CAMBRIDGE WATER TANNED
But could it have won?

by Anthony Fitzsimmons, Ince & Co.

Since the days of the Good Queen Bess, there have been tanneries at Sawston. Eastern Counties Leatherwork Limited ("ECL") had been there since 1879; Hutchings & Harding Limited ("HHL") and its predecessors had been tanning on their site for more than 150 years. Just up the road was Sawston Mill. Whether or not it was dark or satanic is not recorded, but by 1976, its owners did not need it any more. With the mill, however, came the useful right to extract more than a million gallons a day of water.

During the 1970's the Cambridge Water Company ("CWC") found that its customers were out-drinking available supplies. The easiest way to get some more was to buy the Sawston Mill licence. Having tested the water - and found it be "pure and wholesome" - they bought the licence (with free Mill attached) for the princely sum of £20,500. It became an important source of water for CWC.

During the 1980's politicians became aware that drinking water in some parts was not as pure as it might be. They introduced new water quality standards. These included maximum concentrations of two dry cleaning fluids, known to me and my dry cleaner as PCE and TCE. (I will refer to both as "CEs".) The new water quality standards for CEs were so stringent that Cambridge Water had to pay a chemist to devise a test to detect such low levels of contamination. He managed to do so and, out of curiosity, tested his own tap water. He found it was contaminated. It was somewhere between 7 and 17 times over the limit! The contamination was traced to Sawston Mill, which was taken out of use. Cambridge Water lost more than 10% of it available water supply. "No Eau?", said Cambridge Water, "we can't have this". So they arranged to have many bore holes dug, and concluded that the contamination was coming from ECL or HHL, both of whom had been using CEs for decades.

Cambridge Water reached for its lawyers and sued. They accused ECL and HHL of negligence in handling CEs. They accused ECL and HHL of committing a nuisance; and they claimed on the basis that HHL and ECL were liable for the consequences of the escape of CEs from the premises, on the basis of the "Rule in *Rylands -v- Fletcher*".

The claim against HHL foundered on the rock of causation. Kennedy J. held that it was not proved that contamination from HHL had caused CWC's loss; and to make quite sure about it, he also held that if it had caused their loss, any loss they caused was negligibly small – *"de minimis"*

That left ECL. As a result of extensive analysis, Kennedy J. found the CEs had been seeping into the ground beneath ECL's works over the period from about 1950 to 1976, as a result of regular spillages of small quantities of CEs on to the floor. At the time, no one would have thought about the possible pollution consequences. The stuff was thought to evaporate rapidly, the only foreseeable damage from spillage being that somebody might be overcome by the fumes!

The Judge held that in fact, the CEs seeped through the floor at ECL's works, down into the chalk below. There, about three tonnes of the stuff sat, vertically below ECL's works, at least until it dissolved (at a very slow rate indeed) in water wending its way, more slowly than an idle tortoise, towards Sawston Mill. It was no surprise to anybody that Kennedy J. threw out the negligence claim, because the loss was not foreseeable. Holding that a successful action in nuisance also required foreseeability of the loss to be proved, he dispatched that too. All that remained was what had always been Cambridge Water's prime argument, the rule in *Rylands -v- Fletcher.*

In its original form the rule stated that a person who, for his own purposes, brings onto his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril; if he does not, he is *prima facie* answerable for all the damage which is the natural consequence of its escape. The key to *Rylands -v- Fletcher* liability is the "non-natural" use of land, and it was on this that the discussion before Kennedy J. turned. Having observed that, in *Rylands -v- Fletcher,* Lord Cairns was clearly not thinking of "natural" and "non-natural" use in Arcadian terms, Kennedy J. concluded that the storage of drums of CEs in small factories in "industrial villages" such as Sawston was not a non-natural use of land. Small factories in industrial villages after all produce employment; and, as he graphically put it:

"In reaching this decision, I reflect on the innumerable small works that one sees up and own the country with drums stored in their yards. I cannot imagine that all those drums contain milk and water or some like innocuous substance. Inevitably, that storage presents some hazard, but in a manufacturing and outside a primitive

and pastoral society, such hazards are part of the life of every citizen."

The decision provoked academic controversy and an appeal by Cambridge Water. They did not appeal against the decisions regarding nuisance or negligence. They appealed only on the *Rylands -v- Fletcher* point. However, the Court of Appeal allowed the appeal not on the basis of *Rylands -v- Fletcher,* but on the basis of nuisance. They considered the right to pump water out of the ground to be a "natural" right, and that liability for interference with it was "strict". That, they said, did away with the need for the consequences of breach of duty to be foreseeable. Thus, Cambridge Water won, though not without the Court of Appeal raising the question of what Lord Cairns really meant by "non-natural" user of land.

The Court of Appeal refused leave to appeal. However, the palate of the House of Lords was sufficiently whetted by what they heard about the case, to grant leave to appeal. The result is a *tour de force* by Lord Goff, who delivered the Opinion of the House of Lords. As regards nuisances created by a defendant (as opposed to "natural" nuisances), Lord Goff restated what Lord Reid had said more than a quarter of a century earlier in *The Wagon Mound (No. 2):-* foreseeability of harm is a prerequisite of the recovery of damages for nuisances of this kind. He also puzzled over the question why ECL appeared not to have paid more attention to the defence that its use of its premises was a reasonable use of their land. Perhaps the answer is that ECL had relied, all along, on Lord Reid's pronouncement.

Lord Goff's re-visiting of *Rylands -v- Fletcher* was more revealing - a combination of "back to basics" with public policy. As Lord Goff observed, the seminal words of Blackburn J. in the first instance decision underlying *Rylands -v- Fletcher* referred to "anything *likely* to do mischief if it escapes"; and later to something "which (the landowner) *knows* to be mischievous if it gets onto his neighbour's (property)" and finally to the liability to " answer for the natural *and anticipated* consequences" (Lord Goff's italics). Thus, Lord Goff had no difficulty in concluding:-

"The general tenor of his statement of principle is therefore that knowledge, or at least foreseeability of the risk, is a prerequisite of the recovery of damages under the principle; but that the principle is one of strict liability in the sense that the defendant may be held liable notwithstanding that he has exercised all due care to prevent the escape from occurring."
The stage was set for a re-interpretation of the original decision. Before turning to

that, Lord Goff considered whether the House of Lords should itself be developing a general rule of strict liability for damage caused by ultra-hazardous operations. Having re-visited the Law Commission Report on the subject, and observed the current tendency of masses of legislation in the environmental field, Lord Goff thought that it was undesirable that the Courts should independently be developing common law principles in this direction. He therefore concluded that foreseeability of damage of the relevant type should be regarded as a pre-requisite for liability in damages under the rule. This is in practice likely to develop into a kind of "State of the Art" defence. So the claim of Cambridge Water was thrown out.

Apart from the central point, of foreseeability of harm being a pre-requisite for action under *Rylands -v- Fletcher,* the decision raised four points which need to be appreciated particularly by those in insurance markets.

The House of Lords proceeded on the basis that the CEs were "irretrievably lost" in pools vertically below ECL's premises. There is no doubt that at some stage during the past 20 odd years, the "state of the art" would have been that the CEs were "irretrievably lost" to mankind. But what if, as a matter of current technology, they are no longer "irretrievably lost"? And what if it is now possible to prevent future leaching of CEs from the land below ECL's premises, and to extract most if not all of the CEs? If that is so, are the CEs still irretrievably lost? If they are not, is it possible that (but for the judgment in the case) ECL could be held liable for a continuing escape of CEs from its underground CE lake? And could someone potentially affected obtain an injunction to force ECL to clean up? Unless the judgments are misleading, these issues were not addressed. It may be too late for Cambridge Water to raise them now, but the issues have to be live for other polluters and their insurers.

This all leads to the second point, which has to do with time and time bars. Lord Goff reiterated that the right to sue (at least for damages) only arises when damage has been caused. If a pollutant is leaching from a site continuously, then a fresh cause of action is continually accruing (though arguably not for *Rylands -v-Fletcher* liability once the physical damage has peaked). Since the leaching of pollutants is often such a slow process, a polluting act may still be giving rise to new causes of action (and thus to new time bar periods) decades after the original wrong-doing. Whether there will actually be a worthwhile claim in such circumstances is not clear, and interesting "date of loss" problems may arise on reinsurances.
The third point concerns the "reasonable user" defence to nuisance claims. The

scope of liability for nuisance by a defendant who has been responsible for its creation has, as Lord Goff saw it, been "kept under control" by the principle of reasonable use, the principle of give and take and between neighbouring occupiers of land, under which those acts necessary for the common and ordinary use and occupation of lands may be done, The effect is that, if the user is reasonable, the defendant will not be liable in nuisance for consequent harm. It seems clear that "reasonable user" of land is not the same as "natural use" of land. It is not clear precisely what is the difference, but it is possible however that "reasonable use" is a second barrel in the gun of a polluter sued for nuisance. It seems that such an argument would have appealed to Kennedy J. had a lack of foreseeability not dispatched the claim.

Finally, there is a practical point to be extracted from the whole saga. HHL successfully defended the claim against it by showing that its activities had not contributed to the damage to any significant degree. This was a conclusion that they were able to demonstrate partly through forensic examination of their own records of activities, and apparently by a dissection of the expert evidence of Cambridge Water. However, the key point behind their success was that Kennedy J. accepted (he had no choice!) that it was for Cambridge Water to *prove* that HHL had caused its loss, not for HHL to disprove anything. This is in sharp contrast with the position in a number of other European countries. The approach demonstrates the importance of competent technical analysis and of using experts who are "judge friendly". More significantly in the long term, it shows that the English court will not be encouraging American-style plaintiffs to aim a blunderbuss at all possible polluters, leaving it to each of them to prove that they were **not** responsible.

The Cambridge Water Decision is better than the Curate's Egg; it is **very** good in parts. Lord Goff's careful analysis of *Rylands -v- Fletcher* liability does, however, contain some problems for insurers. We shall have to wait to see how bad the less-good parts are in practice.

ADDENDUM

Since this Article went to press, it has been reported that ECL has agreed with Cambridge Water to pump out the "pools" of CEs beneath their site. Since the cost of doing so appears to be of the order of £1 m, it may be safe to assume that ECL is not cleaning up the ground water out of the goodness of its heart.