drain or sewer	22
3.7.3	Power to alter drainage systems and to close or restrict use of public sewers	22
3.7.4	Miscellaneous powers of sewerage undertaker	23
4	THE DRAINAGE OF HIGHWAYS	24
4.1	Methods of creating highways	24
4.2	Duties of highway authorities	24
4.3	Use of highway drains as sewers and vice versa	25
4.4	Rights and duties of landowners	25
5	WATER QUALITY LEGISLATION	26
5.1	Introduction: principal water legislation	26
5.1.1	The Water Act 1989	26
5.1.2	The consolidation legislation	26
5.2	The legal status of the National Rivers Authority	26
5.2.1	The principal functions	26
5.2.2	Environmental obligations	27
5.3	Water pollution under the Water Resources Act 1991	27
5.3.1	Controlled waters	27
5.3.2	The principal offences of polluting controlled waters	28
5.3.3	'Causes or knowingly permits'	29
5.4	Defences and authorised discharges	30
5.4.1	Emergencies	30
5.4.2	Highway drains	30
5.4.3	Discharge consents	30
5.4.4	Charging schemes	31
5.5	Preventative approaches to water quality	32
5.5.1	Water protection zones	32
5.5.2	Policy on groundwater protection	32
5.5.3	Anti-pollution works and operations	33

5.6	Miscellaneous matters on water pollution control	33
5.6.1	Powers of entry	33
5.6.2	Admissibility of analyses of samples	34
6	WATER QUALITY AND EUROPEAN COMMUNITY LEGISLATION	35
6.1	European Community water legislation	35
6.1.1	The basis of European Community environmental policy	35
6.1.2	The single European Act	36
6.1.3	Directives	36
6.1.4	The enforcement of community legislation	37
6.2	The groundwater directive	37
6.3	Implementation of water directives in national law	38
6.3.1	Classification of quality of waters	38
6.3.2	Water quality objectives	39
6.3.3	General duties to achieve and maintain objectives	39
7	WATER RESOURCES	40
7.1	Water resources generally	40
7.1.1	Water resources and water supply: the general background	40
7.1.2	Water resources and the National Rivers Authority	40
7.1.3	General management of water resources	41
7.1.4	Abstraction licensing	41
7.1.5	The legal effect of an abstraction licence	41
8	LAND DRAINAGE	43
8.1	Private rights and public authorities	43
8.1.1	Powers to drain land	44
8.1.2	'Drainage works' and infiltration systems	44
8.1.3	Powers, regulations and byelaws	45
9	PRIVATE RIGHTS AND DUTIES	46
9.1	The general nature of tortious liability	46
9.2	The tort of negligence	46
9.2.1	<i>Donoghue v. Stevenson</i>	46
9.2.2	<i>Murphy v. Brentwood</i> — local authority liability	47
9.2.3	Liability for physical injury and property damage	47
9.2.4	<i>Department of the Environment v. Thomas Bates & Son</i> — builders' liability	47
9.3	Breach of statutory duty	47
9.3.1	Generally	47
9.3.2	The Defective Premises Act 1972	48
9.3.3	The Building Act 1984 and the Building Regulations	48
9.3.4	Water Industry Act 1991 — sewerage undertakers' liability	48
9.3.5	Statutory authority as a defence for statutory undertakers	49
9.4	The tort of nuisance	49
9.4.1	Reasonable foreseeability of harm	50
9.4.2	Reasonableness	51
9.4.3	Nuisance and interests in land	51
9.4.4	Leaseholds	52
9.5	Statutory nuisance	52
9.6	Liability under <i>Rylands v. Fletcher</i>	53
9.6.1	The case of <i>Rylands v. Fletcher</i>	53
9.6.2	The basis of liability	53
9.6.3	Application to infiltration facilities	54

10 CONVEYANCING IMPLICATIONS	56
10.1 Covenants	56
10.2 Transmission of the benefit of covenants at law	57
10.3 Transmission of the benefit of covenants in equity	57
10.4 Transmission of the burden of covenants	58
10.5 The indirect enforcement of positive covenants	58
10.6 Indemnity covenants	58
10.7 The benefit and burden principle	59
10.8 Rentcharges	59
10.8.1 Meaning of 'estate rentcharge'	59
10.8.2 Remedies of the rentcharge owner	60
10.8.3 Transfer to a management company	60
10.9 Leases	60
10.10 The Leasehold Reform Act 1967	61
10.11 Short leases	61
10.12 Law reform	62
10.13 Conveyancing implications: conclusion	62
11 CONCLUSION	63
Bibliography	65

Enactments referred to

Building Act 1984	BA1984
Defective Premises Act 1972	DPA1972
Environmental Protection Act 1990	EPA1990
Groundwater Directive 1980 {80/68/EEC}	GD1980
Highways Act 1980	HA1980
Land Drainage Act 1991	LDA1991
Landlord and Tenant Act 1985	LTA1985
Law of Property Act 1925	LPA1925
Leasehold Reform Act 1967	LRA1967
Public Health Act 1936	PHA1936
Public Health Act 1961	PHA1961
Rentcharges Act 1977	RA1977
Single European Act 1986	SEA1986
Town and Country Planning Act 1990	TCPA1990
Water Act 1989	WA1989
Water Industry Act 1991	WIA1991
Water Resources Act 1991	WRA1991

Overview

This section seeks to provide a comprehensive, and reasonably concise, account of the general law of England and Wales as it applies to infiltration drainage facilities. It will be evident that this spans a range of different kinds of legal provisions: diverse regulatory laws of both national and European origin, which may restrict the initial construction and impose continuing obligations for the operation of an infiltration system, along with private rights and duties which may exist between individuals and give rise to liability where a facility gives rise to some kind of actionable harm. Broadly, the areas of law which have been found to be of greatest relevance are as follows, though this summary should be read subject to the more detailed commentary contained in the text.

Planning control

Initially, the construction of an infiltration drainage facility will be a 'development' of land which requires planning permission from a local planning authority. Although no direct guidance is provided as to how the planning authority should determine an application for planning permission incorporating an infiltration drainage facility, past decisions have indicated that a material consideration in any planning determination will be the adequacy of the drainage system proposed and the likelihood of flooding. Implicitly, therefore, a planning authority will need to consider the suitability of a proposed infiltration system in relation to a development project before planning permission can be given.

Building control

Further controls upon construction activities operate through the system of building control which, generally, requires any person who intends to carry out building work to provide the appropriate local authority with a building notice and full plans of the work which is proposed. Providing no defect is found in the plans the local authority will be bound to approve them. Building requirements specify that systems which carry rainwater from the roof of a building to a soakaway or some other suitable rainwater outfall are to be adequate for these purposes. In other circumstances the use of an infiltration facility will have to satisfy more general requirements relating to drainage to be acceptable.

Adoption by sewerage undertakers

Another important issue which may arise in the construction of an infiltration facility is that of eventual adoption of the facility by the appropriate sewerage undertaker. Ordinarily, a developer proposing to construct a sewer may enter into an agreement with the undertaker to the effect that, if the sewer is constructed in accordance with agreed specifications, it will be adopted by the undertaker. Thereafter, it will be the responsibility of the undertaker, rather than the developer, to maintain the sewer. In relation to infiltration facilities, however, some uncertainty surrounds the question whether a facility of this kind is within the legal definition of a 'sewer' and whether an undertaker would have grounds to decline to agree to adoption of such a facility purely because it comprised an infiltration, rather than a conventional, system of drainage.

Highway drains

Where an infiltration facility is proposed by a developer to serve as a highway drainage system, an analogous issue arises as to whether the facility may become the subsequent responsibility of the highway authority. In relation to this, a developer may enter into an agreement with a highway authority so that a proposed road becomes dedicated as a highway, maintainable at public expense, providing that it is constructed to an agreed specification. Amongst other matters, an agreement of this kind will make provision for the road to be properly drained. In this respect the statutory definition of a 'drain' explicitly includes reference to a 'soak-away',

thereby making it apparent that a highway authority may not decline to undertake future responsibility for a road merely because an infiltration facility has been used for the drainage of surface water.

Water pollution

Following from legal issues relating to the initial construction and adoption of infiltration drainage facilities, continuing concerns may arise as to the water quality implications of this kind of drainage system. A range of criminal offences exist in respect of the pollution of 'controlled waters', including groundwater, and it is clear that these offences would be committed where a person 'caused or knowingly permitted' a facility of this kind to be used as a means of polluting subsurface waters. A defence to this offence is provided to highway authorities unless a prohibition is imposed upon particular highway drains by the National Rivers Authority. Otherwise, an offence will arise in respect of groundwater pollution by means of an infiltration system unless the entry of polluting matter or effluent is the subject of a discharge consent granted by the Authority. Because of increasing concerns about contamination of groundwater, the Authority is actively engaged in formulating a policy for groundwater protection which envisages discharge consents and prohibitions as principal mechanisms for the control of polluting entries into underground waters that are perceived to be at risk. Accordingly, the provision of oil interception, and other pollution prevention, facilities are likely to become standard requirements where a hazard of groundwater contamination is identified.

The European Community Groundwater Directive

Water pollution is not only a matter of national concern, it is equally provided for by way of a European Community obligations under various Directives relating to water quality. Perhaps most notable amongst these is the European Community Groundwater Directive which seeks to prevent the pollution of groundwater by specified substances and to eliminate the consequences of existing pollution. Whilst, in most respects, this Directive requires discharges containing these substances made to groundwater to be subject to authorisations granted by the appropriate national authority, it also specifies that authorisations may only be granted where there is no *risk* of groundwater pollution. Accordingly, the existence, or otherwise, of a risk of that kind will need to be ascertained by the National Rivers Authority, in England and Wales, in deciding whether a groundwater discharge needs to be the subject of a discharge consent.

Water resources

Another facet of the problem of groundwater contamination, potentially arising through the operation of infiltration facilities, relates to water resources. The obligation upon statutory water undertakers to supply wholesome water to domestic premises is clearly dependent upon the protection of water resources including aquifers that are used for this purpose. Accordingly, water undertakers have a significant interest in the maintenance of purity of those resources, and the National Rivers Authority is obliged to have regard to the water supply duties imposed upon undertakers in exercising its powers. It follows, therefore, that in regulating the operation of an infiltration facility, through a discharge consent or otherwise, the Authority must have regard not only to the general protection of the aquatic environment, but also to the effects which proposed discharges into aquifers may have upon underground water which may subsequently be used for water supply purposes.

Drainage responsibilities

Not only is water quality an issue in relation to the law concerning infiltration systems, but also matters of water quantity may need to be taken into consideration. Although a general common law right exists allowing private owners of land to conduct land drainage work, increasingly this activity has become the concern of public bodies entrusted with statutorily defined powers to conduct operations to alleviate flooding and improve drainage. Whilst flood defence and land drainage powers are allocated to the National Rivers Authority, primarily in respect of main rivers, additional powers relating to land drainage are given to internal drainage boards and local authorities to undertake works for securing the effective drainage of their respective areas.

These powers are fairly general in their formulation and allow any act 'required for the drainage of land'. The implication of this is that, under appropriate circumstances, infiltration drainage may be adopted by these bodies if it constitutes an effective means of securing a drainage objective within their powers.

Civil liability

Whether an infiltration facility is the continuing responsibility of a sewerage undertaker, highway authority, developer or a private individual, a vital question arises as to the extent of the civil liability which may arise where the operation of the facility results in harm to another individual or body. Here the essential complaint will be that the facility has brought about an adverse effect upon water quality or water quantity which is so detrimental to the interests of another person that compensation should be payable or some other remedy given. The categories of legal action under which civil liability may be established are rather diverse but of particular importance are negligence, breach of statutory duty, nuisance and liability under the principle established in the case of *Rylands v. Fletcher*. These different forms of civil liability have distinct characteristics, but provide a legal mechanism by which redress may be made available to those who suffer a loss consequent upon the improper construction or maintenance of an infiltration facility. Accordingly, they must be taken into consideration by those with initial or continuing responsibilities for this kind of facility.

Maintenance responsibilities

Another consideration of potentially fundamental importance is that of continuing responsibilities for maintenance of infiltration facilities. This problem will be largely obviated where the particular facility is adopted by a sewerage undertaker or vested in a highway authority, but otherwise consideration will have to be given to the question of continuing responsibilities for maintenance of the facility. In a situation where more than one private individual or body possesses responsibilities for maintenance of the facility covenants would need to be entered into to provide for maintenance responsibilities. However, difficulties may arise in law in enforcing a burdensome covenant to subsequent owners of the land concerned, and other legal mechanisms may need to be considered as a means of achieving the objective of securing continuing obligations in respect of maintenance. One legal mechanism which may secure the more effective imposition of continuing maintenance obligations is the imposition of a rentcharge in respect of properties served by a communal infiltration facility, requiring the payment by each owner of a property served by an infiltration facility to pay an annual sum proportionate to the cost of maintaining the facility.

Conclusions

Many of the conclusions drawn from the study are attributable to the relative legal novelty of infiltration systems. A number of the inferences which are drawn amount to implicit applications of broader principles to the specific issues encountered in respect of the construction or maintenance of infiltration facilities. Clearly, this begs the question as to whether more explicit legal provision should be made in relation to this kind of facility. For example, in relation to planning and building control, and similarly in relation to adoption by sewerage undertakers and highway authorities, more explicit guidance would be helpful to developers seeking to utilise an infiltration facility but unsure as to the legal implications.

1 Planning Law

1.1 PLANNING LAW AND DEVELOPMENT CONTROL

1.1.1 Introduction

The system of planning controls which presently operates in England and Wales can be traced back through a series of Town and Country Planning Acts dating almost to the turn of the century. However, the existing planning law relevant to the construction of infiltration systems is to be found consolidated in the Town and Country Planning Act 1990, as amended by the Planning and Compensation Act 1991. These Acts must also be read alongside a series of statutory instruments and policy documents which make detailed provision for matters of planning regulation, procedure and policy.

Planning law is an intricate area of legal specialism but, fundamentally, two key aspects need to be considered. The first is the development plan-making process whereby the appropriate planning authorities undertake to identify areas of land within their jurisdiction which are suitable, or unsuitable, for generally specified kinds of purpose and zoned in development plans accordingly. The second essential characteristic of the subject is the use of development plans, and other materials, as a means of ascertaining whether a proposed development of land will be authorised by the planning authority. Ultimately, the development of land without authorisation, or in contravention of the terms of an authorisation, will amount to a breach of planning law and may become the subject of enforcement proceedings brought by a planning authority.

1.1.2 The concept of development

The Town and Country Planning Act 1990 provides that, subject to specified exceptions, 'planning permission is required for the carrying out of any development of land' (s.57(1) TCPA1990). Unavoidably, therefore, the most crucial issue in the subject is the question what is to count as a *development* of land for planning law purposes. The matter is dealt with explicitly in the 1990 Act which states that, with certain reservations, 'development' means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land' (s.55(1) TCPA1990).

Traditionally, the formulation of the definition of 'development' which is provided for by statute has been construed disjunctively. That is to say that development can take place *either* by the conduct of building or other operations *or* by a material change in the use of land. Hence, development may take place either when a new building is constructed or where an existing and unmodified building is put to a significantly different kind of use. Although operational development and material change of use are equally 'development' within its legal meaning, the present discussion of the installation of infiltration systems means that attention may justifiably be centred upon the first limb of the definition: operational development.

1.1.3 Operational development

Operational development, as has been noted, is stated to encompass 'the carrying out of building, engineering, mining or other operations in, on, over or under land'. Clearly, therefore, the construction of underground facilities such as infiltration systems will not escape planning controls because of their subterranean character, and this will be so even if the facility is covered over so that its presence is not evident from inspection of the surface of the land. The

installation of infiltration systems will be within planning control to the extent that they require building, engineering, mining or other operations in their construction.

In particular, the construction of an infiltration system will amount to a development in so far as it involves either a 'building operation' or an 'engineering operation' within the terminology of the 1990 Act. However, it may not be entirely clear which of these is involved since the two categories appear to overlap and in many of the decided cases it has been ruled that a development has taken place without any definite statement as to whether a building or engineering operation, or both, was involved. Nonetheless, the Act provides distinct definitions of 'building operations' and 'engineering operations'.

1.1.4 Building operations

'Building operations' are stated to include 'rebuilding operations, structural alterations of or additions to buildings, and other operations normally undertaken by a person carrying on business as a builder'. A 'building' is stated to include 'any structure or erection, and any part of a building, as so defined, but does not include plant or machinery comprised in a building' {s.336(1) TCPA1990}. It is apparent from this that the meaning of 'building', for these purposes, is capable of encompassing many kinds of structure which would not ordinarily be described as 'buildings'.

A wide range of construction activities has been held to fall within the definition of 'building operation'. In one instance the stripping of topsoil was found to be a building operation {*United Refineries Ltd. v. Essex County Council* [1978] *Journal of Planning Law* 110}, and in another decision the laying of drains, amongst other activities, was held to constitute a building operation {*Howell v. Sunbury-on-Thames U.D.C.* (1963) 15 P&CR 26}. Pertinently, in another determination, it was suggested the installation of a septic tank for a dwelling-house was a building rather than an engineering operation where it was incidental to the enjoyment of a dwelling house {*Planning Decision Ref. APP/1957/A/10589* [1967] *Journal of Planning Law* 669}. Depending upon the relationship with other structures, therefore, there are authoritative reasons to suppose that construction of an infiltration facility could amount to a building operation in some situations.

Once a building has been constructed, routine maintenance operations of a minor kind upon it will not amount to building operations, since it is provided that the carrying out of maintenance, improvement or other alteration to any building or works which affect only the interior of the building, or do not materially affect the external appearance of the building, are not to be taken to involve development of land {s.55(2)(a) TCPA1990}. However, a recent amendment has clarified the law in relation to situations where a substantial demolition of a residential property takes place. Accordingly, subject to regulations 'building operations' will in future include demolition of certain buildings, rebuilding, structural alterations of or additions to buildings and other operations normally undertaken by a person carrying on business as a builder' {s.55(1A) TCPA1990}.

1.1.5 Engineering operations

If the construction of an infiltration system is not classified as a building operation then the alternative is that it will fall into the category of 'engineering operations'. Rather uninformatively, the 1990 Act states that 'engineering operations' includes the formation or laying out of means of access to highways' {s.336(1) TCPA1990}, but clearly it also includes many other kinds of engineering operations. A broad indication of the meaning of the phrase has been provided in decided cases which have suggested that 'engineering operations' should be given its ordinary meaning, 'operations of the kind usually undertaken by engineers, that is, operations calling for the skills of an engineer' {*Fayrewood Fish Farms v. Secretary of State for the Environment* [1984] *Journal of Planning Law* 216}. An engineer in this context could be a civil engineer or some other kind of specialist engineer who applies his skills to operations on land. Following this approach, it has been decided that various kinds of operation involving the removal and deposit of topsoil and subsoil, and the formation of hardstanding and laying of

The relationship between the plan making process and the control of particular developments is statutorily provided for in that a local planning authority considering an application for planning permission is 'to have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations' {s.70(2) TCPA1990}. Moreover, 'where regard is to be had to the development plan, the determination shall be made in accordance with the plan unless material considerations indicate otherwise' {s.54A TCPA1990}. The effect of these requirements is to introduce a *presumption* in favour of following the appropriate development plan, in making a determination of an application for planning consent, unless a 'material consideration' indicates otherwise. Accordingly, if the development plan does not contain material policies or proposals and there are no other material considerations, the application should normally be determined in accordance with the plan, and an applicant who proposes a development which was clearly in conflict with the plan will need to produce convincing reasons why the plan should not prevail. Where there are other material considerations, the plan should be taken as a starting point, and the other material considerations should be weighed in reaching a decision. Where the plan is not relevant, because it contains no relevant policies, or the policies pull in different directions, the planning application should be determined on its merits in the light of all the material considerations {paras.25 to 28 Department of the Environment, Planning Policy Guidance Note 1, *General Policy and Principles* (1992)}.

1.4 PLANNING PERMISSION AND THE GENERAL DEVELOPMENT ORDER

The definition of 'development' and its exceptions and qualifications have been noted but, fundamentally, the basis of planning control is that permission is required for the carrying out of any development of land {s.57(1) TCPA1990}. Planning permission can be acquired either by an explicit authorisation granted by the local planning authority or through the operation of a development order. In relation to the latter possibility, the Town and Country Planning Act 1990 allows the Secretary of State to provide for the granting of planning permission by development orders of a general nature, applicable to all land, or a special nature, applicable only to particular land of a description specified in the order {s.59 TCPA1990}. The power to make a development order of a general nature is of the greatest practical importance, and this has been exercised most recently by the making of the Town and Country Planning General Development Order 1988 {SI 1988 No.1813, as amended}.

The General Development Order deals with various matters of planning procedure, but also provides that a number of specified classes of development are permitted to be undertaken on land without the need to obtain express permission from the local planning authority. Developments which fall within the scope of the Order are referred to as 'permitted developments'. Schedule 2 to the Order lists the various kinds of permitted development in detail and in relation to each proposed development it will be necessary to ascertain that it falls within one of the 28 parts to the Schedule. However, it may be useful to note in passing some of the more pertinent provisions from the Order.

Part 10 of Schedule 2 is concerned with repairs to services and provides that it is a permitted development to carry out works for the purposes of inspecting, repairing or renewing any sewer, main, pipe, cable or other apparatus, including breaking open any land for that purpose.

Part 13 of Schedule 2 deals with development by local highway authorities and provides that it is a permitted development for such an authority to carry on, on land outside but adjoining the boundary of an existing highway, work required for or incidental to the maintenance or improvement of the highway.

Part 14 of Schedule 2 concerns developments by drainage bodies (other than the National Rivers Authority) and permits development in, on or under a watercourse or land drainage works in connection with the improvement, maintenance or repair of the watercourse or works.

Part 15 of Schedule 2 relates to developments by the National Rivers Authority and specifies a range of permitted developments including certain drainage works and developments, not above ground level, required in connection with conserving, redistributing or augmenting water resources.

Part 16 of Schedule 2 deals with permitted developments by or on behalf of sewerage undertakers including development, not above ground level, required in connection with the provision, improvement, maintenance or repair of a sewer, outfall pipe, sludge main or associated apparatus.

1.5 APPLICATIONS FOR PLANNING PERMISSION

1.5.1 Application procedure

Where an activity falls within any of the categories of permitted development no application to the local planning authority will be required, since the development consent is directly provided under the General Development Order. Where, however, an operation cannot be placed under any of the categories of permitted development then a planning application to the local planning authority will be necessary.

Although planning determinations are said to be made by the local planning authority, a local authority is actually empowered to arrange for the discharge of any of its functions by a committee or an officer of the authority {s.101 Local Government Act 1972}. Hence, particular determinations will be made by the planning committee of the authority, or in some cases they may be delegated to a planning officer or similar official.

Whatever detailed local arrangements for determination exist, it will be necessary for the applicant to make an application to the local planning authority in accordance with the appropriate regulations, currently the Town and Country Planning (Applications) Regulations 1988 {SI 1988 No.1812, and see Arts.5 to 7A General Development Order}. Amongst other things, these Regulations provide that an application for planning permission is to be made on a form provided by the local planning authority, and is to include the particulars specified on the form. The application is to be accompanied by a plan which identifies the land to which it relates and any other plans and drawings and information necessary to describe the proposed development. In the event of insufficient information being provided, the authority may direct the applicant to supply further information necessary to enable the authority to make the determination and to provide reasonable evidence to verify any particulars. Fees are payable in relation to planning applications and these are determined in accordance with a scale specified in the Town and Country Planning (Fees for Applications and Deemed Applications) Regulations 1989 {SI 1989 No.193, as amended, and s.303 TCPA1990}.

1.5.2 Environmental assessment

An additional level of planning procedure is provided for in relation to projects which are categorised as having a 'significant effect' on the environment within the terms of the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 {SI 1988 No.1199}. These Regulations implement the European Community Directive on Environmental Assessment {85/337/EEC and see 6.1.3 below on Community Directives}. The Regulations require that specified projects which are likely to have significant environmental effects are to be the subject of an environmental assessment prepared by the developer seeking planning authorisation. The local planning authority to which the statement of environmental assessment is submitted is to give consideration to the environmental information before any consent may be granted. Notably, the list of infrastructure projects for which environmental assessment may be required includes industrial estates and urban development projects and 'flood relief works' where these have a significant environmental effect.

tarmac for vehicle parking, are engineering operations. Accordingly, it seems likely that the activities involved in the construction of an infiltration system could fall within this category of development.

Whatever uncertainties surround the precise scope of the phrase 'engineering operation', a clear statement is provided to the effect that certain matters are *excluded* from its meaning. For example, it is provided that there is no development of land where there is (a) the carrying out on land within the boundaries of a road by a local highway authority of any works required for the maintenance or improvement of the road, and (b) the carrying out by a local authority or statutory undertakers of any works for the purpose of inspecting, repairing or renewing any sewers, mains, pipes, cables or other apparatus, including the breaking open of any street or other land for that purpose {s.55(2) TCPA1990}. It follows that maintenance operations of a minor kind which may relate to infiltration systems may fall outside the meaning of 'engineering operation', though the scope of these exceptions will be limited.

In summary, it must be concluded that the construction of an infiltration system will amount to an engineering or building operation in planning law, or in some circumstances both, and will be classified as a development accordingly. Some minor activities such as the maintenance of existing facilities will fall outside the meaning of development, but these will be relatively narrow in their extent.

1.2 PLANNING AUTHORITIES

1.2.1 Local Administration of the Planning System

Administrative responsibility for the operation of the planning system rests initially with the local authorities, and ultimately with the 'Secretary of State', meaning the Secretary of State for the Environment in England and the Secretary of State for Wales in Wales. It is the duty of the appropriate local planning authority both to formulate development plans of various kinds and to determine applications for development consent. In each case these duties are to be discharged subject to a supervisory jurisdiction possessed by the Secretary of State.

In respect of the locally administered aspects of the planning system, it is to be noted that proposals for reform of local government are presently under consideration. However, the system which is presently in place is founded upon the Local Government Act 1972 which establishes a two-tier system of local government. This is reflected in the planning system where, for most parts of England and Wales, planning powers are exercisable by two levels of local government. Hence the county council acts as the *county planning authority* for its area and the district council as the *district planning authority*.

Various exceptions arise to the general duality of local planning administration, in that numerous other bodies may acquire a general or particular role in the planning system. Thus, London boroughs and metropolitan districts exercise planning powers in their particular areas, as do other bodies such as National Park Committees, the Norfolk and Suffolk Broads Authority, Urban Development Corporations, Enterprise Zone Authorities, though in certain cases the powers involved are restricted to specified matters.

Setting aside detailed consideration of the particular powers of the diverse range of planning bodies that may be encountered, *the general picture* is that county planning authorities take responsibility for 'county matters' which include the winning and working of minerals and operational development of land partly within and partly outside a national park. District planning authorities are responsible for all other development control functions including determination of applications for planning permission and the enforcement of planning controls.

1.2.2 The role of the secretary of state

Although the Secretary of State, and officials acting on his behalf, provide overall supervision of the planning system, in practice, most day to day matters of development planning and control are entirely dealt with by the appropriate county or district local planning authority acting in accordance with established planning legislation and policy. However, the role of the Secretary of State in the planning process is a vitally important one in that he exercises three distinct kinds of function: legislative, administrative and judicial.

Acting in a law-making capacity, he is empowered to enact delegated or subordinate legal instruments which fill in the detailed statutory requirements of planning law. A major example of the use of this power is the Town and Country Planning General Development Order 1988 {SI 1988 No.1813, as amended, see 1.4 below} which sets out the kinds of operation which will be 'permitted developments', and so not require explicit planning authorisation. Another important example of the law-making power of the Secretary of State is the Town and Country Planning (Use Classes) Order 1987 {SI 1987 No.764, as amended} which sets out various defined categories of land use such that changes of use within a category will not be taken to amount to 'material' change of use for the purpose of establishing whether a development of land has taken place. In his administrative role, the Secretary of State has responsibility for the preparation of a wide range of planning policy documents to which local planning authorities must adhere, and default powers over authorities in the event of a failure to exercise their planning powers correctly. In judicial terms, the Secretary of State is empowered to determine appeals in particular planning cases, or to 'call in' contentious matters to be determined by him rather than the local planning authority concerned. {These matters are considered in more detail at 1.8 below.}

1.3 DEVELOPMENT PLANNING

The first part of the planning process under the Town and Country Planning Act 1990 is that of production of development plans which designate the uses of land envisaged in particular areas in order to facilitate determinations of individual applications for planning authorisation. Other than in Greater London and the metropolitan areas, where unitary planning systems operate, and subject to other special arrangements which apply in particular areas, development planning operates at two levels. The county planning authorities produce general plans for the county as a whole, termed 'structure plans', whilst district planning authorities formulate 'local plans' providing a more detailed indication as to proposed land use within their areas.

Although the present system is under review, the overall purpose of a structure plan is to provide a statement of the general strategic policies for the area of a county, set out in the form of a written statement supplemented by representative diagrams and a written memorandum. The structure plan for a county is likely to contain major strategic policies on matters such as housing provision, industrial and commercial location and transport facilities for the county {s.31 TCPA1990, as amended}. By contrast, local plans are more detailed in their content consisting of written policies and specific land use allocations for the district {s.36 TCPA1990, as amended}. Although there is now a statutory requirement that all districts should have a local plan, it is also possible for a district planning authority to have subject plans covering more particular matters such as green belt areas or minerals development and action area plans for the redevelopment of small areas.

Extensive provision is made for consultation in the process of formulating development plans so that potential developers, members of the public and interested groups and bodies may make representations in relation to any draft plans which are prepared. Notably, in relation to strategic planning, local planning authorities are under a duty to consult various government departments and public bodies {see Department of the Environment Circular 22/84 Annex C}. This allows bodies such as the National Rivers Authority to comment on the implications of a proposed development plan in respect of the functions exercised by that Authority.

Ministerial guidance on the operation of environmental assessment in planning law indicates that the criteria of significance to be used will be fairly narrowly construed so that environmental assessment will only be required where a project is of more than local importance, or in a particularly sensitive or vulnerable location, or it is a project which has unusually complex or potentially adverse environmental effects. Nevertheless, it is possible that an infiltration facility might fall within these criteria particularly where it forms a part of a larger development project. If this is the case the developer will be required to provide a detailed environmental statement assessing the likely impact of the development on the environment and including information about the effects of the project upon fauna, flora, soil and water {see Department of the Environment Circular 15/88}.

1.6 PUBLICITY REQUIREMENTS AND CONSULTATION PROCEDURES

1.6.1 Publicity requirements

The planning process is intended to be as public as is reasonably feasible, and extensive provision is made for planning information to be made generally available both in relation to the general plan making process and the determination of particular applications for development consent. Accordingly, the 1990 Act provides that local authorities are to keep, in a prescribed manner, a register containing information with respect to planning applications. This register is to be available for inspection by the public at all reasonable hours {s.69 TCPA 1990}.

Details concerning the contents of planning registers are specified in the General Development Order. These are to the effect that the register is to contain, amongst other matters, a copy of every application made to the authority, plans and drawings submitted with the application and a statement of the decision of the authority in relation to the application and any conditions subject to which permission was granted. In principle, therefore, any member of the public has the opportunity to ascertain what planning applications are under consideration by a local planning authority, and to make objections or representations to the authority in relation to a particular application.

General provision for publicity of applications for planning permission has recently been made by an amendment to the General Development Order which requires local planning authorities to publicise applications in a specified manner {see Town and Country Planning General Development (Amendment) (No.4) Order 1992, SI 1992 No.1493}. Accordingly, certain developments including those requiring environmental assessment are to be publicised by a site notice and a local advertisement. 'Major' developments are to be publicised by a site notice or the service of notice upon adjoining owners or occupiers and a local advertisement. Minor developments are to be publicised by giving 'requisite' notice by a site notice or the service of notice on adjoining owners or occupiers {Art.12B General Development Order, as amended, and see Department of the Environment Circular 15/92 (1992)}. A local planning authority is then, in determining an application for planning permission, to take account of any representations made {Art.22A General Development Order, as amended}.

1.6.2 Statutory Consultees

In some respects the provisions for consultation in relation to planning applications extend beyond a duty to make planning information available and become a *duty to consult* specified bodies in relation to certain kinds of proposed development. The full list of 'statutory consultees' for various purposes is set out in the General Development Order but the following

may serve as pertinent examples. Before granting permission for a development, the planning authority must consult the National Rivers Authority in relation to the following kinds of development:

development involving the carrying out of works or operations in the bed or on the banks of a river or stream;

development involving the use of land for the deposit of refuse or waste; or

development relating to the retention, treatment or disposal of sewage, trade-waste, slurry or sludge (other than the laying of sewers, the construction of pumphouses in a line of sewers, the construction of septic tanks and cesspools serving single dwellinghouses or single caravans or single buildings in which not more than ten people will normally reside, work or congregate, and works ancillary thereto) {see Art.18 General Development Order}.

Also, in addition to the statutory consultation requirements, local planning authorities should consult the appropriate water or sewerage undertaker on any planning application which is likely to have significant implications for water or sewerage services {para.34 Department of the Environment Circular 20/89, *Water Act 1989* (1989), and generally see Circular 17/91 *Water Industry Investment: Planning Considerations* (1991)}.

1.7 PLANNING GUIDANCE AND DETERMINATION

1.7.1 Procedure for determination of applications

When a planning application has been submitted to the local planning authority the authority is required to send an acknowledgement to the applicant, indicating whether the appropriate procedures have been complied with, in terms set out in Schedule 3 to the General Development Order. Thereafter, the authority is bound to notify the applicant of its decision within eight weeks from the date when the application was received, or in such extended period as may be agreed between the applicant and the authority. The acknowledgement of receipt of the application will provide that the applicant may appeal to the Secretary of State if, at the end of the eight week period, no decision has been given in writing {s.78 TCPA1990}.

As has been noted, the authority is bound to have regard to the development plan, so far as material to the application, and to any other material considerations {s.70(2) TCPA1990}. Moreover, the determination of the authority is to be in accordance with the development plan unless material considerations indicate otherwise {s.54A TCPA1990}. The duty to adhere to the development plan unless material considerations indicate otherwise means that the issue of what is to count as a 'material consideration' is a vitally important one in planning law.

1.7.2 Official planning policy

Perhaps most important amongst the things which may feature as material considerations are declared planning policy considerations as set out in a range of official publications through which planning policy is promulgated. In particular central government policies are set out in Circulars or, more recently, Planning Policy Guidance Notes, which provide guidance on general and specific planning policy, along with White Papers and other statements of planning policy. Planning matters of special application to particular kinds of development are set out in Minerals Planning Guidance Notes and Regional Planning Guidance Notes. It has been established as a matter of law that Circulars or Planning Policy Guidance Notes are material considerations which must be considered where they are relevant {*J.A. Pye Ltd. v. West Oxfordshire D.C.* [1982] 47 P&CR 125}. However, it will normally be assumed that a Circular has been regarded as a material consideration unless the reasoning supporting a determination makes it apparent that it has either been overlooked or misunderstood.

1.7.3 Circular 17/82

Specific note of the need for liaison between planning authorities and drainage authorities in relation to proposed developments in flood risk areas is provided by Department of the Environment Circular 17/82 {see also, Department of the Environment Consultation Paper, *Development in Flood Risk Areas* (1992)}. This Circular emphasises the importance of ensuring that drainage considerations are always taken into account in determining planning applications. It is noted that if development is permitted without regard to land drainage problems this can lead to danger to life, damage to property and wasteful expenditure of public resources on remedial works either on the development site or elsewhere.

Circular 17/82 recognises the general duty of the National Rivers Authority to carry out surveys in relation to its flood defence function {now provided for under s.105(2) Water Resources Act 1991} and the significance of such surveys in identifying areas likely to give rise to land drainage problems. However, the availability of such surveys is not to be regarded as an alternative to consultation on individual applications where land drainage considerations arise. The problem of run-off from new development is given particular consideration in the Circular, and planning guidance in this respect justifies substantial citation.

'A particular problem is that the run-off from new development may often result in the flooding of water courses, ditches and land, particularly farm land and dwelling houses. An outlet for the discharge of surface water to a water course is in certain circumstances subject to control by [the National Rivers Authority]. The advice of the [National Rivers Authority] in relation to a proposed development will, where time permits, normally include an assessment of the potential flooding effect downstream, and suggestions as to what drainage works, if any, would alleviate it. Where the planning authority consider that, if it were not for this effect, planning permission could be given, they should advise the persons whose land would be affected and give them the opportunity to comment. If the planning authority consider that, in view of the risk of flooding, development should not be allowed to proceed until works have been carried out to improve nearby watercourses, ditches, culverts, etc. outside the application site, it is open to them either to seek the applicant's agreement to the application being held in abeyance while he tries to make suitable arrangements, or to refuse permission and (when appropriate) advise the applicant of the kind of revised application which might overcome the difficulty.'

'It would not be appropriate to grant planning permission subject to a condition requiring works to be carried out on land outside the application site and not under the applicant's control, since such a condition would not be within the terms of [s.72(1) of the Town and Country Planning Act 1990 {concerned with conditions in planning permissions}]. But it should be possible in suitable cases to grant permission if the applicant has produced a formal agreement with the owners of the land through which the water would run providing for the carrying out of the necessary works and for their future maintenance. Alternatively the applicant could amend his application to include particulars of a plan of the drainage work to be carried out – although it may, of course, be necessary for him to submit a fresh application if the site area, or form of development is materially different from that originally proposed. Where an application thus includes drainage works, the planning authority in appropriate cases could incorporate in the permission a condition requiring the drainage works to be carried out first. In cases where it is not possible to incorporate a suitable condition in the planning permission the local planning authority should consider the possibility of making a formal agreement with the applicant.' {paras.8 and 9 of Circular 17/82}

1.7.4 Other material considerations

Although official planning policy statements of various kinds are a major factor in determining what is to count as a 'material consideration' expressed policy objectives do not exhaust all the possibilities. The scope of a 'material consideration' has been held to be limited to considerations of a planning nature, but thereafter it is conceivable that any matter which relates to the use and development of land is capable of being material for these purposes. Inevitably the planning authority will be left with a wide discretion to exercise as to what is and what is not material to an application. Broadly, the courts will only intervene to overturn the exercise of discretion by a planning authority where a decision is one which no planning authority, properly informed of the law and the facts, could reasonably have reached (*Associated Provincial Picture Houses v. Wednesbury Corporation* [1948] 1 KB 223).

To note some relevant examples of material considerations relating to drainage and sewerage matters, it has been held that it is a material consideration to take account of the risk of flooding neighbouring land in granting consent for a development. Specifically in one case, it was held to be material to consider whether the construction of a balancing lagoon to contain surface water would provide a satisfactory solution to drainage problems. (*George Wimpey and Co. Ltd. v. Secretary of State for the Environment* [1978] *Journal of Planning Law* 776). In other instances it was held to be a material consideration to take account of the fact that the main sewage disposal works were inadequate in refusing permission for the erection of a dwelling house (*Planning Decision Ref. T/APP/2394/A/54290* [1972] *Journal of Planning Law* 170), or to refuse a residential development because of special requirements as to drainage (*Planning Decision Ref. P291/32/27* September 1973 [1974] *Journal of Planning Law* 108). However, material considerations must relate to the development at issue, rather than the manner in which subsequent activities are conducted at the location, so that the possible effect of the disposal of farm-yard manure on water supplies was not a relevant consideration in a planning appeal since this was held to be a matter for effective operational management rather than planning control (*Planning Decision Ref. APP/5249/A/79/06798/26* June 1980 [1980] *Journal of Planning Law* 850).

1.7.5 Effects and duration of a planning determination

In broad terms the outcome of a planning determination will be that the application is either refused or granted with or without conditions. The effect of a grant of planning permission will be to benefit the land: that is, the permission will endure for the benefit of the land and any person who acquires an interest in the land (s.75(1) TCPA1990). The eventual developer need not, therefore, be the same person who originally applied for and was granted the development consent.

However, once granted, a planning consent will not continue into the indefinite future. Planning permissions are deemed to be subject to a condition that development is to be commenced within five years, or such other period as the planning authority may expressly impose (s.91 TCPA1990). In some circumstances the planning permission can be granted in outline, with 'reserved matters' to be approved by the authority at a later stage. In that case there is a deemed condition that application for the approval of the reserved matters must be made within three years of the grant of outline planning permission, and the development must be begun within five years of the date on which the outline permission was granted, or within two years of the grant of approval of the reserved matters whichever is the later (s.92 TCPA1990).

The general requirement that a development is to be begun within specified periods raises the question as to what needs to be done in order to *begin* an operational development, and how long thereafter the developer may take to complete the work involved. It is stated that the time at which a development is begun is when any specified 'material operation' is initiated. Material operations involve activities such as the digging of a trench which is to contain the foundations of a building or the laying of any underground main or pipe to the foundations of a building (s.56(2) to (6) TCPA1990). After the beginning of development which does not progress satisfactorily towards completion it is possible for planning permission to be terminated by the service of a 'completion notice' requiring the development to be completed within a reasonable period of time of not less than twelve months. A notice of this kind takes effect only after confirmation by the Secretary of State, and if it takes effect the planning permission becomes invalid at the expiration of the period specified in the completion notice (ss.94 and 95 TCPA1990).

1.8 APPEALS AND THE SECRETARY OF STATE

Although, ordinarily, the initial determination of an application for planning consent will be made by the local planning authority, in most circumstances a right of appeal exists to the Secretary of State, and from his decision to the courts on a point of law. Principally, rights of appeal are provided for where a local planning authority refuses consent to a planning

application or grants it subject to conditions, or fails to determine the matter within the allocated or agreed time, in which case the applicant may appeal to the Secretary of State. Appeals must be made by notice served within six months of the adverse determination or the time within which a determination should have been notified to the applicant {s.78 TCPA1990, and Art.26 General Development Order}.

On appeal to the Secretary of State, he may either allow or dismiss the appeal or reverse or vary any part of the decision of the local planning authority and may deal with the matter as if it had been made to him in the first place. Before making his determination, the Secretary of State must, if requested, give the applicant or the authority the opportunity of appearing before and being heard by a person appointed by the Secretary of State for the purpose, that is a planning inspector, but thereafter the decision of the Secretary of State is final {s.79 TCPA1990}.

1.8.1 Judicial and statutory review

Although the decision of the Secretary of State on a planning determination is stated to be final, two possibilities exist for his determinations to be the subject of consideration by the courts. The first is termed 'judicial review' and allows a decision of the Secretary of State to be set aside, for example, where justice has not been seen to be done either through bias on the part of the decision maker or because the applicant was not afforded a fair opportunity to present his case. The second possibility is that of 'statutory review' whereby rights of appeal are afforded to persons aggrieved by the outcome of planning determination on the ground that the action taken by the Secretary of State was either not within the powers under the 1990 Act or that relevant requirements have not been complied with. Providing that the application for statutory review is made within a six week period of the determination, the applicant may appeal to the High Court, which may quash the decision of the Secretary of State {s.288 TCPA1990}.

Finally, as has been noted in passing, the involvement of the Secretary of State in the development control process is not restricted to the determination of appeals. He is also empowered to 'call in' particular applications for planning permission, or applications of a specified class, for his own determination rather than allowing them to be determined by the local planning authority {s.77 TCPA1990}. This power is, however, only selectively used subject to the criterion that applications will generally only be called in if planning issues of more than local importance are involved.

1.9 PLANNING LAW AND OTHER LEGISLATION

As a concluding matter, some aspects of the relationship between planning law and other systems of control which may apply in relation to the authorisation of infiltration systems may be noted. The overriding principle is that planning law should only be used to realise planning objectives and not to secure objectives which are otherwise provided for under separate legislation. Duplication of regulatory controls should be avoided even where the alternative system of control has local authority involvement. Some general illustrations of this may be noted.

First, Building Regulations impose requirements as to how most domestic buildings must be designed and constructed in order to meet objectives relating to matters such as health and safety {see 2.1 below on building control}. It would be inappropriate to utilise planning law to meet objectives which should properly be provided for within building controls. For this reason detailed attention to precise construction standards is not dealt with under planning law.

Second, in respect of matters of pollution control, many kinds of development which are subject to planning law will also be covered by systems of environmental regulation which provide for the authorisation of potentially polluting emissions. Again, it is outside the scope of planning law to serve continuing pollution control objectives and these matters must be dealt with by the appropriate environmental authority {see 5.4.3 on water pollution control by discharge consent}.

2 The drainage of buildings

2.1 THE BUILDING ACT 1984 AND BUILDING REGULATIONS

In addition to the need to obtain planning permission for the development of land, there is also a requirement to comply with building regulations, currently the Building Regulations 1991 {SI 1991 No.2768}. The provisions relating to building regulations are contained in Part 1 of the Building Act 1984, which consolidated former provisions under public health legislation. More detailed requirements on persons carrying out certain building operations are set out in the Building Regulations 1991 which apply generally throughout England and Wales. Building work has to comply with the relevant requirements contained in Schedule 1 to the Regulations. By virtue of regulation 10, local authorities may dispense with or relax any requirement contained in the Regulations. Buildings belonging to statutory undertakers and other specified bodies are exempt from these Regulations {s.4 BA1984}.

The Building Act 1984 empowers the Secretary of State for the Environment (in relation to both England and Wales) to make regulations with respect to the design and construction of buildings and the provision of services, fittings and equipment in or in connection with buildings. These regulations may be made for any of the purposes of:

- (a) securing the health, safety, welfare and convenience of persons in or about buildings and of others who may be affected by buildings or matters connected with buildings;
- (b) furthering the conservation of fuel and power; and
- (c) preventing waste, undue consumption, misuse or contamination of water {s.1 BA1984}.

2.2 PASSING OR REJECTION OF PLANS

A person who intends to carry out building work (as defined in regulation 3) must give to the local authority a building notice and full plans. This will normally be done at the same time as an application for planning permission is made. Where plans are not defective, the local authority has a duty to approve them {s.16 BA1984}.

It is provided that approved persons may certify deposited plans to the effect that the proposed works, if carried out in accordance with the plans, will comply with prescribed provisions of the Building Regulations {s.17BA1984}. Where deposited plans are accompanied by such a certificate given by an approved person (together with evidence that an approved insurance scheme applies or that prescribed insurance cover has been or will be provided) the authority may not reject the plans, except in prescribed circumstances, on the ground that they are defective with respect to the regulations specified in the certificate, or that they show that the work would contravene those specified regulations {s.16(9) BA1984}. The Building (Approved Inspectors etc.) Regulations 1985, as amended, {SI 1985 No.1066} deal with the approval of persons to certify, under s.16(9), plans deposited with the local authority for passing or rejection.

2.3 BREACH OF BUILDING REGULATIONS

It is generally the function of local authorities to enforce building regulations in their area {s.91(2) BA1984}. Breach of the building regulations is a criminal offence {s.35 BA1984}. A local authority may require an owner to pull down or alter work carried out in contravention of the regulations, provided that the notice is given within twelve months of the completion of the

works {s.36 BA1984}. Failure to comply with the notice entitles the local authority to pull down, remove or alter the works, charging the cost to the person on whom the notice was served.

2.4 APPEALS

If there is a dispute between an authority and a developer as to whether a plan for a proposed building is defective, or whether the proposed work would contravene the regulations, the developer may appeal to the magistrates' court on a number of specified grounds {set out in s.102(1) BA1984}. One of these grounds {under s.103(1)(c) BA1984} is that the local authority has refused unreasonably to approve the execution of alternative works, or that the works required by the notice to be executed are otherwise unreasonable in character or extent, or are unnecessary. Subject to this right of appeal, if the person on whom the notice is served does not comply, the local authority may carry out the works itself and recover its costs of so doing. Failure to comply with such a notice is also an offence {s.99 BA1984}. Powers are conferred upon authorised officers of a local authority to enter premises for specified purposes {s.95 BA1984}. For example, entry is allowed to ascertain whether there has been a contravention of the Act or of the building regulations, or generally for the purpose of the performance by the local authority of its functions under the Act or the building regulations. As an alternative to the determination of a matter by a magistrates' court, the matter may be referred to the Secretary of State for settlement, if both parties agree. It is open to the Secretary of State to state a case for the opinion of the High Court on any question of law {s.30 BA1984}.

2.5 CONSTRUCTION OF DRAINS

A local authority must reject plans submitted under the building regulations unless satisfactory provision is made in the plans for drainage or unless the local authority is satisfied that, in the case of a particular building, it may properly dispense with any provision for drainage {s.21 BA1984}. Under the Building Act 1984 a number of specific provisions apply to drains. It is provided that a proposed drain will not be deemed satisfactory unless it connects with a sewer or discharges into a cesspool or some other place {s.21(4) BA1984}. However, the authority has no right to insist on communication with a sewer if certain conditions are satisfied. Specifically, these are:

- (a) the sewer is 100 feet {30.48 metres} or more away from the building; or
- (b) the levels make the requirements not reasonably practicable; or
- (c) the owner has no right to lay a drain through the intervening land.

The authority may require connection with a sewer which is more than 100 feet away if it undertakes to bear the cost of construction and maintenance attributable to the portion beyond 100 feet. A local authority may require, in an appropriate case, that two or more buildings should be drained in combination {s.22 BA 1984} .

'Sewer' and 'drain' have the same meanings as in the Water Industry Act 1991 {see 3.6 below}, save that in each case the definition goes on to say that it includes any 'manholes, ventilating shafts, pumps or other accessories' belonging thereto {s.126 BA1984}. 'Cesspool' is defined so as to include a settlement tank or other tank for the reception or disposal of foul matter from buildings. It is apparent that surface water drains discharging into a soakaway will be satisfactory if such drains are discharging into a cesspool or *some other place*.

Regulation 16 of the Buildings Regulations 1991 confers a power on the local authority to test any drain or private sewer in order to establish whether it complies with Part H of Schedule 1 which deals specifically with drainage and waste disposal. Part H1 requires any system which carries foul water from appliances within a building to a sewer, a cesspool or a septic or settlement tank to be adequate. Part H2 requires that cesspools, septic tanks or settlement tanks are adequately constructed so as to be impermeable to liquids, adequately ventilated, and so

sited and constructed that they are not prejudicial to health, do not contaminate any underground water or water supply and have adequate means of access for emptying. Part H3 provides that any system which carries rainwater from the roof of a building to a sewer, soakaway, watercourse or some other suitable rainwater outfall shall be adequate. It seems, therefore, that the Building Regulations apply only to the installation of drains and private sewers up to and including the connection of such 'outfalls' but not to the soakaway itself.

2.6 CASELAW ON THE DRAINAGE OF BUILDINGS

It is not uncommon for local authorities to declare a policy with regard to classes of defect or inadequacies and to reject plans which do not comply with that policy. In *Chesterton Rural District Council v. Ralph Thompson Ltd* {[1947] 1 KB 300} it was held that the words 'satisfactory provision will be made for the drainage of the building' refer to the drains of the particular building and not to the system of drainage, so that the local authority was not concerned with what happened to the drainage of the houses once it passed into the sewer, or whether the sewer itself was satisfactory.

In *R v. Bexhill Corporation, ex parte Cornell* {(1911) 75 JP 385}, it was held that a sanitary authority had no right to refuse approval of a plan because of a general objection outside the merits of the plan itself. A builder had submitted a plan for a coastal cottage; the plan was in accordance with the byelaws, that is, building regulations, and showed a proposal to construct a drain and a cesspool for the purpose of dealing with the sink water. The sanitary authority's surveyor advised that the drainage would be inoperative at spring tides because of its level, and it was on this basis that the sanitary authority had disapproved the plan. This was not a ground upon which it had any right to reject a plan, because it was not an objection to the plan as such.

The case of *Wood v. Widnes Corporation* {[1897] 2 QB 357} is authority for the proposition, that in relation to s.36 of the Public Health Act 1875 {concerning a power to require sufficient water closets to be provided} the local authority was not entitled to lay down a general rule requiring the adoption of a particular water-closet system in all future cases. Instead, it had to exercise its discretion in every particular case. This principle is of general application and it would not be open to a local authority to reject a storm water drainage system simply because it operates by infiltration. In order to fulfil the statutory requirement, the local authority will have to examine each application on its merits.

2.7 PRIVATE DRAINS

Various statutory powers are available to a local authority in relation to private drains which prove to be defective {compare the powers of sewerage undertakers at 3.7.3 below}. These provisions also may be relevant in respect of infiltration drainage systems. It is to be noted that a later section examines the terms and conditions which a developer may wish to impose on purchasers of individual properties on an estate in relation to the repair and maintenance of individual drains and contributions to the cost of maintenance {see 10 below}.

2.7.1 Proper arrangements for drainage

Notices requiring works to be carried out must be served on the owner or occupier of premises if it appears to a local authority that certain remedial works are necessary in relation to a building. Specifically, a notice must be served if

- (a) satisfactory provision has not been made and ought to be made for drainage;
- (b) a private sewer or drain communicating directly or indirectly with a public sewer is so defective as to admit subsoil water;

- (c) a cesspool, private sewer, drain, soil pipe, rain-water pipe, spout, sink or other necessary appliance is insufficient or in such a condition as to be prejudicial to health or a nuisance; or
- (d) a cesspool, private sewer or drain formerly used but no longer used is prejudicial to health or a nuisance.

In these circumstances the Building Act 1984 requires the local authority to serve a notice on the owner or occupier requiring remedial works to be carried out {s.59 BA1984}. Failure to comply entitles the local authority to carry out the works in default and to recover its reasonable expenses.. Failure to comply is a criminal offence {s.99 BA1984}. An appeal lies to the magistrates' court against the requirements of a notice {ss.102 and 103 BA1984}.

The provision which is made allowing a local authority to serve a notice requiring remedial works to be carried out is intended to deal with existing buildings, whereas the Building Regulations control the drainage arrangements for *new* buildings. It should also be noted that there may be some overlap between these powers and provisions under Part III of the Environmental Protection Act 1990, which is concerned with statutory nuisances {s.79 EPA1990, see 9.5 below}.

2.8 REPAIR OF DRAINS

Under the Public Health Act 1961 {s.17 PHA1961, as amended} a local authority is empowered, after giving at least 7 days' notice, to cause a drain, private sewer, water closet, waste pipe or soil pipe which it considers to be insufficiently maintained and not kept in good order and which can be sufficiently repaired at a cost not exceeding £250, to be repaired. The expenses reasonably incurred, in so far as they do not exceed £250, may be recovered. The local authority will also be empowered to require stopped up drains, etc., to be remedied and to carry out remedial works itself, at the expense of the person upon whom the notice was served, if the notice is not complied with.

2.8.1 Use and ventilation of soil pipes

Certain explicit prohibitions upon the use of sewers, drains and other pipes are provided for under the Building Act 1984. In particular the 1984 Act prohibits the following: (a) The use of a pipe for conveying rain-water from a roof for the purpose of conveying the soil or drainage from a sanitary convenience; (b) improper ventilation of a soil pipe from a water-closet; and (c) the use of a pipe for conveying surface water as a ventilating shaft to a drain or sewer conveying foul water {s.60 BA1984}. In the event of breach, the local authority may require the owner or occupier to execute remedial works and may carry out the works itself, at the expense of the owner or occupier, if the notice is not complied with. Failure to comply is an offence.

2.8.2 Repairs to underground drains

The Building Act 1984 provides that no person may, except in case of emergency, repair, reconstruct or alter the course of an underground drain which communicates with a sewer, whether public or private, or with a cesspool or other receptacle for drainage, without giving to the local authority at least 24 hours' notice of his intention to do so. If the works have been executed in an emergency, 24 hours' notice must be given of his intention to cover over the drain or sewer. The authority's proper officers are to have free access to the works. Failure to comply with these requirements is an offence {s.61 BA1984}.

2.8.3 Power to alter drainage system

Where any premises have a drain or sewer communicating with a public sewer or a cesspool and the system of drainage, though sufficient for the effectual drainage of the premises, is not

adapted to the general sewerage system of the area or is otherwise objectionable, a sewerage undertaker may at its expense close the existing drain or sewer and fill up the cesspool and do any work necessary for that purpose {s.113(1) WIA1991}. In order to be able to exercise this power, the sewerage undertaker must first provide, in a position equally convenient to the owner of the premises, a drain or sewer which is equally effectual for the drainage of the premises and which communicates with a public sewer. 'Cesspool' is defined to include a settlement tank or other tank for the reception or disposal of foul matter from buildings {s.113(7) WIA1991}.

2.8.4 Overflowing cesspools

The same definition of 'cesspool' also applies in relation to powers under the Public Health Act 1936 {s.50 PHA1936}, which enables a local authority to require a person by whose act default or sufferance soakage or overflow results from a cesspool to execute such works or to take such steps as may be necessary for preventing the soakage or overflow. The local authority is empowered to carry out works in default at the expense of the person served with a notice. Failure to comply with the notice is also a criminal offence {s.290 PHA1936}. It seems arguable that, because the definition in each case {that is, s.113 WIA1991 and s.50 PHA1936}, is not stated to be exhaustive, cesspool could include other drainage facilities such as a dry pond. However, it is perhaps more likely that the definition is not intended to cover receptacles other than those which receive foul matter.

3 The provision of sewerage services

3.1 INTRODUCTION

The current statute law on sewers and drainage of buildings originated in the Public Health Acts 1936 and 1937, under which the local authority was the body responsible for discharging the appropriate functions. The Water Act 1973 transferred the sewerage functions to publicly owned water authorities and the functions relating to drainage of buildings to local authorities, that is, district councils and London borough councils. In practice, however, local authorities often continued to act as agents for the water authorities in relation to sewerage services. {Local authority functions were largely consolidated by the Building Act 1984, and these were examined at 2.1 above.}

The Water Act 1989 fundamentally transformed the water and sewerage industry in England and Wales. This Act replaced public sector water authorities by public limited companies with water supply and sewerage functions. The agency arrangements noted above were continued under the Water Act 1989. The regulatory functions of the public sector water authorities passed to the National Rivers Authority, a newly established public body {see 7.1.2 below on the National Rivers Authority}. The statute law relating to sewerage functions was consolidated as part of a general consolidation of water law statutes, and the relevant law is now to be found in the Water Industry Act 1991, which came into force on 1 December 1991 {see 5.1.2 below on the water consolidation legislation}.

The regulatory framework for the provision of sewerage services is invested in the Secretary of State for the Environment and the Secretary of State for Wales and the Director General of Water Services appointed by the Secretary of State {ss.1 to 5 WIA1991}. The two primary duties of the Secretary of State and the Director are to secure that the functions of water and sewerage undertakers are properly carried out throughout England and Wales and that such undertakers are able to finance the proper carrying out of their functions.

3.2 GENERAL FUNCTIONS OF SEWERAGE UNDERTAKERS

Part IV of the Water Industry Act 1991 {ss.94 to 141 WIA1991} deals first of all with the general functions of sewerage undertakers and prescribes the dual duty of every sewerage undertaker. First, it is obliged to provide, improve and extend such a system of public sewers and so to cleanse and maintain them as to ensure that its area is and continues to be effectively drained. Secondly, it must make provision for the emptying of those sewers and for effectually dealing with the contents, by means of sewage disposal works or otherwise.

As before, the sewerage undertaker may enter into agency agreements with local authorities for its sewerage functions, with the exception of its functions relating to sewage disposal and the discharge of trade effluent into sewers, to be carried out on its behalf {s.97 WIA1991}. The arrangements may contain any provisions agreed between the parties {s.97(2) WIA1991}. Existing arrangements in force between a relevant authority and a water authority before 1 September 1989 will continue in force {Sch.26 para.15 WIA1989}. These arrangements can be varied only by agreement between the sewerage undertaker and the relevant authority, and can be brought to an end only by one party giving reasonable notice to the other.

The duty of the undertaker may be enforced by the Secretary of State or, with the consent of or in accordance with a general authorisation given by the Secretary of State, the Director {s.94(3) WIA1991}. Any agency arrangements which may exist with a local authority do not affect any remedy against a sewerage undertaker for failure to comply with its sewerage

functions {s.97(2) WIA1991}. The enforcement regime is set out in ss.18 to 22 of the Water Industry Act 1991 and will be considered in the context of the liability of the sewerage undertaker.

3.3 PROVISION OF SEWERAGE SERVICES

In addition to the imposition of the general duty on sewerage undertakers, the provision of sewerage services is provided for within Part IV of the Water Industry Act 1991 {ss.98 to 117 WIA1991}. The general effect of these provisions will be examined before considering their particular applicability to infiltration systems of drainage.

3.3.1 Requisition of a public sewer

Sewerage undertakers are under a duty to provide a public sewer {defined at 3.6 below} to drain premises in a particular locality for domestic purposes where a requisition is made by specified persons {detailed under s.98(2) WIA1991}. These persons include owners or occupiers of premises in the locality, and a local authority within whose area the locality is situated. The premises must be those on which there are or will be buildings {s.98(1)(b) WIA1991}, and specified financial conditions must be satisfied {under s.99 WIA1991}. This section enables developers to be sure that a particular locality will be provided with a public sewer, even though this may be in advance of the performance of its general duty {under s.94 WIA1991}. In fulfilling its duty, the undertaker will exercise various powers conferred by the Water Industry Act 1991, particularly the power to lay pipes in public or private streets or in other land {ss.158 and 159 WIA1991}.

3.3.2 Adoption of sewers by vesting declaration

A sewerage undertaker may, either of its own volition or in response to an application from the owner, make a declaration vesting a sewer or part of a sewer, or any sewage disposal works, in itself. In deciding whether a declaration ought to be made, the undertaker must have regard to all the circumstances of the case, but five considerations are listed as particularly pertinent. These are: whether the sewer is adapted to any general system provided or to be provided; whether the sewer is constructed under a highway; the number of buildings to be served or likely to be served if additional buildings are planned; the method of construction and state of repair of the sewer; and whether the declaration would be seriously detrimental to an owner who objects {s.102(5) WIA1991}.

Any person who immediately before the making of a declaration was entitled to use the sewer will be entitled to use it to the same extent as if the declaration had not been made {s.102(6) WIA1991}. Separate provision is made for the adoption of cross border sewers {s.105 WIA1991}.

3.3.3 Agreements to adopt sewers and drains

A person constructing or proposing to construct a sewer or sewage disposal works may apply to a sewerage undertaker, requesting it to declare the sewer to be vested in it if it is constructed in accordance with an agreement between the undertaker and the developer {s.104 WIA1991}. An agreement of this kind will provide that, upon completion of the work or at some specified date or on the happening of some future event, the undertaker will make such a vesting declaration {see Water Authorities Association, *Sewers for Adoption – a Design and Construction Guide for Developers* (1989, as updated) which contains a model form of agreement relating to sewer adoption}. Provision for agreement as to adoption also applies to drains {defined at 3.6 below}, but no declaration can be made until the drain becomes a sewer. Any vesting agreement made under these provisions is enforceable against the undertaker by the owner or occupier for the time being of the premises served by the sewer {s.104(5) WIA1991}.

3.4 APPEALS WITH RESPECT TO ADOPTION

If an owner of any sewer or sewage disposal works is aggrieved by the proposal of a sewerage undertaker to make, or its refusal to make, a vesting declaration {under s.102 WIA1991}, he may appeal to the Secretary of State. In addition, an appeal lies to the Secretary of State from a developer, where an undertaker has refused an application requesting the making of an adoption agreement, or has offered to enter into such an agreement on objectionable terms, or has failed to deal with the application within the statutory time limit. On hearing the appeal, the Secretary of State has wide powers to allow or disallow it on such terms as he considers reasonable or appropriate {s.105 WIA1991}.

3.5 COMMUNICATION OF DRAINS AND PRIVATE SEWERS WITH PUBLIC SEWERS

The owner or occupier of premises or the owner of any private sewer draining premises is generally entitled to have his drains or sewer communicate with the public sewers of an undertaker and thereby to discharge foul water and surface water from the private sewer or premises {s.106 WIA1991}. There are restrictions on the right, for example, discharge from a factory is limited to domestic sewage, surface and storm water. However, occupiers of 'trade premises' {as defined in s.141 WIA1991} may, with the sewerage undertaker's consent, discharge trade effluent into the public sewerage system by means of a drain or sewer. A discharge made without consent is an offence {s.118 WIA1991}.

Notice of the proposed works has to be given to the undertaker so that it has the opportunity of electing to carry out the works itself {s.107(1)(a) WIA1991}. The undertaker may refuse to permit the connection to be made if it considers that the mode of construction or condition of the drain or sewer is such that the making of the communication would be prejudicial to the undertaker's sewerage system {s.106(4) WIA1991}. If works proceed, the undertaker may require the works to be opened up {s.106(5) WIA1991}. The owner or occupier may appeal against the undertaker's decisions to a magistrates' court {s.106(4) WIA1991}.

Where a connection is to be made through land belonging to a third party, neither the owner of the sewer nor the undertaker may carry out any works until that third party's consent has been obtained {*Wood v. Ealing Tenants* [1907] 2 KB 390}.

3.6 THE MEANING OF 'SEWER' AND 'DRAIN'

It will be apparent from the above that the definition of 'sewer' and 'drain' is of crucial importance in relation to adoption considerations. Practical difficulties may be encountered in this respect in relation to infiltration facilities. For example, can it be established that a line of pipes discharging to a soakaway is a 'sewer', so that it is capable of adoption under sections 102 or 104 of the Water Industry Act 1991 ?

As a matter of common law it may be noted that the terms 'sewers' and 'drains' have no precise technical meaning apart from channels by which surface water and foul water and matter are conveyed away from land and buildings by gravity. However, the terms are explicitly defined in s.219(1) of the Water Industry Act 1991 as follows.

'Drain' is defined as meaning 'a drain used for the drainage of one building or of any buildings or yards appurtenant to buildings within the same curtilage'.

'Sewer' is defined as meaning 'all sewers and drains (not being drains within the meaning given by this subsection) which are used for the drainage of buildings and yards appurtenant to buildings'.

Both of these definitions are made subject to the proviso that references to a pipe, sewer or drain are to include references to a tunnel or conduit and any accessories for the pipe, sewer or drain {s.219(2)(a) WIA1991}. References to any 'sewage disposal works' are to include references to the machinery and equipment of those works and any necessary pumping stations and outfall pipes {s.219(2)(b) WIA 1991}. It seems unlikely that an infiltration system could be classified as a small sewage works because the definition suggests the disposal of sewage by mechanical means rather than simply by natural means of infiltration.

'Public sewers' are those sewers vested in the sewerage undertaker in its capacity as such either under the Water Industry Act 1991 (under s.179 WIA1991) or any other statute. The term 'private sewers' is to be construed accordingly (s.219(1) WIA1991).

The separate statutory definition of 'highway drains' will be considered later in the context of the drainage of highways {see 4.2 below}.

3.6.1 Meader v. West Cowes Local Board

A leading decision on the statutory meaning of the term 'sewer' is the Court of Appeal ruling in *Meader v West Cowes Local Board* {[1892] 3 Ch 18}. In interpreting the word 'sewer' in the context of the Public Health Act 1875, the court stated that a pipe which terminates in a pit or cesspit and does not carry the effluent away is not a sewer even though it drains more than one building {also see *Clark v. Epsom RDC* [1929] 1 Ch 287}. Similarly, in *Pakenham v. Ticehurst RDC* {(1903) 67 JP 448} it was held that pipes which conveyed sewage to an open ditch from which there was no outflow could not constitute a sewer. It was stated that the sewer 'must be in some form a line of flow by which sewage or water of some kind, such as would be conveyed by a sewer, should be taken from a starting point to a finishing point and then discharged. It must have a *terminus a quo* and a *terminus ad quem*'.

The *Meader* case, and those which followed it, are of crucial significance in relation to the legal status of infiltration systems. Specifically, this is because, if the definition of sewer propounded is of universal application, it will prevent an infiltration facility, lacking a 'proper outfall' from being treated as a sewer. The main legal result of this will be that the sections of the Water Industry Act 1991 dealing with adoption of sewers, examined above, will be inapplicable to facilities of this kind. Because of this important consequence the reasoning in the case justifies fairly detailed consideration.

In the actual circumstances which gave rise to the *Meader* decision there was an elaborate system of pipes which ran into a cesspool and communicated with the foreshore of a tidal river. No licence to drain through the foreshore had been obtained. When the owner of the foreshore built upon it and stopped the drain, as it was admitted he was entitled to do, the cesspool overflowed and caused a serious nuisance, which the local board required Meader to abate. Meader brought this action, to restrain the local board from permitting the nuisance to continue, alleging that the pipes were a 'sewer' and the cesspool a 'thing belonging thereto' within the meaning of the Public Health Act 1875 and was therefore vested in the local board, so that the local board was itself bound to keep it in order. The Court of Appeal held that the continuation through the foreshore, which Meader had no right to make, had to be left out of account. This left only a set of pipes terminating in a pit on Meader's own ground. As these pipes did not carry the sewage away, they could not be considered a sewer. A number of observations arise from this reasoning.

First of all, it can be noted that the case concerned an unmeritorious plaintiff who was seeking to turn the tables against the local board and to make it answerable for a series of wrongs that he had committed, and which really gave the board a claim *against him*. The court was clearly concerned to try to avoid construing a statute in such a way as to produce such mischievous and undesirable results.

Second, the case concerned a cesspit and not a soakaway, and the judge at first instance made it very clear that he was not deciding any general questions about what is or is not part of the sewer in the abstract, but what was or was not part of the particular so-called sewer in the case

before him. His judgment was upheld by the Court of Appeal and, therefore, it may be argued that the case should not be used as an authority in support of a general proposition that a soakaway is incapable of amounting to a sewer because it lacks a proper outfall.

Third, it was stated by one of the judges in the Court of Appeal that he did not think that anything which did not drain could properly be called a drain, or that anything which did not carry away sewage could properly be called a sewer {per Lopes LJ}. On this basis, there is an argument that there should be no objection to describing a soakaway as a 'drain' because water does in fact drain from it by infiltration. Indeed, in *Attorney-General v. Peacock* {[1926] 1 Ch. 241} it was held that a line of pipes which eventually terminated in a 'subsoil irrigation scheme' was nonetheless a sewer vested in the local authority.

Fourth, in *Pinnock v. Waterworth* {(1887) 51 JP 248}, it was held that a line of pipes terminating at a cesspool was a sewer within the meaning of the Public Health Act 1875. The case was principally concerned with another issue but according to the summary of counsel's argument in *Meader*, the point as to whether a proper outfall was essential was fully considered.

Fifth, the definitions given to 'drain' and 'sewer' in what is now s.219(1) of the Water Industry Act 1991 are very wide and ought, therefore, to be given the widest possible construction. This point was explicitly made in *Acton Local Board v. Batten* {(1885) 28 Ch.D 283 per Kay J} in relation to the Public Health Act 1875.

Sixth, reference can be made to the case of *Attorney General v. Copeland* {[1902] 1 KB 690, concerning s.67 of the Highway Act 1835}. The highway authority had, for a time beyond living memory, maintained a pipe, through which water which had collected on the highway was discharged on to the defendant's land. There was no defined channel on the defendant's land into which the discharged water could flow. The Court of Appeal held that the fact that the pipe was not connected to a defined channel did not prevent its being a 'drain' for statutory purposes and that, in view of the length of time during which the drain had been used, a legal origin for the right claimed ought to be presumed.

Another case involving highways was *Croft v. Rickmansworth Highway Board* {(1888) 39 Ch.D 272}, which turned upon the question whether a dumb-well, that is, a well into which surface water and foul water flowed through pipes and then percolated naturally into the soil, was a drain or watercourse within the meaning of s.67 of the Highways Act 1835. The owner of the land in which the dumb well was situated had stopped up the pipes and the highway board had cleared them out. The legal action was brought to restrain them from so doing. The highway board would only have had statutory authority to clean out the dumb well and the pipes connected with it if it were a drain or watercourse. The Court of Appeal held that it was not. A drain or watercourse was apt to describe the sort of conveyance whereby the course of water was directed, but not where water worked its own way through porous chalk. It was similarly held in *Croysdale v. Sunbury-on-Thames UDC* {[1898] 2 Ch 515} that a disused gravel pit or stagnant pond was not a drain within s.67 of the 1835 Act.

By contrast to the early decisions relating to highway drainage, s.100(9) of the Highways Act 1980 extends the definition of drain given in the Highways Act 1837 and provides that drain is to include a 'ditch, gutter, watercourse, *soak-away*, bridge, culvert, tunnel and pipe'. It would be curious that, if a soakaway is legally capable of constituting a drain for the purposes of the Highways Act 1980, it should not also be similarly regarded for the purposes of the Water Industry Act 1991, even though the definition in the latter statute does not refer expressly to soakaways.

To summarise the preceding observations, there may, therefore, be reasons to doubt that the *Meader* decision, and the cases following it, are binding authorities for the proposition that a soakaway is legally incapable of being a sewer or drain, though this view may be commonly followed in practice. However, despite practical adherence to the view that infiltration systems are legally incapable of adoption, the legal foundation for this view appears rather tenuous on close scrutiny. Possibly, therefore, in the event of a sewerage undertaker refusing to adopt a line

of pipes draining into a soakaway *merely* on the basis that a soakaway is not within the statutory definition of drain or sewer, the developer may have grounds for appealing against that decision. It has already been noted {see 3.3.2 above} that adoption could be resisted on the basis of any of the statutory considerations {set out in s.102(5) WIA1991}, but these matters should be considered separately from the overriding issue of principle as to the legal possibility of adoption of infiltration systems. This fundamental issue would appear to be in urgent need of clarification.

3.7 PROVISIONS PROTECTING SEWERAGE SYSTEM

Whether or not an infiltration facility is capable of amounting to a sewer, a number of key provisions concerning the construction and use of sewers are usefully noted.

3.7.1 Restrictions on use of public sewers

It is prohibited to discharge into a public sewer, or any drain or sewer connecting thereto, any matter likely to injure the drain or sewer or interfere with the free flow of its contents. A person who contravenes the prohibition is guilty of a criminal offence {s.111 WIA1991}. This offence is not normally likely to be important in the case of stormwater run off, but it is so formulated that it is made unlawful 'to suffer or permit to be thrown or emptied or to pass' any matter likely to have the stated consequences. This phrasing widens the scope of the provision and may make it relevant, for example, where the system consists of an infiltration facility which is subjected to abnormal rainfall allowing detritus to obstruct the operation of the system.

3.7.2 Construction requirements for a drain or sewer

Sewerage undertakers are empowered to require a person, such as a developer, who proposes to construct a drain or sewer, to construct it in accordance with the specifications of the undertaker {s.112(1) WIA1991}. This situation will arise where the sewerage undertaker considers that the proposed sewer or drain is, or is likely to be, needed to form part of a general sewerage system which that undertaker provides or proposes to provide {See its general duty imposed by s.94 referred to at 3.2 above}. Failure to comply with the undertaker's requirement will be a breach of duty, entitling the undertaker to bring a civil action against the developer for any loss or damage caused by the breach. The undertaker must repay to the developer the extra expenses incurred by the developer in complying with the undertaker's requirements, both in terms of original construction costs and maintenance costs until adoption.

Any person upon whom requirements are imposed and who is aggrieved by the requirements may appeal to the Secretary of State who may either disallow the requirements or allow them with or without modification {s.112(3) WIA1991}. Thus, for example, a developer seeking to provide an infiltration facility would be able to appeal to the Secretary of State if the sewerage undertaker were to insist that a traditional drainage system, as opposed to an infiltration system, be constructed.

3.7.3 Power to alter drainage systems and to close or restrict use of public sewers

A sewerage undertaker is empowered to alter the drainage system of premises connected to a public sewer where the existing arrangements do not conform to the undertaker's general sewerage system or are otherwise objectionable {s.113 WIA1991}. The costs would be borne entirely by the sewerage undertaker, which must provide an effective alternative drainage system, which connects with the public sewerage system. A person aggrieved by the proposed substitute drainage system has a right of appeal to a magistrates' court, for example, if an infiltration system were proposed as a replacement.

A sewerage undertaker may discontinue and prohibit the use of any public sewer vested in it. Discontinuance or prohibition may be for all purposes, for the purpose of foul water drainage or for the purpose of surface water drainage. The undertaker is obliged to provide an alternative sewer which is equally effective before any person lawfully using a sewer is deprived of his use of the sewer, and the undertaker must at its own expense carry out any work necessary to make such person's drains or sewers communicate with the sewer provided {s.115 WIA1991}.

3.7.4 Miscellaneous powers of sewerage undertaker

A wide power is conferred upon a sewerage undertaker to carry out tests to determine whether any drain or private sewer connecting with a public sewer is defective {s.114 WIA1991}. Compare the powers of a local authority in relation to sanitary conveniences, drains, private sewers or cesspools under s.48 PHA1936, as amended.}. Similarly, powers are conferred upon undertakers to lay, maintain, inspect, adjust or alter their pipes in under or over a street or elsewhere, together with ancillary powers and a power of entry for such purposes {ss.158, 159 and 171 WIA1991}. However, the undertaker is under a duty to minimise damage and to pay compensation in certain circumstances {s.180 and Schedule 12 WIA1991}. An undertaker authorised by the Secretary of State is able to purchase compulsorily land required for the performance of its functions {s.155 WIA1991}.

4 The drainage of highways

4.1 METHODS OF CREATING HIGHWAYS

A 'highway' may be defined as a way over which the public has a right to pass freely, without hindrance at all times of the year. Highways can be created by highway authorities using statutory provisions contained mainly in the Highways Act 1980. In addition, a highway may be created at common law by the owner of the land dedicating the right of passage to the public and public acceptance of that right. Long use by the public may justify an inference of dedication.

The highway authority in relation to trunk roads is the Minister of Transport or the Secretary of State for Wales. The highway authority in respect of most roads other than trunk roads is the county or metropolitan district council or the London borough council or the Common Council of the City of London.

A local highway authority may construct new highways {s.24(2) HA1980}. Alternatively, a private carriage or occupation road may be dedicated by the owner and become a highway maintainable at the public expense by an agreement with a highway authority on such terms as may be agreed {s.38(3)(A) HA1980}. In addition, an owner of land may agree with a highway authority to dedicate as a highway, to be maintainable at the public expense, a way to be constructed by him on such terms as may be agreed. Such an agreement will usually be supported by a bond as a guarantee for the due performance of the terms of the agreement. Such an agreement will provide, inter alia, that the way shall be properly sewered, levelled, paved, metalled, flagged, channelled, drained and joined with the existing road to which it abuts and generally made good in accordance with agreed specifications.

A street which is not a highway may become a highway and be maintainable at the public expense {as provided for under ss. 228 and 229 HA1980}. For example, when street works have been executed in a private street, the street works authority {as defined in s.203(3) HA1980} may by notice displayed in a prominent position in the street declare the street to be a highway maintainable at the public expense. Street works means any 'works for the sewerage, levelling, paving, metalling, flagging, channelling and making good of a street' {s.203(3) HA1980}. Another way in which a street may become a highway is where, all street works having been executed to the satisfaction of the street works authority, the majority of the owners, by rateable value, of the premises apply to the authority {s.228(7) HA1980}. A majority of frontagers is also empowered to require adoption in specified circumstances {set out in s.229 HA1980}. It can be seen that the street works authority may refuse to declare a street to be a highway on the basis that it is not satisfied with the system of drainage employed.

4.2 DUTIES OF HIGHWAY AUTHORITIES

The highway authority is under a duty to maintain the highway {s.41 HA1980}. What constitutes or forms part of the highway for the purpose of repair is a question of fact, but it must surely extend to drains which are part of the highway. For the purpose of draining a highway, or of otherwise preventing surface water from flowing onto it, the highway authority may conduct certain operations. These allow it to (1) construct or lay in the highway, or in land adjoining or lying near it, such drains as it considers necessary; (2) erect barriers in the highway or in such land to divert surface water into or through any existing drain; and (3) scour cleanse and keep open all drains situated in the highway or in such land {s.100(1) HA1980}. The water so drained and diverted may then be discharged into any inland waters or tidal waters, but the consent of the National Rivers Authority or other drainage body within the meaning of the Land

Drainage Act 1991 will be required where the exercise of the powers interferes with a watercourse vested in such an authority {s.339 HA1980}. Moreover, the powers to undertake these operations are without prejudice to any enactment the purpose of which is to protect water against pollution {s.100(8) HA1980, and see 5.4.2 below on water pollution}. The highway authority must pay compensation to the owner or occupier of any land who suffers damage by reason of the exercise by the authority of any of these powers {s.100(3) HA1980}.

As previously noted {see 3.6 above}, the definition of 'drain' provided for under the Highways Act 1980 includes a 'ditch, gutter, watercourse, *soak-away*, bridge, culvert, tunnel and pipe' {s.100(9) HA1980}. As a consequence of the explicit mention of soakaways in this context, it follows that, provided that the infiltration system of drainage has been properly constructed, a highway authority could not refuse to declare a street to be a highway simply on the basis that soakaways have been used for the drainage of surface water.

4.3 USE OF HIGHWAY DRAINS AS SEWERS AND VICE VERSA

The Water Industry Act 1991 enables highway authorities and sewerage undertakers to enter into reciprocal agreements whereby a highway authority may use any public sewer vested in the sewerage undertaker for the conveyance of surface water from roads repairable by them and a sewerage undertaker may use any drain or sewer vested in the highway authority for the purpose of conveying surface water from premises or streets {s.115 WIA1991}. Neither an authority nor a sewerage undertaker may unreasonably refuse to enter into an agreement, and neither the authority nor the undertaker may insist unreasonably upon terms unacceptable to the other party. The issue of reasonableness is to be determined by the Secretary of State.

4.4 RIGHTS AND DUTIES OF LANDOWNERS

A private individual has no right to connect his drains or sewers to a highway drain and is liable for any nuisance arising as a result of an unauthorised connection {*Wincanton RDC v. Parsons* [1905] 2 KB 34}. Moreover, it is an offence to alter, obstruct or interfere with a drain which has been constructed or laid by a highway authority without the authority's consent, and the authority may also recover from such a person its expenses of repair or reinstatement necessitated by his action {s.100(4) HA1980}. In addition, the owner or occupier of land adjoining the highway has a common law duty to cleanse and scour any ditches on his land so as not to permit them to cause a nuisance on the highway {*Attorney General v. Waring* (1899) 63 JP 789}, but is not obliged to provide or keep ditches or other means of draining the road.

5 Water quality legislation

5.1 INTRODUCTION: PRINCIPAL WATER LEGISLATION

5.1.1 The Water Act 1989

Since 1 September 1989 regulatory responsibility for the aquatic environment in England and Wales has been primarily entrusted to the National Rivers Authority. The Authority came into existence under the Water Act 1989. This Act transformed the former system of 'integrated management of the water cycle', which had been provided for under the Water Act 1973, and replaced it by a clear administrative division between bodies charged with utility and regulatory functions. Thus the privatised Water Services Companies, termed 'water and sewerage undertakers' under the 1989 Act, acquired responsibility for matters relating to water supply and sewage treatment, whilst the National Rivers Authority was invested with a range of powers and duties concerning the regulation of the aquatic environment.

5.1.2 The consolidation legislation

Following the *Law Commission Report on the Consolidation of the Legislation Relating to Water* (Cm.1483, April 1991), the law was reenacted as *The Water Consolidation Legislation 1991*, consisting of the following statutes.

- The Water Industry Act 1991
- The Water Resources Act 1991
- The Statutory Water Companies Act 1991
- The Land Drainage Act 1991
- The Water Consolidation (Consequential Provisions) Act 1991

For the most part, the powers and duties of the National Rivers Authority are contained in the Water Resources Act 1991, and the organisation of the Water Services Companies in the Water Industry Act 1991. Although these constitute the most important enactments relating specifically to water, in relation to infiltration systems, it may also be necessary to make reference to the other Acts and particularly the Land Drainage Act 1991. All the consolidating Acts came into effect on 1 December 1991.

5.2 THE LEGAL STATUS OF THE NATIONAL RIVERS AUTHORITY

5.2.1 The principal functions

Following on from provisions under the 1989 Act, the Water Resources Act 1991 commences with the statement that there shall continue to be a body corporate known as the National Rivers Authority for the purpose of carrying out the functions specified in s.2 of the Water Resources Act 1991. Section 2 specifies the 'principal functions' of the Authority as follows.

- (a) its functions with respect to water resources by virtue of Part II of the Water Resources Act 1991;
- (b) its functions with respect to water pollution by virtue of Part III;
- (c) its functions with respect to flood defence and land drainage by virtue of Part IV and other enactments;
- (d) its functions with respect to fisheries by virtue of Part V and other enactments;

- (e) the functions as a navigation authority, harbour authority or conservancy authority which were transferred to the Authority by virtue of Chapter V of Part III of the Water Act 1989 and other enactments;
- (f) the functions assigned to the Authority by any other enactment {s.2(1) WRA1991}.

5.2.2 Environmental obligations

Before describing the principal functions of the Authority, it is to be noted that the general manner in which these functions are to be exercised is subject to certain overriding environmental obligations. Specifically, it is stated to be the duty of the Authority, to such an extent as it considers desirable, generally to promote the conservation and enhancement of the natural beauty and amenity of inland and coastal waters and of land associated with such waters; and the conservation of flora and fauna which are dependent on an aquatic environment {s.2(2) WRA1991}.

In broader terms the environmental obligations upon the Authority are characterised as the 'General Environmental Duty' of the Authority which requires the Authority in formulating or considering any proposals relating to any of its functions:

- (a) so far as is consistent with the purposes of any enactment relating to its functions so to exercise any power as to further the conservation and enhancement of natural beauty and the conservation of flora, fauna and geological or physiographical features of special interest;
- (b) to have regard to the desirability of protecting and conserving buildings, sites and objects of archaeological, architectural or historic interest; and
- (c) to take into account any effect which the proposals would have on the beauty or amenity of any rural or urban area or on any flora, fauna, features, buildings, sites or objects {s.16(1) WRA1991}.

The same threefold General Environmental Duty is imposed upon the Secretary of State, the Minister of Agriculture, Fisheries and Food. A similar duty is imposed on water and sewerage undertakers {see s.3 WIA1991, see also the general duty of the Authority with respect to the water industry under s.15 WRA1991 discussed at 7.1.2 below}.

Some detail as to the manner in which the General Environmental Duty will be exercised in particular contexts is provided for by the power of the Secretary of State and the Minister of Agriculture, Fisheries and Food to approve codes of practice on the Duty {s.18 WRA1991}. This power has been exercised through the enactment of the Water and Sewerage (Conservation and Recreation) (Code of Practice) Order 1989 {SI 1989 No.1152} approving the *Code of Practice on Conservation, Access and Recreation* {published in July 1990}.

5.3 WATER POLLUTION UNDER THE WATER RESOURCES ACT 1991

5.3.1 Controlled waters

A central concern in respect of the operation of infiltration systems is the capacity that such systems may possess to bring about pollution of groundwater. The legal implications of this relate to the scope of the criminal offences concerning water pollution.

The key provisions of criminal law on water pollution are grouped together under Part III of the Water Resources Act 1991, headed 'Control of Pollution of Water Resources' {ss.82 to 104 WRA1991}, and particularly Chapter II, headed 'Pollution Offences' {ss.85 to 91 WRA1991}. An initial point to note about these provisions concerns the kinds of waters to which they apply. Essentially, the main provisions concerned with water pollution apply in relation to 'controlled waters'. Controlled waters fall into four subcategories: 'relevant territorial waters', 'coastal

waters', 'inland freshwaters' and 'groundwaters' {s.104 WRA1991}. In relation to infiltration systems only the last two of these are likely to be of any relevance.

'Inland freshwaters' means the waters of any relevant lake or pond or of so much of any relevant river or watercourse as is above the fresh-water limit {s.104(1)(c) WRA1991}.

'Lake or pond' is stated to include a reservoir of any description {s.104(3) WRA1991}.

'Relevant lake or pond' means any lake or pond which, whether it is natural or artificial or above or below ground, discharges into a relevant river or watercourse or into another lake or pond which is itself a relevant lake or pond {s.104(3) WRA1991}.

'Watercourse' includes all rivers, streams, ditches, drains, cuts, culverts, dykes, sluices, sewers and passages through which water flows except mains and other pipes which belong to the Authority or a water undertaker or are used by a water undertaker or any other person for the purpose only of providing a supply of water to any premises {s.221(1) WRA1991}.

'Drain' is stated to have the same meaning as in the Water Industry Act 1991. That Act defines the expression to mean a drain used for the drainage of one building or of any buildings or yards appurtenant to buildings within the same curtilage {s.219(1) WRA1991}.

'Relevant river or watercourse' means any river or watercourse, including an underground river and an artificial river or watercourse, which is neither a public sewer nor a sewer or drain which drains into a public sewer {s.104(3) WRA1991}.

'Fresh-water limit', in relation to any river or watercourse, means the place for the time being shown as the fresh-water limit of that river or watercourse in the latest map deposited by the Secretary of State with the Authority for that purpose {ss.104(3) and 192 WRA1991}.

'Ground waters' are defined as any waters which are contained in underground strata {s.104(1)(d) WRA1991}.

'Underground strata' means strata subjacent to the surface of any land {s.221(1) WRA1991}.

In respect of infiltration systems, it is clear that such systems which discharge to groundwaters would be discharging to 'controlled waters' within the water pollution provisions of the Water Resources Act 1991.

5.3.2 The principal offences of polluting controlled waters

Given the inclusion of groundwater within the definition of 'controlled waters' under the Water Resources Act 1991, a key matter concerns the circumstances under which the pollution of groundwater by the operation of an infiltration system will constitute a criminal offence. The principal offences concerning pollution of controlled waters arise under s.85 of the Act. Most pertinently in relation to present concerns, s.85 provides for three particular water pollution offences:

'A person contravenes this section if he causes or knowingly permits any poisonous, noxious or polluting matter or any solid waste matter to enter any controlled waters' {s.85(1) WRA1991}.

'A person contravenes this section if he causes or knowingly permits any matter, other than trade effluent or sewage effluent, to enter controlled waters by being discharged from a drain or sewer in contravention of a prohibition imposed under s.86' {s.85(2) WRA1991}.

'A person contravenes this section if he causes or knowingly permits any trade effluent or sewage effluent to be discharged . . . into any controlled waters' {s.85(3) WRA1991}.

Several significant aspects of these two offences justify comment. First, in relation to the first offence, under s.85(1), it may be noted that the matter concerned is stated to be 'poisonous, noxious or polluting'. These terms are not defined under the Act but the polluting character of the substance for these purposes would take account of the effects which it has upon the aquatic environment (*National Rivers Authority v. Egger UK Ltd.*, Unreported, Newcastle upon Tyne Crown Court, 17 July 1992), so that food substances such as milk and fruit juice have recently been found by magistrates to be within the meaning of the expression despite the apparent oddity of describing potable commodities in this way.

Second, again in relation to the first offence, the additional wording 'or any solid waste matter' indicates that the matter involved here need not be 'poisonous, noxious or polluting'. It would seem to follow that the entry of inert solid sediment into a watercourse or groundwater, such as solid matter washed off land, would fall within the offence despite the fact that no immediate pollution of the receiving waters takes place.

Third, in relation to the second offence, under s.85(2), it is to be noted that this offence applies in relation to 'any matter, *other than* trade effluent or sewage effluent' since these types of effluent are separately provided for (see s.85(3)). As the definitions of these kinds of effluent specifically exclude surface water, including water from roofs, (s.221(1) WRA1991) the offence can be committed, where a prohibition is imposed, despite the fact that the matter concerned is surface water.

Fourth, the second offence is committed in relation to matter entering controlled waters by being discharged from a drain or sewer 'in contravention of a prohibition'. This relates to the possibility of prohibiting certain discharges by notice or regulations under s.86, whereby the Authority may give a person notice prohibiting him from making or continuing a discharge, or from making or continuing a discharge unless specified conditions are observed (s.86(1) WRA1991). Alternatively, a discharge is in contravention of a prohibition if the matter discharged contains any prescribed substance or a prescribed concentration of such a substance, or derives from a prescribed process or from a process involving the use of prescribed substances or the use of such substances in quantities which exceed prescribed amounts (s.86(2) WRA1991).

5.3.3 'Causes or knowingly permits'

Finally, in relation to all three offences an overriding consideration is the intention of the accused person. Common to the wording of both offences is the requirement that the accused 'causes or knowingly permits' the prohibited acts. The precise meanings of 'cause' and 'knowingly permit' have occupied the attention of the courts on many occasions. It is established that they have distinct meanings and that it is sufficient for the prosecution to establish that *either* the accused caused pollution *or* that he knowingly permitted it for a conviction to succeed. That is, both elements need not be shown.

Summarising an extensive body of caselaw concerned with the extent of the offence as it was provided for under previous legislation, it has been established that causing water pollution is an offence of 'strict liability', or an 'absolute offence'. The leading decision of the House of Lords in *Alphacell Ltd. v Woodward* 1972, ([1972] 2 All ER 475) establishes that 'cause' does not require an intention to pollute waters or negligence on the part of the polluter to be shown.

The fundamental principle of strict liability for water pollution is well illustrated by the case of *Wrothwell Ltd. v Yorkshire Water Authority* ([1984] *Criminal Law Review* 43) where a director of a company deliberately poured 12 gallons of a concentrated herbicide down a drain. It was known that the herbicide was toxic to fish life, but the natural expectation was that the liquid would pass down the drain into the public sewer system. In fact, the company's drain did not connect with the public sewer but to a system of pipes leading to a nearby stream where the discharge caused a substantial fish-kill. The director of the company was charged with causing the entry of the polluting matter, but he maintained that the actual result of his act had been so different from its natural consequence that it could not be said to have been 'caused' by his act. The decision of the court was that, even though the director may not have intended the water pollution incident which took place, it was nonetheless the consequence of his act and, therefore, he was guilty of 'causing' the pollution within the meaning of the section.

The disjunctive formulation of the water pollution offences is such that guilt may be established *either* by showing that the accused caused the entry or discharge *or* that he knowingly permitted it. 'Knowingly permit' in this context means that the accused failed to prevent the entry or discharge of the matter concerned into controlled waters when it was within his power to do so, accompanied by knowledge that the discharge or entry was taking place.

A recent illustration of the interpretation 'knowingly permit' in this context is provided by the decision in *Schulmans Incorporated Ltd. v. National Rivers Authority* (unreported, 3 December 1991, Queen's Bench Division). The facts giving rise to the prosecution concerned a spillage of fuel oil near a tank on the accused's premises which found its way into the drainage system on its land, and from there into a nearby watercourse. At first instance the justices convicted the accused of knowingly permitting poisonous, noxious or polluting matter to enter controlled waters. On appeal, however, the court found that the company should be acquitted because it had not been satisfactorily established that it had knowingly permitted the escape of fuel oil and consequent water pollution. In particular, there was no evidence, that the company could have taken preventative action more swiftly than it did, or that there was an escape of oil which it could have prevented but failed to prevent. Accordingly, they had not been shown to have *permitted* the entry of the oil into the watercourse within the wording of the charge.

5.4 DEFENCES AND AUTHORISED DISCHARGES

The principal water pollution offences are subject to stated defences and exceptions provided under the Water Resources Act 1991 through systems of authorisations including 'discharge consents'. Considering the defences first, two of these may be especially appropriate to pollution arising in connection with infiltration systems. The first concerns emergencies, and the second highway drains.

5.4.1 Emergencies

In respect of emergencies, a person will not be guilty of the main water pollution offences in respect of an entry of any matter into any waters, or any discharge, if three factors are established. First, the entry is caused or permitted, or the discharge is made, in an emergency in order to avoid danger to life or health; second, that person takes reasonably practicable steps for minimising the extent of the entry or discharge and of its polluting effects; and, third, that the particulars of the entry or discharge are furnished to the National Rivers Authority as soon as reasonably practicable after it occurs (s.89(1) WRA1991). It is thought that in circumstances where, for example, a spillage of a hazardous substance occurred and the fire brigade sought to wash it away in order to avoid danger, and this resulted in the substance entering a soakaway causing minimal degree of pollution of groundwater, the fire brigade would not commit any water pollution offence providing that the particulars were furnished to the Authority as soon as reasonably practicable afterwards.

5.4.2 Highway drains

The second defence which might arise in relation to infiltration systems is specifically related to highway drains. Where a highway authority or other person is entitled to keep open a drain, by virtue of s.100 of the Highways Act 1980, that person will not be guilty of the principal water offences by reason of his causing or permitting any discharge to be made from the drain unless the discharge is made in contravention of a prohibition imposed under s.86 (s.89(5) WRA1991). That is, the basic defence available in respect of discharges made from highway drains is subject to the exception relating to prohibition by notice or regulations as previously described. (On highway drains generally see 4 above.)

5.4.3 Discharge consents

For practical purposes the most important exceptions to the water pollution offences arise where a person has an authorisation of a specified kind which legitimates a discharge which would otherwise amount to a water pollution offence. Although various kinds of authorisation may serve this purpose, the most important are 'discharge consents'. It is provided that a person will not be guilty of a principal water pollution offence in respect of the entry of matter into any

waters or any discharge if the entry occurs or the discharge is made under and in accordance with, or as a result of any act or omission under and in accordance with, a consent provided under Chapter II of Part III of the Water Resources Act 1991 {s.88(1)(a) WRA1991}.

The detailed provisions relating to the granting of discharge consents by the National Rivers Authority are grouped together in Schedule 10 to the Act. This requires applications for discharge consents to be accompanied or supplemented by all such information as the Authority may reasonably require. Notice of an application is to be published by the Authority and copies of the application sent to every local authority or water undertaker within whose area the proposed discharge is to occur unless the discharge will have no appreciable effect on the waters into which the discharge is to be made. The Authority is then to consider any written representations or objections to the application made within a specified period. Consents may be granted subject to such conditions as the Authority may think fit and may include conditions such as to the nature, origin, composition, temperature, volume and rate of the discharges and as to the periods during which the discharges may be made.

The Authority are placed under a duty to review consents from time to time, and the outcome of this process may be the revocation of a consent, or the modification of its conditions, or the making of an unconditional consent subject to conditions. Modification of consents can also be made by the Authority as a result of a direction given by the Secretary of State. Where a consent is given by the Authority for a discharge, the instrument signifying the consent is to specify a period during which no notice of revocation or modification will be served in relation to the consent. The period during which the revocation or variation of a consent is precluded, without the consent of the person making the discharge, is to be a period of not less than two years. Although it is legally possible that variation of a consent may be undertaken within the two-year minimum period for review it is likely that this procedure will give rise to a duty upon the Authority to compensate the discharger for any loss or damage sustained as a consequence of the variation of the consent.

5.4.4 Charging schemes

Also of relevance to the discharge consent system are recent provisions allowing for charges to be imposed in relation to discharge consents. Where an application is made to the Authority for a consent under Part III of the Water Resources Act 1991, the Authority gives a Part III consent; or a Part III consent is for the time being in force, the Authority may require the payment to it of such charges as may be specified in or determined under a scheme made by it under s.131 of the Act {s.131(1) WRA1991}.

The Authority may not make a discharge consent charging scheme unless its provisions have been approved by the Secretary of State and the Treasury {ss.131(4) and 132(4) WRA1991}. It is the duty of the Secretary of State, in determining whether or not to approve the scheme or to approve it subject to modifications, to consider any representations or objections duly made to him and not withdrawn, and to have regard to specified matters {s.132(2) WRA1991}. The specified matters are the desirability of ensuring that the amount recovered by the Authority by way of charges does not exceed an amount which is reasonably attributable to its expenses in carrying out its functions in relation to discharges into controlled waters, the need to ensure that no undue preference is shown, and that there is no undue discrimination, in the fixing of charges by or under the scheme {s.132(3) WRA1991}.

In accordance with these powers, a scheme of charges has been devised in relation to discharge consents: the National Rivers Authority *Scheme of Charges in respect of Discharges to Controlled Waters* {1991}. Although standard initial charges are provided for in relation to consent applications and revision of consents, the main practical function of the scheme is to determine annual charges in relation to discharge consents. Annual charges are determined by multiplication of the volume of a discharge, the nature of its contents, the kind of receiving waters and a 'financial factor' fixed each year by the Authority.

5.5 PREVENTATIVE APPROACHES TO WATER QUALITY

5.5.1 Water protection zones

Clearly, prevention of water pollution is environmentally preferable to prosecution after the event, and in recognition of this the Water Resources Act 1991 makes provision for a number of preventative requirements. Of general note in this respect are powers to impose precautionary requirements upon persons who have custody of poisonous, noxious or polluting substances {under s.92 WRA1991} and regulations with respect to 'nitrate sensitive areas' {under ss.94 and 95 WRA1991}. However, of most relevance to the problems of groundwater pollution generated by contaminated surface water runoff into soakaways are the powers provided in relation to 'water protection zones' {under s.93 WRA1991}.

Where the Secretary of State, after consultation with the Minister of Agriculture, Fisheries and Food, considers that it is appropriate to do so with a view to preventing or controlling the entry of any poisonous, noxious or polluting matter into controlled waters, he may designate an area a water protection zone. Designation is brought about to prohibit or restrict the carrying on in a particular area of activities considered likely to result in the pollution of any such waters. Accordingly, an order may make provision prohibiting or restricting the carrying on in the designated area of such activities as may be specified or described in the order {s.93(1) and (2) WRA1991}.

An order may confer powers on the National Rivers Authority to determine the circumstances in which the carrying on of any activities is prohibited or restricted, and to determine the activities to which any such prohibition applies. In addition an order may apply a prohibition or restriction in respect of any activities to cases where the activities are carried on without the consent of the Authority or in contravention of any conditions subject to which any such consent is given. An order may also provide that a contravention of a prohibition or restriction or condition of a consent shall be an offence. Finally, an order may provide for anything falling to be determined by the Authority to be determined in accordance with such procedure and by reference to such matters and to the opinion of such persons as may be specified {s.93(4) WRA1991}.

5.5.2 Policy on groundwater protection

Although it is evident that the provisions allowing for the designation of water protection zones have considerable potential for the prevention of water pollution, no use has yet been made of them in that no water protection zones have yet been designated. Nonetheless, the National Rivers Authority is particularly concerned about the need to confront problems of groundwater pollution and has recently published a draft policy document on the subject for consultation: *Policy and Practice for the Protection of Groundwater* {November 1991}. This document notes the mechanism for designation of water protection zones, and also the general legal duties of the Authority to achieve and maintain water quality objectives {s.84 WRA1991 and see 6.3.2 below} and for the conservation and proper use of water resources {s.19 WRA1991, see 7.1.3 below}.

Specifically in relation to discharges to underground strata, the consultation document concedes that in some areas the discharge of surface water via soakaways will not result in pollution of controlled waters, but adds that in areas of high vulnerability significant long term groundwater contamination can occur. In the absence of water protection zones, the Authority sees discharge consents {under s.88 WRA1991, see 5.4.3 above} and prohibition notices {under s.86 WRA1991, see 5.3.2 above} as principal weapons to control discharges in areas where groundwater is judged to be at risk. Surface water runoff will be controlled in areas where this problem arises and discharge consents will be subject to standard conditions, such as the installation of petrol or oil interception facilities where this is appropriate. Other precautionary conditions upon infiltration systems are envisaged to prevent such systems providing a direct conduit to aquifers, and accordingly the Authority will seek to control the depths of these facilities by recommending maximum penetration depths and requirements that the water table

should not be intersected. In addition to discharge controls the consultation procedures provided for under planning legislation and the Building Regulations {see 1.6.2 above} will facilitate discussion between a person proposing to make a discharge and the Authority, but ultimately the Authority will object to developments involving discharges to underground water until sufficient information is provided to ascertain that there is no threat to groundwater. Despite the absence of water protection zones, therefore, it appears that the Authority has extensive powers to regulate underground discharges and the consultation document leaves no doubt that the Authority is prepared to make use of these powers where necessary.

5.5.3 Anti-pollution works and operations

Although the designation of water protection zones will have important long-term effects in preventing activities which will produce contamination of surface water to be transmitted via soakaways into groundwater, more immediate operational powers exist to tackle the effects of water pollution. Where it appears to the National Rivers Authority that any poisonous, noxious or polluting matter or any solid waste matter is likely to enter, or to be or to have been present in, any controlled water, the Authority will be entitled to carry out specified anti-pollution works and operations. The works and operations are, first, to prevent matter from entering controlled waters where it appears likely to do so; and, second, where matter appears to be or to have been present in any controlled waters, works and operations for the purpose of (i) of removing or disposing of the matter; (ii) of remedying or mitigating any pollution caused by its presence in the waters; or (iii) so far as it is reasonably practicable to do so, of restoring the waters, including any flora and fauna dependent on the aquatic environment of the waters, to their state immediately before the matter became present in the waters {s.161(1) WRA1991}.

Where the Authority carries out works or operations of these kinds it will be entitled to recover the expenses reasonably incurred in doing so from any person who caused or knowingly permitted the matter in question to be present at the place from which it was likely to enter any controlled waters; or caused or knowingly permitted the matter in question to be present in any controlled waters {s.161(3) WRA1991}.

5.6 MISCELLANEOUS MATTERS ON WATER POLLUTION CONTROL

5.6.1 Powers of entry

Clearly the legal powers and duties which are provided for in relation to water pollution would be of limited value if the staff of the National Rivers Authority, and other persons with responsibility for law enforcement, were not empowered to enter premises in order to ascertain whether any offences had taken place. Accordingly, powers of entry are afforded to various officials to enter premises for law enforcement purposes.

Specifically, any person designated in writing for the purpose by the Secretary of State, the Minister of Agriculture, Fisheries and Food or the Authority may enter any premises for the purpose of ascertaining whether any water pollution provision of the Water Resources Act 1991, or of any subordinate legislation or other instrument, or of any byelaws made by the Authority, is being or has been contravened. A similarly designated person is empowered to carry out inspections, measurements and tests on any premises entered by that person or of any articles found on the premises, and take away such samples of water or effluent or of any land or articles as authorised {s.169(1) WRA1991}.

Supplemental provisions relating to powers of entry are contained in Schedule 20 to the Water Resources Act. These require that, other than in an emergency, an entry must be at a reasonable time and after notice of entry has been given to the occupier. In the case of residential premises and where entry on premises is to be with heavy machinery, seven days' notice of entry is required. A person designated to exercise a power of entry must produce evidence of his

designation and other authority before he exercises the power. Finally, any person who intentionally obstructs another person acting in the exercise of any power of entry to which Schedule 20 applies will be guilty of an offence and liable, on summary conviction, to a fine.

5.6.2 Admissibility of analyses of samples

A notable peculiarity of the law relating to water pollution concerns the admissibility of evidence in legal proceedings relating to water quality. An exclusionary rule of evidence applies so that the result of the analysis of any sample taken on behalf of the National Rivers Authority in exercise of any power conferred by the Act will not be admissible in any legal proceedings, in respect of any effluent passing from any land, unless the person who took the sample followed a stated procedure. This requires that the person who took the sample must, first, on taking the sample have notified the occupier of the land of his intention to have it analysed; second, there and then divided the sample into three parts and caused each part to be placed in a container which was sealed and marked; and, third, delivered one part to the occupier of the land and retained one part, apart from the one he submitted to be analysed, for future comparison {s.209(1) WRA1991}.

If it is not reasonably practicable to comply with these requirements on taking the sample, the requirements are to be treated as having been complied with if they were complied with as soon as reasonably practicable after the sample was taken {s.209(2) WRA1991}. Nevertheless the need to adhere strictly to the formalities of 'tripartite' sampling in relation to water pollution prosecutions is, in practice, an important procedural requirement.

6 Water quality and European community legislation

6.1 EUROPEAN COMMUNITY WATER LEGISLATION

The legislation of the United Kingdom concerning water pollution can no longer be viewed in isolation. Increasingly, the national law serves as a means of giving effect to international obligations and, specifically, obligations arising from membership of the European Community. The following discussion seeks to present the overall context in which Community law operates, to look at some key measures on water quality and to outline the general mechanism by which Community law is implemented in the national law of England and Wales.

Membership of the European Community has brought with it a body of international environmental legislation which contrasts sharply with national law on water pollution control. To pick some examples from the formidable list of Community provisions relating to water quality, the following have been, and will continue to be, of profound importance in shaping water quality policy in the United Kingdom.

75/440/EEC Directive concerning the quality required of surface water intended for the abstraction of drinking water in the Member States.

76/160/EEC Directive concerning the quality of bathing water.

76/464/EEC Directive on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community.

80/68/EEC Directive on the protection of groundwater against pollution caused by certain dangerous substances

80/778/EEC Directive relating to the quality of water intended for human consumption.

86/278/EEC Directive on the use of sewage sludge in agriculture.

91/271/EEC Directive concerning urban waste water treatment.

91/676/EEC Directive concerning the protection of waters against pollution caused by nitrates from agricultural sources.

An explanation of the significance of these provisions requires a brief introductory account of the status of European Community legislation and the basis of Community environmental policy.

6.1.1 The basis of European Community Environmental Policy

The European Economic Community came into existence through the signing of the Treaty of Rome 1957, although the United Kingdom did not become a member until a Treaty of Accession was signed at Brussels in 1972, which took effect from 1st January 1973. The objectives of the Community were originally conceived of as the 'four freedoms': the freedom of movement of goods, the freedom of movement of persons, the freedom to provide services, and the freedom of movement of capital. Subsidiary policies, including the policy relating to the environment, have been engrafted on to these original objectives.

Since 1973 it has been acknowledged that harmonious development of economic activities and genuine freedom of competition require member states to be equally strict in their environmental legislation. Moreover, the quality of life in the Community is intimately

dependent upon the quality of the Community's environment. In accordance with this view there has been a succession of 'Action Programmes for the Environment', the objects of which have been:

- to prevent, reduce and as far as possible eliminate pollution and nuisances,
- to maintain a satisfactory ecological balance and ensure the protection of the biosphere,
- to ensure the sound management and to avoid any exploitation of resources or of nature which cause significant damage to the ecological balance,
- to ensure that more account is taken of environmental aspects in town planning and land use,
- to seek common solutions to environmental problems with states outside the Community, particularly international organisations {1973 European Council Declaration}.

6.1.2 The Single European Act

The translation of policy into law, however, requires appropriate legislative powers to realise policy objectives, and the lack of an explicit constitutional power to legislate in the environmental field meant that some of the early environmental legislation was placed upon an uncertain foundation. However, the Single European Act 1986, amended the original Treaty of Rome by the introduction of a number of new articles which make explicit provision for Community environmental policy and legislation. These state that Community policy relating to the environment is to have the objectives:

- to preserve, protect and improve the quality of the environment,
- to contribute towards protecting human health, and
- to contribute towards a prudent and rational utilisation of natural resources {Art.130R(1) Treaty of Rome 1957, as amended}.

To further these objectives, action by the Community on the environment should:

- involve preventative measures wherever possible,
- see that environmental damage is rectified at its source, and
- maintain the principle that the polluter should pay the cost of making good environmental damage wherever possible {Art.130R(2) Treaty of Rome 1957, as amended}.

6.1.3 Directives

Setting aside discussion of the intricate process of Community law making, the main vehicle by which environmental policy is translated into law is the 'Directive'. Directives are said to be binding 'as to the result to be achieved' but to 'leave to the national authorities the choice of form and methods' of enactment within a member state {Art.189 Treaty of Rome 1957}. In essence, therefore, the different member states have a degree of discretion as to how they realise the objectives of a Directive through their own national legal system. In the United Kingdom, the European Communities Act 1972 s.2(3) provides for the national implementation of Directives by means of principal or delegated legislation, and it is usually envisaged that Directives will be realised by the enactment of a binding legal measure in order to incorporate the obligation of Community law into national law.

By whatever mechanism a Community Directive is implemented in national law, the overriding principle is one of supremacy of Community over national law. As the point was expressed by the European Court: 'a national court which is called upon . . . to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing . . . to apply any conflicting provisions of national legislation' {*Simmenthal SpA (No.2)* 106/77 (1978)}.

6.1.4 The enforcement of community legislation

The enforcement of Community legislation in the European Court is provided for under the Treaty of Rome which states that:

'If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State does not comply with the opinion within the period laid down by the Commission the latter may bring the matter before the Court of Justice' {Art.169 Treaty of Rome 1957}.

Following from this:

'If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice' {Art.171 Treaty of Rome 1957}.

6.2 THE GROUNDWATER DIRECTIVE

For present concerns, the most relevant Community water measure is the Council Directive on the protection of groundwater against pollution by certain dangerous substances {80/68/EEC, and see Department of the Environment Circulars 4/82 and 20/90}. Previously, groundwater pollution had been provided for under the Dangerous Substances Directive {76/464/EEC}, but it has now been separately provided for under the Groundwater Directive which, in many respects, follows the general pattern of the Dangerous Substances Directive which it supersedes. Essentially, the key features of the Groundwater Directive are as follows.

First, the stated purpose of the Directive is to prevent the pollution of groundwater by substances belonging to the families and groups of substances in lists I or II of the Annex to the Directive, and as far as possible to check or eliminate the consequences of pollution which has already occurred {Art.1(1) GD1980}. For the purposes of the Directive the following definitions are used.

'Groundwater' means all water which is below the surface of the ground in the saturated zone and in direct contact with the ground or subsoil.

'Direct discharge' means the introduction into groundwater of substances in lists I or II without percolation through the ground or subsoil.

'Indirect discharge' means the introduction into groundwater of substances in lists I or II after percolation through the ground or subsoil.

'Pollution' means the discharge by man, directly or indirectly, of substances or energy into the groundwater, the results of which are such as to endanger human health or water supplies, harm living resources and the aquatic ecosystem or interfere with other legitimate uses of water {Art.1(2) GD1980}.

Second, as been indicated, the scheme of the Directive is to impose a system of classification of pollutants which closely follows the 'black and grey lists' provided for under the Dangerous Substances Directive. For groundwater purposes, list I contains the most toxic, persistent and bioaccumulatable substances which include organohalogens, organophosphorous and organotin compounds, substances possessing carcinogenic properties, mercury, cadmium and their compounds, and mineral oils and cyanides. List II includes other substances which have a less harmful effect on groundwater such as metals including zinc, copper, nickel, chromium, lead and their compounds, biocides and their derivatives, and substances such as fluorides and ammonia.

Third, the key obligations of the Directive are that member states are to take the necessary steps to prevent the introduction into groundwater of substances in list I, and to limit the introduction into groundwater of substances in list II so as to avoid pollution of this water by these substances {Art.3 GD1980}. In order to comply with these obligations, member states are to prohibit all direct discharges of substances in list I, and to take appropriate measures to prevent

any indirect discharges of list I substances owing to activities on or in the ground {Art.4(1) GD1980}.

Fourth, in respect of list II substances, member states are to make all direct discharges of these substances the subject of prior investigation of the hydrological and other conditions of the area concerned, so as to limit such discharges, and similarly to limit the disposal or tipping of these substance which might lead to indirect discharge. In the light of these prior investigations, the competent authorities in member states may grant an authorisation for the direct or indirect discharge or disposal of list II substances provided that all the technical precautions for preventing groundwater pollution by these substances are observed {Art.5(1) GD1980}.

Fifth, where a discharge is authorised by the competent authority in a member state, the authorisation is to specify a range of particular matters. The matters to be specified include essential precautions, with particular attention being paid to the nature and concentration of the substances present in the effluents, the characteristics of the receiving environment, and the proximity of water catchment areas, in particular those for drinking, thermal and mineral water {Art.9 GD1980}. The competent authorities are to monitor compliance with the conditions laid down in the authorisations and the effect of discharges on groundwater {Art.13 GD1980}.

Finally, to summarise the effect of these provisions on infiltration systems, it may be noted that the Directive is stated not to be applicable to discharges containing substances in lists I or II in a quantity and concentration so small as to obviate any present or future danger of deterioration in the quality of receiving groundwater {Art.2 GD1980}. Arguably, uncontaminated surface water run off should come into that category if there is no surface disposal of listed substances in the vicinity. However, it is stated that authorisation for discharge to groundwater may only be granted where there is no *risk* of polluting the groundwater, and the conditions to which an authorisation is subject have to specify *essential precautions*. Accordingly, the *possibility* that an infiltration system designed for surface water *might* receive polluting matter and channel it into groundwater, for example from an accidental spillage of some kind, is almost invariably a consideration to be taken into account.

6.3 IMPLEMENTATION OF WATER DIRECTIVES IN NATIONAL LAW

As has been explained, Community water Directives must be implemented within each member state by means of national legislation which requires that water which falls within the scope of each particular Directive should meet the quality parameters established by that Directive. Other obligations arising from Directives, such as the need for a national body, termed the 'competent authority', to oversee monitoring and law enforcement within the scope of a Directive must also be determined by the government of the member state.

In England and Wales the competent authority for the water Directives is primarily the National Rivers Authority, though in certain respects, as under the Groundwater Directive, other bodies are involved as competent authorities in relation to waste on land. The main body of law which provides for the implementation of Directives within national law is to be found under Chapter I of Part III of the Water Resources Act 1991, concerned with 'Quality Objectives'. Three vital aspects of this law are to be discerned: the classification of water quality; the specification of water quality objectives; and the general duty to achieve and maintain objectives.

6.3.1 Classification of quality of waters

Although in England and Wales it has been a long-standing national administrative practice to classify waters according to their suitability for various purposes, a distinctive feature of the Water Act 1989 was to require the administrative arrangements for water quality classification to be placed on a statutory footing. This significant change of status in the practice of water classification is now provided for under the Water Resources Act 1991 which provides for statutory water classification systems to be devised.

Water classification is realised through an enabling power which states that the Secretary of State may, in relation to any description of controlled waters, prescribe a system of classifying the quality of those waters according to criteria specified in the regulations {s.82(1) WRA1991}. The criteria specified in water quality classification regulations are to consist of:

- (a) general requirements as to the purpose for which the waters to which the classification is applied are to be suitable;
- (b) specific requirements as to the substances that are to be present in or absent from the water and as to the concentrations of substances which are or are to be present in the water; or
- (c) specific requirements as to other characteristics of those waters {s.82(2) WRA1991}.

The programme for formulation of water quality classification regulations has not yet encompassed all the different kinds of waters covered by Community Directives, but three illustrative sets of water quality classification regulations have so far been made. The Surface Waters (Classification) Regulations 1989 {SI 1989 No.1148} prescribe a system for the classification of the quality of inland waters according to their suitability for supply, after treatment, as drinking water. The Surface Waters (Dangerous Substances) (Classification) Regulations 1989 {SI 1989 No.2286} prescribe a system for the classification of 'dangerous substances' in inland and coastal waters. The Bathing Waters (Classification) Regulations 1991 {SI 1991 No.1597} establish a system of water quality classification for bathing waters. {See also National Rivers Authority, *Proposals for Statutory Water Quality Objectives* (1991).}

6.3.2 Water quality objectives

The second feature of the implementation process is the facility for specifying which quality classifications are to be applied to particular waters. In this respect, for the purpose of maintaining and improving the quality of controlled waters, the Secretary of State may serve a notice on the National Rivers Authority specifying one or more of the prescribed water quality classifications and a date for compliance. This specification will serve to establish the water quality objectives for the waters concerned {s.83(1) WRA1991}. The realisation of any specified water quality objectives for particular waters requires the satisfaction by those waters of the specified classification requirements on, and at all times after, the specified date, {s.83(2) WRA1991}.

6.3.3 General duties to achieve and maintain objectives

The final part of the mechanism for implementation of Community water Directives concerns the relationship between the system of water quality objectives and other powers and obligations of the Secretary of State and the National Rivers Authority in relation to water pollution. In effect, a legal duty is imposed to ensure that objectives are met and maintained at all times. It is the duty of the Secretary of State and of the Authority to exercise the powers conferred on him or it by or under the Act in such manner as ensures, so far as it is practicable by the exercise of those powers to do so, that the water quality objectives specified for any waters are achieved at all times {s.84(1) WRA1991}. Most significantly in legal terms, this imposes a *legal duty* upon the Authority to ensure that Community water quality requirements are realised and adhered to at all times.

In-practical terms, the effect of this is likely to be a continuing process of review of the terms of discharge consents in relation to those waters which fail to achieve their specified water quality objective, or are in danger of failing to do so. It may also be appropriate for the Authority to utilise the other legal powers which it possesses, such as the imposition of prohibitions upon discharges {under s.86 WRA1991, see 5.3.2 above}, where this is necessary to achieve and maintain water quality objectives.

7 Water resources

7.1 WATER RESOURCES GENERALLY

7.1.1 Water resources and water supply: the general background

Under the Water Industry Act 1991, a range of water supply obligations is provided for relating to water undertakers, whilst analogous obligations also apply in many areas where water supply duties are entrusted to statutory water companies within the terms of their respective enabling Acts and subject to general administrative controls under the Statutory Water Companies Act 1991. The central obligation in respect of water supply is that every water undertaker is bound to develop and maintain an efficient and economical system of water supply within its area. Specifically, a water undertaker is to ensure that arrangements have been made for providing supplies of water to premises in its area, for making supplies available to persons who demand them, and for maintaining, improving and extending the water undertaker's mains and other pipes, as are necessary for securing that the undertaker is and continues to be able to meet its obligations under Part III of the Water Industry Act 1991 {s.37(1) WIA1991}.

The details of the water supply duty under the Water Industry Act 1991 are rather intricate, but alongside duties with respect to the maintenance of continuing supply and pressure, there is a general obligation upon undertakers in respect of water quality. This is the duty to supply water to domestic premises which is 'wholesome', as this expression is defined under regulations made by the Secretary of State {ss.67 and 68 WIA1991}. Correspondingly, it is an offence for a water undertaker to supply water, by means of pipes to any premises, which is unfit for human consumption {s.70(1) WIA1991}.

7.1.2 Water resources and the National Rivers Authority

Clearly, the supply of wholesome water to premises is dependent upon the purity of water resources, and the water undertakers have an interest in the protection of water resources from contamination where this creates water quality problems. However, as has been noted, the protection of water resources, as such, is amongst the principal functions of the National Rivers Authority as provided for under Chapter II of Part II of the Water Resources Act 1991. It follows that where, as in many parts of the country, water supplies are taken from aquifers, there is a shared concern on the part of the Authority and the water undertaker that these supplies are free from contamination brought about, amongst other things, through infiltration systems.

In legal terms this co-incidence of interests is reinforced by the imposition of a general duty upon the Authority with respect to the water industry. This duty obliges the Authority, in exercising any of its powers, to have particular regard to the water supply duties, imposed by Part III of the Water Industry Act 1991, on any water undertaker which appears to be or to be likely to be affected by the exercise of the power in question {s.15(1) WRA1991}. Thus, for example, in granting a discharge consent in relation to an infiltration facility, the Authority will be bound not only to have regard to the protection of the aquatic environment in general, but also to the effect of the proposed discharge upon any underground water which may be used for water supply purposes. In that respect, therefore, aquifers are doubly protected in law.

7.1.3 General management of water resources

It is the general duty of the National Rivers Authority to take all action, in accordance with the directions of the Secretary of State, as it considers necessary or expedient for the purpose of conserving, redistributing or otherwise augmenting water resources in England and Wales, and for securing the proper use of water resources. However, this general duty is not to be construed as relieving any water undertaker of the obligation to develop water resources for the purpose of performing its duty to maintain an efficient and economical system of water supply {s.19 WRA1991}. It is also the duty of the Authority to enter into water resource management schemes with water undertakers, so far as it is reasonably practicable to do so, for securing the proper management of water resources used by water undertakers for carrying out their functions {s.20 WRA1991}.

To a large extent the practice of water resource management by the National Rivers Authority is provided for by restrictions upon the abstraction and impounding of water from inland waters and underground strata by a system of licensing and offences relating to unlicensed abstraction. The basic prohibition is that no person may abstract from a source of supply, or cause or permit any other person so to abstract, except in pursuance of a licence granted by the Authority and in accordance with any provisions of that licence {s.24(1) WRA1991}. For these purposes 'source of supply' means certain inland waters and any water contained in underground strata other than in a sewer, pipe, reservoir, tank or other underground works, unless the works are constructed for the purpose of abstracting the water or the water level depends upon water entering from the strata {s.221(1) and (3) WRA1991}. Ordinarily, therefore, abstraction of water from an underground source of supply will fall within the abstraction licensing scheme operated by the Authority.

7.1.4 Abstraction licensing

Particular exemptions from the abstraction licensing scheme apply to the abstraction of small quantities of water and abstraction for domestic or agricultural purposes {s.27 WRA1991}. Similarly, exceptions are provided for in relation to abstractions in the course of, or resulting from, any operations for the purpose of land drainage {s.29(1) WRA1991}. There are also provisions made to allow abstraction licences where these are required by the National Rivers Authority itself {s.64 WRA1991}, and where water abstraction is to be brought about by a water undertaker {s.167 WRA1991}. Subject to these exceptions, however, it will be necessary for other abstractors to obtain a licence before undertaking any abstraction of water from an underground source of supply.

The procedure involved in making an abstraction licence application involves the applicant submitting a licence application in a prescribed form {see Water Resources (Licences) Regulations 1965, SI 1965 No.534, as amended}. Publication of a notice of the application in specified newspapers is required, and notice must be served on any internal drainage board or water undertaker within whose area the proposed point of abstraction is situated. Provision is made for public inspection of the details relating to the proposed abstraction and representations may be made to the Authority in relation to the application {s.37 WRA1991}.

The Authority may not grant an abstraction licence so as to derogate from the 'protected rights' of existing holders of abstraction licences without the consent of the holders of those rights. In relation to abstraction from underground strata, the Authority is also to have regard to the requirements of existing lawful users of water abstracted from those strata, whether for agriculture, industry, water supply or other purposes {s.39 WRA1991}. Provision is made for an appeal to the Secretary of State where an applicant for an abstraction licence is dissatisfied with the decision of the Authority in relation to an application {s.43 WRA1991}.

7.1.5 The legal effect of an abstraction licence

The general effect of a licence to abstract water is that the holder is to be taken to have the right to abstract water to the extent authorised by the licence and in accordance with the

provisions contained in it. Accordingly, where any legal action is brought against a person in respect of water abstracted from a source of supply, it will be a defence for that person to prove that the abstraction was in pursuance of a licence and the provisions of the licence were complied with {s.48(2) WRA1991}.

An important and particularly pertinent issue arises concerning the relationship between a licensed abstractor of water from an underground source and the owner of an infiltration facility which is alleged to have an adverse effect upon the quality or quantity of water which is authorised to be abstracted. The general situation is that the possession of an abstraction licence does not confer any special right of action in civil proceedings nor derogate from any right of action in civil or criminal proceedings {s.70 WRA1991}. This means that the possession of an abstraction licence would not provide the licence holder with any special civil rights as against the owner of an infiltration facility which was alleged to have caused contamination of the source of supply from which abstraction was made. Likewise the licensee would not be impeded in seeking civil redress by the possession of the abstraction licence. Essentially, therefore, the operation of the abstraction licensing system will neither aid nor hinder a civil action involving the contamination of groundwater {*Cargill v. Gotts* [1981] 1 All ER 682}.

Another legal possibility to be considered concerns the relationship between the National Rivers Authority and the abstraction licensee, and specifically the question as to when the Authority could become civilly liable to the abstractor for an action which had an adverse effect upon the source of supply. For example, if after granting an abstraction licence, the Authority were subsequently to grant a discharge consent for an infiltration facility in the same locality and contamination of the underground water occurred, would the abstractor have a right of action against the Authority? The legal position is not entirely clear.

One ruling which suggests that the Authority might be liable in respect of a discharge consent which allows the contamination of waters in respect of which a right of abstraction exists is *Scott-Whitehead v. National Coal Board* {(1987) 53 P&CR 263}. Here a water authority was found liable in negligence to a farmer where the authority had failed to warn him of salination of water in his source of supply owing to an upstream discharge. On the other hand, a subsequent decision of the House of Lords {*Murphy v. Brentwood D.C.* [1990] 2 All ER 908, and see 9.2.3 below} has greatly restricted the extent to which public bodies can become liable in negligence when exercising statutory licensing functions. It is *improbable*, therefore, that by authorising a discharge from an infiltration facility the National Rivers Authority would become liable to abstractors from an underground source of supply. If civil liability were to arise in such a situation it would arise against the discharger of pollutant rather than the body that authorised the discharge. {Generally see the discussion of civil law at 9 below.}

8 Land drainage

8.1 PRIVATE RIGHTS AND PUBLIC AUTHORITIES

Traditionally, the owner of land has an extensive collection of private rights in relation to drainage activities. At common law there is recognised to be an unqualified right to drain agricultural land by the removal of surface water, and where this is done a neighbouring landowner will not be able to complain that he will thereby be deprived of water which would have otherwise come onto his land (*Rawstron v. Taylor* (1855) 11 Ex.369). Similarly, land drainage activities have been held to be permissible despite the consequence that they bring about an increase in the flow of a watercourse which passes onto neighbouring land (*Durrant v. Branksome U.D.C.* (1897) 76 L.T. 739). These common law rights continue to allow landowners considerable scope to undertake private land drainage activities, including the construction of infiltration facilities, without risk of incurring legal liability to neighbouring landowners.

However, increasingly over the years, land drainage has become the concern of public bodies, entrusted with statutorily defined powers and duties, especially in relation to projects where the objective is to avoid or diminish flooding risks over a large area of land which may be owned by many individuals. Accordingly, flood defence and drainage are today primarily allocated as a responsibility of the Ministry of Agriculture, Fisheries and Food and the Secretary of State for Wales who supervise and co-ordinate the activities of the various 'flood defence authorities'. The 'flood defence authorities' are the National Rivers Authority, which conducts its flood defence function through regional and local flood defence committees, and internal drainage boards. In addition, land drainage and flood defence work may also be undertaken by local authorities exercising a power to maintain the flow of watercourses in their area and to carry out drainage works for that purpose. The statutory powers within which these bodies are empowered to act are provided for under the Land Drainage Act 1991, although those powers which relate specifically to the National Rivers Authority are set out, for the most part, under Part IV of the Water Resources Act 1991.

In respect of the powers of the National Rivers Authority, the general function relating to flood defence and land drainage requires it to exercise an overall supervision of all matters relating to flood defence, although this obligation is to be carried out through financially independent regional flood defence committees (ss.105 and 106 WRA1991). However, these functions relate primarily to drainage functions in respect of 'main rivers' as these are defined by main river maps (ss.107 and 193 WRA1991). The powers and duties relating to drainage of main rivers are of limited relevance to situations where infiltration systems are likely to be utilised, but the Authority is also involved in the administration of drainage in relation to local and delegated legislation and the supervision of internal drainage boards.

Under the general supervision of the National Rivers Authority, land drainage other than in respect of main rivers, is entrusted to internal drainage boards for their respective districts, and local authorities, as provided for under the Land Drainage Act 1991. In general terms, internal drainage boards are empowered to maintain or improve drainage works or to construct new works within their respective districts in relation to 'ordinary watercourses', that is watercourses other than main rivers, and are similarly empowered in relation to land which will derive benefit or avoid danger as a result of drainage operations.

The National Rivers Authority may give general or special directions for the reasonable guidance of internal drainage boards with respect to their powers and duties, and the consent of the Authority will be required by an internal drainage board to construct drainage works, or to alter existing drainage works, if the construction or alteration will affect the interests of, or the

working of any drainage works belonging to, any other internal drainage board {s.7 LDA1991}. The Authority also has certain default powers allowing it to exercise the powers of an internal drainage board in circumstances where powers of the board are not being exercised to prevent flooding or alleviate inadequate drainage within its area {s.9 LDA1991}. Alternatively the Authority may, on application, direct that, in default, the powers of an internal drainage board may be exercised by a local authority, that is, the council of any county, metropolitan district or London borough {s.10 LDA1991}. Provision is also made for the Authority to enter into agreements with an internal drainage board to carry out any work which the board is authorised to carry out or maintain {s.11 LDA1991}.

It is the general environmental duty of the Ministers, the National Rivers Authority and every internal drainage board, in formulating or considering any proposal relating to their respective functions, so to exercise their powers as to further the conservation and enhancement of natural beauty and the conservation of flora, fauna and geological or physiographical features of special interest. Similarly, they are to have regard to the desirability of protecting and conserving buildings, sites and objects of archaeological or historic interest, and to take into account any effect which the proposal would have on the beauty or amenity of any rural or urban area or on those flora, fauna, features, buildings, sites or objects {s.12(1) LDA1991}.

8.1.1 Powers to drain land

A range of general powers in relation to the drainage of land is given to internal drainage boards acting within their districts, and to local authorities carrying out the drainage of small areas or acting to prevent flooding or to mitigate any damage caused by flooding of their areas. Specifically, the powers conferred upon drainage boards and local authorities are the following:

- (a) to maintain existing works, that is, to cleanse, repair or otherwise maintain in a due state of efficiency any existing watercourse or drainage work;
- (b) to improve any existing works, that is, to deepen, widen, straighten or otherwise improve any existing watercourse or remove or alter obstructions to waters, or raise, widen or otherwise improve any existing drainage work; and
- (c) to construct new works, that is, to make any new watercourse or drainage work or erect any machinery or do any other act required for the drainage of land {s.14(1) and (2) LDA1991}.

It is significant that none of these powers imposes any *duty* upon internal drainage boards or local authorities to execute drainage works, but merely gives a *power* to do so. Whether this power is exercised in any particular case is a matter entirely within the discretion of the drainage body concerned. If the powers are not exercised, the drainage body will not become liable to a landowner for damage sustained by reason of the failure to act. Nevertheless, it is possible that drainage bodies may be liable in nuisance for the consequences of exercising or failing to exercise their powers if they foresaw or ought to have foreseen the consequences of their acts or omissions {*Leakey v. National Trust* [1980] QB 45}. If the discretion to act is exercised, however, the duty owed to landowners is a duty not to exacerbate the damage which would have been suffered if no action had been taken {*East Suffolk Catchment Board v. Kent* [1940] 4 All ER 527}. Where any person suffers injury as a result of the exercise by a drainage body of any of the general drainage powers {conferred under s.14 LDA1991}, statutory compensation is available which, if not agreed, is determined by the Lands Tribunal {s.14(5) and (6) LDA1991}.

8.1.2 'Drainage works' and infiltration systems

In relation to infiltration systems, a central question is the extent to which the general drainage powers of internal drainage boards and local authorities are capable of being used to construct or maintain this kind of facility. It is not expressly stated what particular kinds of 'drainage works' are permitted under the powers provided for by the Land Drainage Act 1991. However, it is specifically stated that the powers authorise an internal drainage board or a local authority to construct drainage works or 'do any other act required for the drainage of land'

{s.14(2)(c) LDA1991}. The implication is that the powers provided extend beyond securing the improved flow of a watercourse, or improved flow into a watercourse, and under suitable circumstances may allow infiltration methods to be utilised to secure land drainage objectives. That is to say, infiltration may be justified where it can be shown that land drainage works will cause the area of land concerned to 'derive benefit, or avoid danger, as a result of the drainage operations' {s.1(1)(a) LDA1991}.

8.1.3 Powers, regulations and byelaws

An internal drainage board may, for any purpose in connection with the performance of any of its functions, acquire land by agreement or, if authorised by the relevant Minister, may acquire land compulsorily. Similarly, the exercise of the power to acquire land for land drainage purposes is conferred upon local authorities who may be authorised by the Secretary of State to acquire land compulsorily {s.62 LDA1991}. Acquisition of land by either an internal drainage board or a local authority will be subject to the Acquisition of Land Act 1981.

A person authorised by an internal drainage board or local authority has specified powers of entry, after producing, if required, a duly authenticated document showing his authority. These allow the person to enter land for the purpose of exercising any power of the board or local authority under the Land Drainage Act 1991, and to enter and survey land and take levels of the land and inspect the condition of drainage works on it {s.64 LDA1991}.

Each of the Ministers concerned with land drainage has the power to make regulations for the purpose of carrying the Land Drainage Act 1991 into effect {s.65 LDA1991}. An internal drainage board or a local authority may make byelaws necessary for securing the efficient working of the drainage system in their district or area. Although the power to make byelaws is generally formulated, it is specifically stated that byelaws may be made for the purposes of regulating the use or preventing the improper use of any works vested in an internal drainage board or local authority or under their control, or for preserving them from destruction. Byelaws for land drainage purposes will not be valid until they are confirmed by the appropriate Minister in accordance with the procedure set out in Schedule 5 to the Land Drainage Act 1991. A person who acts in contravention of, or who fails to comply with, a land drainage bylaw will be guilty of an offence. In addition, the internal drainage board or local authority may take any action necessary to remedy the effect of the contravention and may recover any expenses reasonably incurred by them in so doing {s.66 LDA1991}.

9 Private rights and duties

9.1 THE GENERAL NATURE OF TORTIOUS LIABILITY

In this section consideration will be given to the various ways in which civil liability might be imposed on a sewerage undertaker, highway authority, developer or householder for breach of obligations imposed by statute or by the common law and linked to the construction or operation of infiltration systems. For example, the liability of a sewerage undertaker for breach of statutory duty will be examined, as will the liability of a developer for the construction of a defective drainage system, and the liability of a householder who fails to maintain private drains.

Ordinarily, the most common basis upon which civil liability may arise is in tort. A general definition of this area of law is that tortious liability arises from the breach of a duty primarily fixed by the law. This duty is towards persons generally and its breach is redressible by an action for damages assessed by the court. A tort, like a breach of contract, is a civil wrong and the most usual remedy is an award of damages in an action brought by one individual or body against another. However, whilst the duties of the parties in contract are fixed by the parties themselves by agreement, in tort they are fixed by rules of civil law.

9.2 THE TORT OF NEGLIGENCE

The most important of all torts is the tort of negligence. Broadly, the tort of negligence is committed when damage, which is not too remote, is caused by the breach of a duty of care owed by the defendant to the plaintiff {per Lord Wright in *Lochgelly Iron & Coal Co v. M'Mullan* [1934] AC 1 at p.25}. Whilst the detailed implications of this definition are rather intricate, the following discussion seeks to provide a brief summary of some of those principles which will be of particular significance in relation to the potential liability of local authorities, which negligently approve an inadequate drainage system, and of builders or developers who negligently construct a drainage system.

9.2.1 *Donoghue v. Stevenson*

The House of Lords decision in the leading case of *Donoghue v. Stevenson* {[1923] AC 562} established that if a manufacturer negligently puts goods into circulation containing a latent defect which renders them dangerous to persons or property, the manufacturer can be liable in tort for injury to persons or damage to property which is caused. The injured person is, by the reasonable foreseeability of injury, in a sufficiently proximate relationship to the person responsible for the defect to allow an action for negligence to succeed provided that the other requirements of negligence exist. However, if a dangerous defect is discovered before it causes any personal injury or property damage, the defect becomes merely a defect in quality, in which case the loss sustained is purely economic, that is, the cost of repair if it can be repaired at economic cost, or if not, the cost of replacing a worthless item. This economic loss may, depending on the terms of the contract, be recoverable from a party who is in breach of contract, but is not normally recoverable in tort in the absence of a special relationship between the parties. The House of Lords decisions in *Murphy v. Brentwood District Council* {[1990] 2 All ER 908, discussed below} and in *Department of the Environment v. Thomas Bates & Son* {[1990] 2 All ER 943, discussed below} have recently affirmed that these principles are equally applicable to buildings as to goods.

9.2.2 *Murphy v. Brentwood* – Local Authority Liability

The *Murphy v. Brentwood Council* decision involved a local authority which had negligently approved inadequate foundations, the plans of which had been submitted to it for approval under the Public Health Act 1936 (now the Building Act 1984, see 2.1 above). The house suffered damage as a result of the inadequate foundations, and the owner sued the local authority for the breach of the duty of care which he alleged was owed to him by the local authority when approving the plans. The House of Lords held that no such duty was owed. As the defect had become known before it caused any damage or injury, it was a defect in quality. To permit the owner to recover such economic loss would lead to an unacceptably wide category of claims in respect of buildings or goods defective in quality. The only damage which the plaintiffs could show was damage to the building itself. This damage was classified as economic loss and, as has been noted, something more than mere foreseeability of damage is required before liability will be imposed upon a person for putting right a defect.

9.2.3 Liability for physical injury and property damage

The decision in *Murphy* determines only that the council did not owe the plaintiff a duty to take reasonable care to safeguard him against the economic loss which was the particular kind of damage which he suffered in that case. The question remains whether there is *any* duty owed by a local authority to persons who might suffer injury through a failure to take reasonable care to secure compliance with building regulations, or whether there is a duty but one which is *limited* in its scope to personal injury and possibly also damage to property other than the defective building itself. In *Murphy* the House of Lords chose not to express a view on that point since no argument had been heard concerning it.

However, it is clear from the House of Lords decision in *Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson Ltd* ([1984] 3 All ER 529) that where a local authority is sued for negligence in performance of its statutory functions, account must be taken of the purpose of the legislation concerned. In that case, which involved a statute on all fours with the Building Act 1984, a building was constructed with defective drains, which caused no danger to health or safety but had to be expensively re-laid. It was held that the legislation existed to protect occupiers against danger to their health or safety and not to protect developers from financial loss. As there was no such danger on the facts, the authority was not liable for negligence in approving the construction of the drains.

9.2.4 *Department of the Environment v. Thomas Bates & Son* – Builders' Liability

The reasoning in *Murphy* was applied in *Department of the Environment v. Thomas Bates & Son* ([1990] 2 All ER 943), where a builder was held not liable in tort for the cost of remedying defects in a building in order to make it safe and suitable for its intended purpose, where the plaintiff's loss was purely economic in character. The builder would have been liable under the principle in *Donoghue v. Stevenson* if the defect had caused physical injury to persons or damage to property other than the building itself, but this was not the case.

9.3 BREACH OF STATUTORY DUTY

9.3.1 Generally

An increasing number of statutory duties are being imposed by legislation, breaches of which may be held to give rise to liability to a civil action. It is necessary for the plaintiff to establish that Parliament intended that an individual harmed by a breach of statutory duty should be able to bring an action in respect of that breach. To establish civil liability for breach of a statutory duty, the plaintiff will have to establish four things. First, that the injury which he has suffered is within the ambit of the statute. Second, that the statutory duty imposed a liability to civil

action. Third, that there has in fact been a breach of the statutory duty. Fourth, that his injury has been caused by the breach of that statutory duty. The possible liability of builders, local authorities and sewerage undertakers for breach of statutory duty will now be examined.

9.3.2 The Defective Premises Act 1972

Under the Defective Premises Act 1972, a person 'taking on work for or in connection with the provision of a dwelling house' owes a duty to 'see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed' {s.1 DPA1972}. However, if builders provide specific guarantees in respect of their workmanship under schemes approved by the Secretary of State, this duty is excluded. As approved schemes, notably the National House Building Council (NHBC) scheme, cover most cases of construction of dwelling-houses, consequently the 1972 Act will rarely be of practical importance in relation to residential properties.

In the cases where the Act does apply, the person undertaking the work, which encompasses both new construction and improvements, is liable both for what he himself does and for the work of independent contractors employed by him. The statutory duty is owed both to the person commissioning the work and also to subsequent purchasers and mortgagees. However, if the defects result from a method of construction expressly stipulated for by the person commissioning the work, there will be no liability.

The Act is silent whether it covers liability for both physical damage and economic loss. In the absence of any express restriction on the wording in the statute, the better view is that there should be liability for both. In the case of personal injury or property damage, there is, of course, likely to be liability at common law under *Donoghue v. Stevenson*.

9.3.3 The Building Act 1984 and the Building Regulations

As has been seen, the Building Act 1984 charges local authorities with the task of making sure new buildings are constructed in accordance with building regulations {ss.16 and 91(2) BA1984, and see 2.1 above} which provide a detailed code to be followed in the construction of buildings. General liability is imposed upon any person, not merely a local authority, who is in breach of a duty imposed by building regulations, and express provision is made for civil liability where there is damage, which is defined to include death and personal injury {s.38 BA1984}. This provision has not, however, yet been brought into force.

In *Worlock v. SAWS* {[1981] EGD 872} it was found that it would be wrong to regard building regulations as giving rise to a statutory duty creating an absolute liability on the builder, when the building contract imposed no such obligation. In view of the fact that the Building Act 1984 expressly provides for civil liability {see s.38 BA1984}, it would seem that Parliament did not intend that liability should exist independently of it. However, it is also stated that the statutory provision imposing civil liability does not prejudice any right of action which may exist at common law {s.38(3) BA1984}.

9.3.4 Water Industry Act 1991 – Sewerage Undertakers' Liability

As has been noted {see 3.2 above}, the Water Industry Act 1991 imposes a general duty on sewerage undertakers {s.94 WIA1991, corresponding with the duty imposed by s.37 on water undertakers} to provide and extend a system of public sewers and to cleanse and maintain those sewers so as to ensure that the area is and continues to be effectually drained, and to make provision for the emptying of those sewers. Compliance with the general duty to provide a sewerage system is enforced by means of an enforcement order made by the Secretary of State or by the Director General of Water Services if authorised by the Secretary of State {s.18 WIA1991}. Breach of an enforcement order leading to loss or damage is expressly declared to be actionable, although it is a defence for the sewerage undertaker to show that it took all reasonable steps and exercised all due diligence to avoid contravening the order

{s.22 WIA1991}. Sewerage undertakers have the right to challenge enforcement orders on the grounds of lack of jurisdiction (or *ultra vires*) or failure to comply with procedural requirements {s.21 WIA1991}.

It is unclear whether third parties could challenge a decision by the Secretary of State not to make an enforcement order. This would depend upon whether the court considered that an ordinary citizen had a sufficient interest, or *locus standi*, to apply for judicial review. The use of enforcement orders is declared to be an exclusive remedy, in the absence of any other express provisions {s.18(8) WIA1991}. The exclusiveness of the remedy would not, however, necessarily preclude a civil action based on breach of statutory duty.

The Water Industry Act 1991 contains no express provisions making an undertaker liable for loss or damage caused by sewer flooding. Any liability will normally require proof of some negligence on the part of the undertaker {*Smeaton v. Ilford Corporation* [1954] Ch 450}.

9.3.5 Statutory authority as a defence for statutory undertakers

Statutory authority is a general defence to actions in tort, though most of the relevant cases have arisen in the tort of nuisance {considered at 9.4 below}. The overriding consideration is that the defendant must have acted without negligence in order successfully to raise the defence of statutory authority. Thus in *Geddis v. Proprietors of the Bann Reservoir* {(1878) 3 App Cas 430}, where the defendants had statutory authority to maintain a reservoir and to cleanse the channel of a river, they were held liable when they negligently failed to keep the latter clean so that it overflowed and caused damage to the plaintiff.

A review of the relevant principles concerning the liability of undertakers performing a statutory duty was conducted in the case of *Department of Transport v. North West Water Authority* {[1983] 3 WLR 707}. These principles were approved by the House of Lords and are as follows.

First, in the absence of negligence, a body is not liable for a nuisance which is attributable to the performance by it of a duty imposed upon it by statute.

Second, it is not liable in those circumstances even if it is expressly made liable, or not exempted from liability, for nuisance.

Third, in the absence of negligence, a body is not liable for a nuisance which is attributable to the exercise by it of a power conferred by statute if, by statute, it is not either expressly made liable, or not exempted from liability, for nuisance.

Fourth, a body is liable for a nuisance by it attributable to the exercise of a power conferred by statute, even without negligence, if by statute it is expressly either made liable, or not exempted from liability, for nuisance.

9.4 THE TORT OF NUISANCE

The tort of nuisance is an act or omission which is an interference with, disturbance of, or annoyance to a person in the exercise or enjoyment of his ownership or occupation of land or of some easement, profit or other right used or enjoyed in connection with land. An easement is a right enjoyed by one landowner over the land of another, such as a right of way or a right of water. A profit is a right to take something off another person's land, such as the right to dig gravel or to cut turf. Damage to land caused by sewage or flood-water collecting on it could constitute a nuisance. Therefore, the liability of a householder whose house is served by an infiltration system of drainage which causes damage to the land of an adjoining householder needs to be considered.

9.4.1 Reasonable foreseeability of harm

One of the most difficult questions in the law of nuisance is the extent to which it is necessary to prove that the defendant was at fault. Because nuisance covers such a wide variety of situations, it is probably impossible to attempt to lay down the standard of duty which is applicable in all cases. There are cases which assert that the duty of an occupier towards his neighbour is strict, that is, the duty is to abstain from causing a nuisance at all, whereas there are other cases which stress the need for reasonable foreseeability of harm, that is, the requirement of negligence. In modern times, there has been a general reluctance shown by the courts to impose strict liability. Instead the general field of liability for negligence has been expanded, which has affected the law of nuisance. If the defendant knew or ought to have known that, in consequence of his conduct, harm to his neighbour was reasonably foreseeable, he is under a duty of care to prevent such consequences as are reasonably foreseeable. In this situation, nuisance and negligence coincide.

A relevant illustration is the case of *Sedleigh-Denfield v. O'Callaghan* {[1940] AC 880}, where the defendant was held liable on the basis that he neglected to remedy a defect when he became or should have become aware of it. The defendant owned an open ditch that ran alongside the plaintiff's land. Without permission, the local authority laid a pipe in the ditch. This pipe lacked a grid at its mouth and became blocked with the consequence that the plaintiff's land was flooded. The House of Lords held the defendant liable because he was aware of the presence of the pipe and ought to have appreciated the risk of flooding. The defendant had also made use of the drain for his own purposes, which meant that he had both continued the nuisance and adopted it. However, the occupier will only be liable if he is guilty of some conduct which connotes fault.

Although it is a defence to an action in nuisance to prove ignorance of the facts constituting the nuisance, liability will arise if ignorance is the consequence of omitting to use reasonable care to discover the facts. Thus in *Ilford UDC v. Beal* {[1925] 1 KB 671}, the plaintiff had built a wall over a sewer, which became cracked by the wall. The defendant was held not liable on the ground that she was ignorant of the existence of the sewer and could not reasonably have been expected to know of it. If the defendant neither knows of and intends harm nor is negligent with regard to the consequences of his conduct he will not be liable, unless the plaintiff can bring the case within the ambit of the rule in *Rylands v. Fletcher* {(1866) LR 1 Ex 265; (1868) LR 3 HL 330, see 9.6 below}. In such a case liability is strict and it will be no defence that reasonable care has been exercised.

In the recent decision of *Cambridge Water Company v. Eastern Counties Leather PLC* {[1992] *Journal of Environmental Law* 81} a water company brought a legal action based on nuisance, negligence and the rule in *Rylands v. Fletcher* but was unsuccessful on all three grounds. The case involved the historical pollution of groundwater caused by industrial storage and handling of a chemical solvent which the leather company admitted, on the balance of probabilities, originated at least in part from its site. There was insufficient evidence to show that spillages had occurred after 1976. The issue in relation to nuisance and negligence was essentially one of foreseeability of damage caused by the escape of the solvent. The judge held that a reasonable supervisor overseeing the operation of the plant in and before 1976 would not have foreseen that detectable quantities of solvent would have found their way into the aquifer and would not have believed that repeated spillages would have had a material effect upon water extracted for drinking purposes. The judge noted that the levels of solvent in the aquifer only caused provable damage to the water company on the introduction of statutory requirements for drinking water quality, and considered that it was not the role of the common law to award damages in respect of the 1991 impact of activities which were not actionable nuisances when committed. The relevant standard to be applied was the knowledge to be expected of management up until the mid 1970s. It was held that it was the responsibility of Parliament to enact legislation if the public interest required that those who were responsible for activities whose polluting consequences could not reasonably be foreseen at the time they were carried out were now to be subjected to a duty to undo their impact or to pay damages if a remedy was impractical. It is understood that an appeal has been lodged against this decision.

The case of *Cambridge Water Company v. Eastern Counties Leather PLC*, concerning the contamination of groundwater as a result of industrial handling of a chemical solvent (referred to above), has been the subject of further legal proceedings before the Court of Appeal and the House of Lords. The final outcome of this sequence of litigation was that the House of Lords reaffirmed the decision in the court of first instance to the effect that the leather company was not civilly liable for the losses incurred by the water company due to unforeseeable contamination of a water supply (*The Independent*, 10 November 1993).

In declining to allow recovery of damages, the House of Lords emphasised that *foreseeability* of harm was an essential element in establishing civil liability in these circumstances. Since at the time the spillages of solvent took place, before 1976, it could not be foreseen that they would lead to contamination of a water supply, to such an extent that it would be unsuitable for supply in accordance with an EC directive that had not yet been enacted, no liability could arise against the leather company.

Some care must be taken in the interpretation of the *Cambridge Water Case*. Notably the House of Lords was concerned not to impose an unreasonably high standard in relation to 'historic' pollution. Implicitly, it was held to be wrong to impose liability upon present day landowners for past activities the polluting potential of which was not appreciated at the time they occurred. However, it would be no defence in a present day civil action for a polluter to claim that he did not know, or could not foresee, the contaminating potential of a chemical spillage upon water to be used for supply purposes. The key point is that the foreseeability of harm must be judged at the time when the offending activity took place and not in the light of later knowledge of the adverse environmental effects of the activity.

Relating this back to the problem of pollution from infiltration drainage systems, if it is established that water which discharges into such systems may have a contaminating effect upon groundwater sources of supply, then potential for civil liability will clearly exist. Care is needed in the design of such systems to ensure that no foreseeable contamination may take place. The absence of care in this respect may, as the recent House of Lords decision indicates, give rise to claims for compensation of considerable magnitude.

9.4.2 Reasonableness

Central to the law of nuisance is the question of reasonableness. This involves a balancing exercise between the right of an occupier to do what he likes with his own land and the right of a neighbouring occupier not to be interfered with. In other words, the law requires 'give and take'. If the defendant has created a nuisance, it is actionable even if the occupier has acted with all reasonable care, but the 'reasonableness' of his conduct is relevant in determining whether he has in fact created a nuisance. If the defendant has been negligent and the harm could have been avoided by that defendant by the exercise of reasonable care, that may be evidence of unreasonable user. A person who causes a nuisance cannot maintain that no liability attaches just because he is making a reasonable use of his own property. Moreover, where damage has been caused, the character of the neighbourhood, the situation of the land affected and the surrounding circumstances are not matters to be taken into account.

9.4.3 Nuisance and interests in land

A private nuisance is a wrong only to the owner or occupier of the land affected. The person liable for a nuisance is the actual wrongdoer, whether or not he is in occupation of the land (*Hall v. Beckenham Corp.* [1949] 1 KB 716). Thus he may be liable even if, because of his lack of occupation, he is in no position to put an end to it, on the principle that the wrongful state of affairs is something for the creation of which he is responsible. Thus a contractor who is employed to erect a building on another's land would be liable if the building is a nuisance (*Thompson v. Gibson* (1841) 7 M&W 456). The wrongdoer may create the nuisance either personally or by his employees or agents. There are also circumstances where a person can be

liable for a nuisance created by his independent contractor, that is, a person performing a task pursuant to a contract for services as opposed to a contract of service, where the nature of the work involves inherent dangers (see *Salisbury v. Woodland* [1970] 1 QB 324).

The occupier of land who does not create a nuisance, but who has continued it during his period of occupation, is liable if he knows or ought to have known of its existence (*Sedleigh Denfield v. O'Callaghan* [1940] AC 880). If the nuisance is created after he becomes the occupier, liability will depend upon whether he knows, or by the exercise of reasonable care should have known, of the nuisance.

9.4.4 Leaseholds

If a nuisance exists at the date of a letting of property the landlord will be liable, if he knew or ought reasonably to have known about it, and even if the tenant has covenanted to repair (*Brew Bros Ltd v. Snax (Ross) Ltd* [1970] 1 QB 612). If the nuisance arises afterwards, the landlord's liability will depend upon how much control he exercises over the state of repair of the premises. If he enters into an express covenant to repair, he will clearly have retained sufficient control (*Payne v. Rogers* (1794) 2 Hy.Bl. 350).

Under the Landlord and Tenant Act 1985, where a dwelling-house is let for less than 7 years, there is an implied covenant, which cannot be ousted, that the landlord will keep in repair the structure and exterior of the premises, including drains, gutters and external pipes, and the installations in the premises for the supply of water, gas and electricity, and for sanitation (ss.11 and 12 LTA1985). There is no definition of 'drains, gutters and external pipes' in the 1985 Act, but on the basis of the arguments advanced when discussing the definition of 'sewer' and 'drain' for the purposes of the Water Industry Act 1991 (see 3.6 above), there seems no reason to believe that a soakaway and ancillary pipes would not be included. A landlord will also have retained sufficient control if he has reserved to himself the right to enter and do repairs, or if such a right is implied into the tenancy (*Mint v. Good* [1951] 1 KB 517), even if there is no obligation on him to do them and even if he did not know of the want of repair (*Wilchick v. Marks* [1934] 2 KB 56).

In addition to liability in nuisance, a landlord will owe a duty of care under the Defective Premises Act 1972 to all persons who might reasonably be expected to be affected by defects in the state of the premises, where the landlord has an obligation or a power to maintain or repair premises (s.4 DPA1972). The duty is to take such care as is reasonable to see that adjoining owners and anyone else foreseeably affected are reasonably safe from personal injury or from damage to their property. The 1972 Act does not provide a definition of the term 'premises' but it is now widely used as including land, houses, buildings and not restricted to its technical conveyancing meaning.

A landlord will not be liable if there is no express or implied power to enter and repair and the tenant has covenanted to repair. Even where the landlord is liable, the tenant in occupation will also be liable for the nuisance as an occupier if he could have ascertained the defect by the use of reasonable care. This is so even if the landlord is under a duty to repair and the injury has resulted from a breach of that duty. Where, however, the landlord is under a duty to repair, and injury has resulted to a third party as a result of a breach of the landlord's duty, the tenant will, if sued, be able to obtain an indemnity from his landlord.

9.5 STATUTORY NUISANCE

In addition to common law nuisance as previously described, Part III of the Environmental Protection Act 1990 deals with statutory nuisances. In particular this Act provides that it is the duty of every local authority to cause its area to be inspected for statutory nuisances and to investigate any complaints of statutory nuisance made to it. 'Statutory nuisance' is defined to include any accumulation or deposit which is prejudicial to health or a nuisance and any premises in such a state as to be prejudicial to health or a nuisance. 'Prejudicial to health'

means injurious or likely to cause injury to health {s.79 EPA1990}. 'Premises' includes land {s.79(7) EPA1990. For a decision concerning sewage tanks and works under the previous statutory nuisance provisions, see *R. v. Parlbay* (1889) 22 QBD 520}.

In *National Coal Board v. Neath Borough Council* {[1976] 2 All ER 478} it was held that a nuisance must be either a private or a public nuisance as understood at common law. This means that a nuisance cannot arise where the only person affected is the person occupying the premises where the nuisance is said to have taken place. There has to be interference with the enjoyment of neighbouring property. If satisfied that a statutory nuisance exists or is likely to occur or recur, the local authority must serve an abatement notice. Failure to comply with such a notice, without reasonable excuse, is a criminal offence {s.80(4) EPA1990}. The local authority has power to abate a nuisance and to recover its costs in so doing where an abatement notice has not been complied with {s.81 EPA1990}. A person aggrieved may make a complaint to a magistrates' court, which has power to make an abatement order and also to impose a fine if satisfied that a nuisance exists or is likely to recur. Failure to comply with an order without reasonable excuse is an offence {s.82 EPA1990}.

9.6 LIABILITY UNDER RYLANDS V. FLETCHER

9.6.1 The Case of Rylands v. Fletcher

In some situations, a plaintiff might, as an alternative to an action in nuisance, bring a claim under the rule in *Rylands v. Fletcher* {(1866) LR 1 Ex 265; (1868) LR 3 HL 330}. This case involved a mill owner who engaged independent contractors to construct a reservoir on his land. The contractors discovered some old shafts, which they did not block up. The shafts communicated with some mines of an adjoining landowner and when the reservoir was filled, water burst through the old shafts and flooded the mines. The House of Lords held the mill owner liable, even though it was found as a fact that he had not himself been negligent in his selection of the contractors. The classical exposition of the rule is that 'the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape'.

When stated without qualification, the rule is one of strict liability not requiring negligence. In other words, liability is imposed when a thing likely to do mischief escapes, even though escape and consequent damage are not foreseeable. However, there are now so many exceptions to the rule that there is little left of it. Although the rule is not frequently pleaded or relied upon today, and has indeed been criticised by the Law Commission, it does remain in force, as recently confirmed in *Cambridge Water Company v. Eastern Counties Leather plc* {[1992] *Journal of Environmental Law* 81}. In that case, however, the water company's claim, based on *Rylands v. Fletcher*, failed at first instance.

9.6.2 The basis of liability

The basis of the liability under *Rylands v. Fletcher* arises from the artificial and deliberate accumulation of things not naturally present in or on land. Thus where rainwater enters the plaintiff's premises by natural gravitation from the defendant's premises, there is no liability under the rule. Similarly, in *Smith v. Kenrick* {(1849) 7 CB 515}, there was no liability on the defendant mine owner who extracted the coal from his mine but left no barrier between his mine and the plaintiff's mine on a lower level, with the result that the water percolating through the upper mine flowed into the lower mine. The damage sustained by the plaintiff was occasioned by the natural flow or percolation of water, and there was no obligation on the defendant to protect the plaintiff against this. The essence of the case was that there was no artificial accumulation of the escaping water, only a reasonable user of land affecting the drainage flow underground. Where, however, water is accumulated artificially by the defendant and then flows on to the defendant's land, the defendant may be liable without any proof of negligence.

9.6.3 Application to infiltration facilities

On the strength of the decisions applying *Rylands v. Fletcher*, it might appear that the escape, whether by natural percolation or by flooding following very heavy rain, of water artificially collected in an infiltration facility would render the person who accumulated the water liable, without any proof of negligence, to a person whose neighbouring land is damaged. However, a number of points suggest that strict liability will only rarely be imposed.

First, some of the relevant decisions (*Baldwin's Ltd. v. Halifax Corpn.* (1916) 85 LJ KB 1769; *Hurdman v. The North Eastern Railway Company* (1878) 3 CPD 168), also involved negligence on the part of the person who created the nuisance and can be justified on that basis.

Second, *Sedleigh-Denfield v. O'Callaghan* {discussed at 9.4.1 above} is authority for the proposition that where liability is sought to be imposed upon a defendant on the ground that he permitted a nuisance to continue, proof of negligence is essential. That is, it must be shown that the defendant knew, or ought to have known, of the nuisance in time to correct it and obviate its mischievous effects. Thus a defendant avoids liability if the escape was caused by the deliberate or intentional act of a third party such as a trespasser, unless the plaintiff can go on to show that the act was of a kind which the defendant could reasonably have foreseen and guarded against.

Third, in *Rylands v. Fletcher* it was stated that the defendant will only be liable if he is making 'a non-natural use' of his land. This qualification has produced a confusing array of cases on the meaning of 'non-natural use'. Each case is a question of fact. In deciding the issue, all the circumstances must be taken into consideration. In other words, the court is possessed of a flexible tool, enabling it to adapt the law to changing social conditions and needs. Consequently, some of the earlier cases may require reconsideration. For example, in *Rickards v. Lothian* ((1912) AC 262), it was accepted that the provision of a proper supply of water to a wash room on business premises was a natural use of land, such a supply being considered desirable in the interests of the community. Moreover, in the recent *Cambridge Water Company* case it was held that the storage of organochlorines did not amount to a non-natural use of land, taking account of the fact that in a manufacturing locality the storage of chemicals and the attendant hazards are part of everyday life. It may well be that the temporary storage of storm water in a soakaway amounts to a natural use of land on the basis that it represents a perfectly acceptable system of drainage.

Fourth, there are some exceptions to the principle of strict liability. One such exception is the finding of an act of God, although the tendency of the courts nowadays is to restrict the ambit of the defence to a situation where it is impossible to provide against the occurrence. In *Tennent v. Earl of Glasgow* ((1864) 2 M 22), an act of God was characterised as an occurrence where the escape is caused by natural causes without human intervention in 'circumstances which no human foresight can provide against and of which human prudence is not bound to recognise the possibility'. In *Nichols v. Marsland* ((1876) 2 Ex D 1) a rainfall greater and more violent than any within the memory of witnesses was held to constitute a valid defence, although this test was criticised as excessively generous in a later case (*Greenock Corporation v. Caledonian Railway* [1917] AC 556).

Fifth, another exception to the rule is when the thing is brought on premises for the common benefit of the plaintiff and the defendant, for example, when one spout collects the drainage of several roofs or one cistern supplies water to several flats. In such circumstances there will not be liability unless the plaintiff can prove negligence on the part of the defendant. All the cases have involved a relationship of landlord and tenant {see *Kiddle v. City Business Properties Ltd* [1942] 1 KB 269} between the parties. However, there seems no reason in principle why the defence should not apply where pipes from more than one property drain into a shared soakaway within the curtilage of one of them.

Finally, in recent times, the courts have tended to bring the rule more into line with the modern philosophy of liability for fault and away from strict liability. Indeed, in *Dunne v. North Western Gas Board* {[1964] 2 QB 806}, it was stated that the defendant's liability in *Rylands v. Fletcher* itself could have been placed on failure of a duty to take reasonable care to protect the adjacent mines which were known to be there or which ought to have been discovered with reasonable care. The position has virtually been reached where a defendant will not be considered liable unless he would also be liable according to the ordinary principles of negligence.

10 Conveyancing implications

Reference has already been made to the problem of determining whether a line of pipes discharging to a soakaway is a sewer or drain for the purposes of the Water Industry Act 1991 and whether adoption by the appropriate sewerage undertaker is possible (see 3.6.1 above). Where, for example, there is an unadopted dry pond which serves a number of properties on an estate, the developer and each individual purchaser will be concerned to ensure that proper provision is made for repair and maintenance of what is, in effect, a common or shared facility. Maintenance may involve mowing, removal of rubbish and general control to ensure that the pond does not become dangerous or an eyesore. In relation to pipes and a soakaway situated exclusively within the curtilage of the property served by them, the individual owner or occupier will be responsible for their upkeep. A failure to maintain, or careless maintenance, which causes harm to neighbouring landowners may well lead to liability in negligence, nuisance or under the rule in *Rylands v. Fletcher*, which have all been discussed above. Difficulties arise, however, in relation to the maintenance of an infiltration facility which does not belong exclusively to any individual property.

10.1 COVENANTS

One possible approach to the problem of allocating shared maintenance responsibilities for infiltration facilities is that a developer could, when selling individual units, enter into covenants with the purchasers whereby it promises to keep the facilities in repair. In return, the developer would doubtless require each purchaser to covenant to pay, when called upon to do so, a proportionate part of the costs of maintenance. These covenants could be expressed to be made not only with the vendor or developer but also with the current owners of the other properties which had already been sold, as the Law of Property Act 1925 provides that a person 'may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument' {s.56(1) LPA1925}. The courts have decided that a person cannot be a covenantee within the scope of this provision unless he is in existence and identifiable at the time when the covenant is made (*Re Ecclesiastical Commissioners for England's Conveyance* [1936] Ch.430). This means that future purchasers from the developer vendor and successors of the original purchasers would only be able to sue if the benefit had passed to them under the rules to be discussed.

The question which then arises is whether the benefit and burden of covenants would pass to successors in title of the original contracting parties (as extended by s.56 LPA1925). The original covenantee (the person with the benefit) can always sue the original covenantor (the person subject to the burden), provided that the covenantee has not expressly assigned the benefit of the covenant to some other person. This right arises by virtue of the contractual relationship which exists between the parties. This is so even if the original covenantor has already parted with the land. However, if at the time of the breach of a covenant to contribute to the costs of maintenance, the original covenantee himself has already parted with the land, he will be entitled to recover only nominal damages as the loss will not be suffered by him but by the present owner of the benefited land. In any event, it is unlikely that the original covenantee would want to sue once he has parted with the land. In summary, therefore, it is apparent that contractual arrangements for the maintenance of shared infiltration facilities may give rise to considerable legal difficulties where property changes hands.

10.2 TRANSMISSION OF THE BENEFIT OF COVENANTS AT LAW

The first issue to consider is whether a purchaser of the benefited land, having the right to use an infiltration facility, may sue for breach of a covenant to maintain the facility. This depends upon whether the benefit of the covenant, that is, the right to sue on it, has passed to him. At common law, two conditions need to be satisfied. The first is that the covenant must touch and concern the land of the covenantee. This means that the covenant must be designed to benefit the original covenantee in his capacity as owner of the land rather than in a personal capacity, and must also benefit not only him but successive owners as well. A useful, although not decisive, test is to consider whether the covenant enhances the value of the land. Thus, in *Smith v. River Douglas Catchment Board* {[1949] 2 KB 500}, there was a covenant by a catchment board to keep river banks in repair. It was held that such a covenant touched and concerned the covenantee's adjacent farmland which would be flooded if repair were neglected and, therefore, it could be enforced.

The second requirement for the passing of the benefit of a covenant at law is that the covenantee and the present owner must each have a legal estate, that is, freehold or leasehold in the land benefited. However, as a result of a provision of the Law of Property Act 1925, it is not necessary for the original covenantee and the present owner to have the same legal estate. This provides that 'a covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and his successors in title and the persons deriving title under him or them, and shall have effect as if such successors and other persons were expressed' {s.78 LPA1925}. Thus, in the *Smith* case, both the purchaser from the original covenantee (the owner of the freehold) and also the purchaser's tenant were able to recover damages for breach of the covenant to repair the river banks when the land was flooded.

It should be noted at this stage that if the above two conditions are satisfied, it makes no difference to the transmission of the benefit whether the particular covenant is a positive one, imposing an obligation to do something such as maintain and repair an infiltration facility, or a negative one, prohibiting the use of land for particular purposes. The benefit can pass in either case. Thus a purchaser from the developer could enforce a positive maintenance contribution covenant against an original covenantor.

10.3 TRANSMISSION OF THE BENEFIT OF COVENANTS IN EQUITY

Where the benefit of a covenant cannot pass at law, for example, because the successor to the covenantee is not a legal owner, the benefit may nevertheless pass in equity. Equity is the system of justice which, prior to the Supreme Court of Judicature Acts 1873 to 1875, was administered in a separate court from the common law, originally by the Lord Chancellor. Nowadays the two systems are administered as one. Subject to the pre-condition that the covenant touches and concerns the land of the covenantee, the benefit may pass in one of three ways.

First, the benefit may be annexed to the land retained by the vendor at the time of sale of each plot with the consequence that it passes with that retained land to each successive owner, tenant or occupier. Annexation may occur either as a result of the use of express words in the conveyance or transfer or, following the decision in *Federated Homes Ltd v. Mill Lodge Properties Ltd* {[1980] 1 WLR 594}, it may occur simply by virtue of the Law of Property Act 1925 without the use of special words, unless the wording of the covenant provides otherwise {s.78 LPA1925, and see *Roake v. Chadha* [1984] 1 WLR 40}.

The second method of ensuring the transmission of the benefit of a covenant is assignment, that is, a distinct agreement contained in the conveyance or transfer of the covenantee's land that the benefit of the covenant shall run to the purchaser of the covenantee's land.

The third possibility is a scheme of development as explained in *Elliston v. Reacher* {[1908] 2 Ch 374}. If such a scheme exists, the covenants given on the sale of each plot are enforceable by the owner for the time being of any plot on the estate, subject to the rules relating to the transmission of the burden being satisfied.

The equitable rules are more intricate than those at law and it is assumed that the equitable rules rather than the legal ones apply in all actions where the defendant is not the original covenantor, but a successor, who can only be liable in equity, as explained below.

10.4 TRANSMISSION OF THE BURDEN OF COVENANTS

Whereas the benefit of a covenant refers to the right to sue upon it in the event of its breach, the burden signifies the obligation to abide by the terms of the covenant. The rule at common law has always been that the burden will not pass with freehold land. The successors in title of the original covenantor will not be bound by the covenant, which binds only the covenantor himself and, after his death, his estate (*Austerberry v. Oldham Corporation* (1885) 29 ChD 750). The distinctive contribution of equity to the law of covenants was the rule that, subject to certain conditions, the burden of a restrictive covenant can run with the land of the covenantor, so as to bind not only the original covenantor but also his successors in title (*Tulk v. Moxhay* (1848) 2 Ph 774). Since the case of *Haywood v. Brunswick Permanent Building Society* {(1881) 8 QBD 403}, it has been settled that equity will only enforce negative or restrictive covenants. This means that if the original developer were to covenant with the purchasers of houses served by an infiltration facility to keep it in good order and repair, and if the purchasers were each to covenant to contribute to the costs of repair, such covenants, being positive in nature, could not be enforced against purchasers from the original parties, although the original parties would remain liable to one another by virtue of the contractual relationship subsisting between them.

Generally, a covenantee is required to own adjacent land for the benefit of which a covenant is taken, but this rule has been modified by various statutes which apply to public bodies, such as local authorities and the National Trust, enabling such bodies to enforce restrictive covenants against successors in title of the original covenantor despite the fact that they do not own adjoining land.

10.5 THE INDIRECT ENFORCEMENT OF POSITIVE COVENANTS

Although the burden of a positive covenant, such as the responsibility for maintenance of an infiltration facility, will not pass with freehold land, there are a number of legal mechanisms whereby the difficulties presented by the rule may be avoided, so that the desired result of enforcing positive covenants against successors of the original covenantor may be achieved indirectly.

10.6 INDEMNITY COVENANTS

In view of the fact that the original covenantor remains liable even after he has disposed of his interest in the land, he may well protect himself by extracting a covenant of indemnity from his purchaser, who will in turn extract a similar indemnity covenant when he comes to sell his interest in the land. In this way, a chain of indemnity covenants is created, which means that, in theory, the original covenantee, or his successor to whom the benefit has passed, should be able to ensure that the covenants are observed. In the event of a breach of covenant, he could sue the original covenantor, who would then seek an indemnity from his own purchaser, and so on, until the party actually in breach was reached. In practice, however, such a chain of indemnity covenants is not satisfactory because of the possibility of the death or disappearance or insolvency of one of the parties in the chain, or because the chain breaks down as a result of one party forgetting to insist upon an indemnity covenant when selling the land.

10.7 THE BENEFIT AND BURDEN PRINCIPLE

In addition to the imposition of positive and restrictive covenants, a conveyance or transfer would probably also need to grant to each purchaser the right to use pipes which connect with the infiltration facility and which pass through the land of other householders. Such rights, which are known as easements, could be made conditional upon payment by each householder of his contribution towards the maintenance costs. It was made clear in the case of *Halsall v Brizell* {[1957] Ch.169} that a person who enjoys a benefit granted by a conveyance or transfer must submit to a burden imposed by the same instrument. Thus it is possible to require that an easement can only be exercised in compliance with the condition attached to it.

In *Halsall v. Brizell* an estate was laid out and sold off in plots. The vendors retained the roads, the sewers, a promenade and sea wall as trustees for the benefit of all the householders. Each purchaser covenanted for himself and his successors in title with the vendors that he would contribute rateably towards the cost of maintaining the roadways and sewers etc. The question arose whether a successor in title of one of the original purchasers was bound by the covenant to contribute. Although it was held that the covenants were unenforceable on the basis that the burden of positive covenants does not run with the land, it was further held that individual householders could not take advantage of the trusts concerning the use of the roads and sewers contained in the deed without undertaking the obligations imposed by the deed, namely to contribute to the cost of maintenance and repair. As a matter of practicality, it may well be that a householder has no choice but to contribute if he wishes to use his house. The rule in *Halsall v Brizell* is, therefore, a means of ensuring the observance of positive obligations such as the contribution to the cost of the maintenance of shared infiltration facilities.

10.8 RENTCHARGES

Another way of providing for the transmission of the burden of positive covenants is the use of the estate rentcharge. A rentcharge is defined in the Rentcharges Act 1977 as 'any annual or other periodic sum charged on or issuing out of land, except (a) rent reserved by a lease or tenancy, or (b) any sum by way of interest' {s.1(1) RA1977}. Rentcharges, also known as 'chief rents' or 'fee farm rents', have long been in use in certain parts of the country, for they enable the vendor to convey the freehold in return for not only a capital sum but also a recurring sum of usually a fairly small amount, charged on the land. Rentcharges differ from rents paid by tenants to their landlords in that they arise independently of any relationship of landlord and tenant.

The policy of the Rentcharges Act 1977 is to abolish existing rentcharges and to prevent their creation in the future. However, 'estate rentcharges' are treated in a privileged manner: they can continue to be created and cannot be compulsorily redeemed like other rentcharges. No other rentcharges can be newly created. All rentcharges except estate rentcharges will be extinguished, normally not later than 60 years after the coming into force of the Act. Provision is also made for the compulsory redemption of existing rentcharges at the option of the person liable to pay them.

10.8.1 Meaning of 'estate rentcharge'

'Estate rentcharge' means a rentcharge created for the purpose:

- (i) of making covenants to be performed by the owner of the land affected by the rentcharge enforceable by the rent owner against the owner for the time being of the land; or
- (ii) of meeting, or contributing towards, the cost of the performance by the rent owner of covenants for the provision of services, the carrying out of maintenance or repairs, the effecting of insurance or the making of any payment by him for the benefit of the land affected by the rentcharge or for the benefit of that and other land {s.2(4) RA1977}.

It is provided that a rentcharge within (i) above created after 22nd August 1977 (when the Rentcharges Act 1977 came into force) must be of no more than a nominal amount {s.2(5) RA1977}. Thus the developer is not able to reserve a rentcharge containing a profit element. With regard to a rentcharge within (ii), the 1977 Act confirms the authority of *Morland v Cook* {(1868) LR 6 Eq 252}. In that case, there was a deed of partition of land which was below sea level and protected by a wall. The parties to the deed entered into a covenant to pay their contribution of the expense of repairing the wall. The covenant was enforced by and against successors in title of the parties to the deed, despite the positive nature of the covenants. The decision was explained in *Austerberry v. Oldham Corporation* {(1885) 29 Ch.D. 750} on the basis that the covenant was really a grant by each of the parties of a rentcharge of so much money as would be equivalent to his proportion of the total expense of repairing the sea wall.

The conveyance or transfer by the developer of the fee simple in each of the houses served by the communal infiltration facility could reserve a nominal rentcharge of, say, £1 per year as well as an amount equal to the contribution required from each householder pursuant to his covenant to pay a proportion of the cost of maintaining and repairing the infiltration facility and the pipes serving it.

10.8.2 Remedies of the rentcharge owner

All the positive covenants are secured by the rentcharge which cannot be extinguished or redeemed compulsorily. There are four remedies available to the owner of a rentcharge if it is unpaid. The landowner is liable at common law for the money due. In addition, the Law of Property Act 1925 provides remedies of distress, that is the seizure of goods, entry into possession and demise to a trustee {s.121 LPA1925}. The landowner need not feel insecure because of the existence of the right of re-entry for when forfeiture is sought on the ground of non-payment of the rentcharge, there must be a formal demand for the amount owing, unless the instrument creating the rentcharge dispenses with it. Moreover, the landowner may be able to escape forfeiture by claiming relief if he pays the amount due and it is otherwise just and equitable to grant relief. This much used jurisdiction is a significant limitation on the rentcharge owner's right of forfeiture. By reserving a rentcharge which cover the maintenance contribution as well as a nominal amount, there will be no need for the rentcharge owner to serve a notice of breach of covenant under the Law of Property Act 1925 {s.146 LPA1925}, which is required in the case of any breach of covenant other than the covenant to pay a rentcharge.

10.8.3 Transfer to a management company

In return for the individual purchasers' covenants to contribute to the maintenance costs of a shared infiltration facility, the developer would covenant to carry out the necessary work, conditionally upon the performance of the householders' covenants. Once all the properties have been sold, the developer will have no incentive to remain involved, as it has been noted that it is no longer possible to reserve a rentcharge containing a profit element. Accordingly, he could transfer the rentcharges and the freehold in the infiltration facility to a management company consisting exclusively of the landowners served by it, and then drop out altogether. The landowners, as members of the management company, will be able to ensure that each landowner observes his covenants, including the covenant to pay his proportion of the maintenance expenses. A similar scheme, but involving the use of leases, is frequently utilised in relation to flats in a block, where each leaseholder enters into covenants with the developer and the other flat owners to observe various restrictions and to pay a proportionate part of the expenses of maintaining and repairing the common parts.

10.9 LEASES

An alternative solution to the conveyance of the freehold and the reservation of a rentcharge would be for the developer to grant a long lease of, say, 999 years to each purchaser, so that the doctrine of 'privity of estate' becomes relevant. This doctrine enables assignees of the original landlord and tenant to sue and be sued on those covenants which have reference to the

subject matter of the lease (ss.141 and 142 LPA1925), which is the statutory replacement in relation to leases of the hallowed phrase 'touching and concerning the land'. Clearly, a covenant by the developer landlord to keep an infiltration facility in repair so as to prevent flooding of the tenants' premises is a covenant which touches and concerns the tenants' land. Similarly, a covenant by a tenant to contribute to the cost of repairs to a structure which would, in effect, be a common facility, would qualify as a covenant touching and concerning the landlord's reversion.

The sanction against the tenant who fails to perform his covenant to pay his contribution towards the cost of the repairs would be the threat of re-entry by the landlord and forfeiture of the lease, subject to the possibility of relief against forfeiture being granted by the court if it is just and equitable to do so. If the maintenance contribution is expressly made payable as 'rent', the landlord may, in the event of a breach, proceed as for non-payment of rent. This means that he is relieved of the obligation to serve a statutory notice (under s.146 LPA1925). If the landlord fails to carry out his repairing obligations, within a reasonable time after he has had notice of the want of repair, the tenant may claim damages or do the repairs himself and claim the cost from the landlord. There are also circumstances where the tenant may set off the cost of repairs against his future liability for rent (*Lee-Parker v. Izzet* [1971] 3 All ER 1099). Moreover, in limited situations, a tenant may obtain a decree of specific performance against the landlord, requiring him to carry out the repairs specified in the court order (*Jeune v. Queens Cross Properties Ltd* [1974] Ch 97).

10.10 THE LEASEHOLD REFORM ACT 1967

Once the developer had completed the construction of the dwellings and granted long leases, he could transfer the freehold reversions of the individual dwellings and the freehold of the infiltration facility to a management company consisting of the tenants, as explained above. However, such a scheme is affected by the Leasehold Reform Act 1967 which, in summary, enables a tenant of a house under a long lease of more than 21 years, where the rent payable is less than two thirds of the rateable value at the relevant statutory appropriate day, to acquire the freehold or to obtain an extended lease. The tenant must have been occupying the house as his residence for at least 3 years, and the house itself must fall within statutory rateable value limits, since houses of a high value are not included, though the Government proposes to abolish this exclusion.

The 1967 Act provides that where a tenant has the right to acquire the freehold in his house, and gives the landlord written notice of his desire to have the freehold, the landlord is bound to convey the freehold subject to the tenancy and to tenant's incumbrances, but otherwise free of incumbrances. It is specifically provided that 'burdens originating in tenure, and burdens in respect of the upkeep or regulation for the benefit of any locality of any land, building, structure, works, ways or watercourse shall not be treated as incumbrances . . . but any conveyance executed to give effect to this section shall be made subject thereto' (s.8 LRA1967). Thus the conveyance of the freehold can be made subject to positive obligations such as the requirement to contribute to the cost of maintaining a shared infiltration facility, and if the tenant who has acquired the freehold in his property enjoys the benefit of those shared facilities, he can be compelled to submit to the burden of paying for them on the basis of the principle laid down in *Halsall v Brizell*.

10.11 SHORT LEASES

The Landlord and Tenant Act 1985 imposes repairing obligations on landlords of dwelling-houses or flats, where the lease is for a term of less than 7 years. The landlord impliedly covenants to keep in repair the structure and exterior of the dwelling-house, including drains, gutters and external pipes (s.11 LTA1985). However, drains or gutters on adjacent land which do not form part of the premises let to the tenant are outside the scope of the implied obligation and repairing obligations would have to be expressly imposed (*Peters v Prince of Wales*

Theatre (Birmingham) Ltd. [1943] KB 73}. The same would be the case where the lease is for a term of seven years or more. Any covenant which purports to exclude or limit the obligations of the landlord or the immunities of the tenant is void {s.12 LTA1985}.

10.12 LAW REFORM

As a postscript to this discussion of the law relating to the enforceability of covenants, it is notable that in 1965 the Wilberforce Committee on Positive Covenants Affecting Land produced a report {Cmnd.2719} which recommended that, subject to certain conditions, the burden of positive covenants should run with freehold land. Moreover, the Law Commission produced a report on positive and restrictive covenants in 1984 {Law Com. No. 127}, proposing reforms which would enable obligations, whether restrictive or positive in nature, to run with the benefited and the burdened land so as to be directly enforceable by and against the current owners of each. Reform was to be achieved by creating a new interest in land, to be known as a land obligation, capable of subsisting as a legal interest if equivalent to either the freehold or leasehold interest in land.

10.13 CONVEYANCING IMPLICATIONS: CONCLUSION

It has been seen that the technical rule which forbids the enforcement of positive obligations against a purchaser of the covenantor's land poses problems where a system of infiltration drainage exists which requires maintenance contributions from the landowners served by it. However, the legal problems are not insuperable. An infiltration system of drainage should not be discounted merely because of conveyancing difficulties.

11 Conclusion

This report has sought to provide a comprehensive account of the law of England and Wales relating to infiltration drainage facilities in a suitable amount of detail for those concerned with the planning, construction and operation of this kind of facility in practice. Inevitably, a large amount of detail concerning some of the areas of law that have been discussed has had to be curtailed in order to avoid the report becoming too unwieldy. Nonetheless, it is apparent that the legal issues raised by this kind of drainage system are quite wide-ranging, spanning diverse features of national regulatory law, the private rights and duties of individuals at common law, and the implications of European Community environmental policy.

It is important to emphasise, initially, that there is no coherent and independent body of law relating exclusively to infiltration systems, and a number of the issues that have been dealt with are relatively untested in the courts and in some respects uncertain. Whilst the report seeks to provide a reasonably definitive statement of the law, whilst recognising the novel problems raised by infiltration systems, there are a number of respects in which clarification would be desirable.

First, in respect of planning law, many of the principles that have been described have been drawn by analogy from situations where infiltration and other drainage facilities have featured as a part of larger kinds of development project. As a matter of practice, it would be informative to ascertain whether any distinct principles should be generally applied in relation to infiltration projects featuring in particular developments. Indeed, the question is raised whether the use of infiltration drainage should be the subject of specific planning guidance.

Second, in relation to building regulation, similar considerations apply. The outstanding issue remains whether the construction of infiltration systems should become the explicit subject of specialised building control requirements.

Third, the adoption of infiltration systems by sewerage undertakers is clearly a vitally important issue in practice and yet the legal provisions governing the adoption of 'sewers' are not expressly formulated with infiltration systems in mind. Although there is some reason to believe that infiltration systems are legally capable of adoption, the uncertainty of the law in this respect is most undesirable and in urgent need of clarification.

Fourth, the law relating to the pollution of groundwater is a relatively undeveloped branch of water pollution law. However, given increasing dependence upon aquifers for potable supplies, groundwater pollution control is certain to become increasingly important in the future. Again, it is not always apparent how offences and practices which have been formulated and previously applied primarily in relation to surface water are to be translated to enable the effective protection of groundwater. This issue must, however, be effectively confronted given European Community obligations and national requirements.

Fifth, civil liability for the pollution of groundwater is also a matter of undesirable uncertainty and the recent *Cambridge Water Company* case illustrates the limitations of this branch of the law. The case raises the crucial issue as to whether a more stringent form of civil liability should attach to those responsible for the contamination of groundwater.

Sixth, although the liability of local authorities when carrying out their statutory functions of exercising control over building operations has to a certain extent been clarified by the decision of the House of Lords in *Murphy v. Brentwood D.C.*, the case has not resolved all issues

concerning the precise nature and extent of a local authority's liability. It is to be hoped that subsequent decisions will further elucidate the law as to recovery of damages for losses other than those of a purely economic kind.

Seventh, the law relating to the enforceability of covenants affecting land by and against successors in title of the original contracting parties is in a most unsatisfactory and confusing state. The rule which prohibits the running of the burden of positive covenants, such as the obligation to maintain an infiltration system, is particularly inconvenient. It is to be hoped that legislation will soon be enacted creating land obligations, the benefit and burden of which will run with the respective plots of land, so that they are directly enforceable by and against the present owners of each plot.

Finally, by way of summary, the difficulties which have been highlighted do not appear to constitute insuperable legal obstacles to the greater use of infiltration drainage systems in practice. However, clarification of the points mentioned above would greatly assist developers who are contemplating the use of facilities of this kind.

Bibliography

In addition to general legal sources, the following works have been found especially helpful in the preparation of this work.

Bates, J.H. (1990 updated)
Water and Drainage Law
Sweet and Maxwell

Garner, J.F. (1991)
The Law of Sewers and Drains
Shaw and Sons

Grant, M. (1959 updated)
Encyclopaedia of Planning Law and Practice
Sweet and Maxwell

Haigh, N. (1991 updated)
Manual of Environmental Policy: the EC and Britain
Longman

Howarth, W. (1988 and 1990 supp.)
Water Pollution Law
Shaw and Sons

Howarth, W. (1992)
Wisdom's Law of Watercourses
Shaw and Sons

Howarth, W. (1990 to 1992)
Water Law
Chancery Law Publishing

Sales, H.B. and McCall, R.H. (1982)
Halsbury's Laws of England, Vol.38 Public Health
Butterworths

Sinclair, I.C. (Ed.) (1984)
Halsbury's Laws of England, Vol.49 Water
Butterworths

Water Authorities Association (1989 and Advisory Notes)
Sewers For Adoption (3rd ed.)
Water Research Centre