



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER**

(AGRICULTURAL LAND & DRAINAGE)

Case Reference : ALT/L/LD/2013/001

Property : Land at Hethel Norfolk as comprised in a tenancy dated 7 July 2009 between the Norwich Diocesan Board of Finance Ltd & Alexander Hunter Gray and The Moat House Hethel Norfolk & associated land

Applicant : Alexander Hunter Gray

Represented by : Jamie Sutherland of counsel

Respondents : Colin Kenneth Bevan Rudd and Lesley Rudd

Type of Application : Section 28 Land Drainage Act 1991

Tribunal Members : Andrew Gore (Regional Judge)

The Earl of Romney (Landowners' Panel)
Stuart Hemmings (Drainage Panel)

DECISION

By reference to the written reasons set out in the attached schedule and to the features marked on the attached plan

IT IS ORDERED THAT BY 30 April 2015 the Respondents shall

(i) cleanse the culvert at point “a” on the attached plan, together with the length of ditch running through the said culvert, commencing at a point 5 metres upstream and finishing at a point 5 metres downstream of the said culvert, of all silt and remove from it any matter impeding the flow of water through the said culvert or along the said length of ditch;

(ii) cleanse the ditch in the vicinity of point “B” on the said plan, commencing at the point of junction between the arm of the outer moat of The Moat House running from point “m1” towards point B on the said plan and the arm of the outer moat running from point “b1” towards point “B” on the said plan and finishing at the point where the said ditch resumes a straight course between fields numbers 2 and 4 on the said plan, of all silt and remove from it any matter impeding the flow of water along the said length of ditch

– all such work to be carried out in a workmanlike order in accordance with good drainage practice and with any necessary consents in place.

REASONS

The Application

1. On 11 January 2013 Mr Gray applied to the Agricultural Land Tribunal, now the Agricultural Land and Drainage division of the First Tier Property Tribunal, for an order pursuant to section 28 Land Drainage Act 1991 requiring Mr and Mrs Rudd to carry out work to their land. It was accompanied by a report prepared by Mr Gray’s expert, Mr Geoff Beel, dated 28 November 2012. Mr Gray is the tenant of adjoining farmland, the freehold of which is owned by the Norwich Diocesan Board of Finance Ltd (“the Board”).

2. Mr Andrew Adams, appointed to act on behalf of the Environment Agency, to which the Secretary of State for Environment Food and Rural Affairs has delegated responsibility for his relevant functions, to prepare a report in relation to the application, prepared a report nominally dated 1 March 2012, but in fact 2013.

3. On 14 March 2013 Birketts, who have acted on behalf of Mr Gray throughout these proceedings, sought various directions. That letter was referred to the Tribunal which on 27 March 2013 gave directions. In the event an amended application dated 3 April 2013 was filed by Birketts, supported by a supplementary report from Mr Beel. The following day Birketts submitted a response to Mr Adams’ first report.

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5. Mr Rudd, who has acted on behalf of himself and his wife, the Second Respondent, throughout these proceedings, submitted a Reply to the Application under cover of his letter dated 10 April 2013. It is apparent that he had received the further documents recently submitted by Birketts.

6. On 16 May 2013 the Tribunal sent the parties directions for the future conduct of the application. In the light of a letter dated 24 May 2013 from the Norwich Diocesan Glebe Surveyor which suggested that one of the ditches now included in the application remained in the ownership of the Diocesan Board of Finance (“the Board”) there was further correspondence regarding the ambit of the application, after which Mr Adams visited the site again and prepared a comprehensive report dated 15 August 2013. Mr Beel responded with a further report dated 30 September 2013. Birketts filed Form 12 on 3 October 2013, and Mr Rudd filed Form 12 on 1 November 2013.

7. Mr Beel was then admitted to hospital and was unlikely to be well enough to attend a hearing before the end of April 2014. The Tribunal accordingly gave further directions for the conduct of the application on 9 April 2014.

8. The parties did not agree to exchange witness statements but Mr Gray made a comprehensive witness statement dated 4 September 2014. Mr and Mrs Rudd did not make statements.

9. The application was heard by the Tribunal on 22 and 23 September 2014, beginning with a lengthy site inspection at which Mr Gray, Mr Rudd, Mr Beel and Mr Adams were in attendance. We found the site inspection very helpful. At the subsequent hearing Mr Gray was represented at the hearing by Mr Sutherland of counsel, who prepared a helpful skeleton argument dated 15 September 2014. Mr Rudd submitted a short document headed “Outline”. Mr Gray and his expert Mr Beel gave evidence. Mr Rudd gave evidence on behalf of himself and his wife. Mr Adams presented his reports and was questioned by the Tribunal and the parties.

The Land Drainage Act 1991

10. As noted above, this is an application under section 28. There is no application under section 30.

11. Section 28 provides, so far as relevant, as follows:

(1) Where a ditch is in such a condition as—

(a) to cause injury to any land; or

(b) to prevent the improvement of the drainage of any land,

– the appropriate tribunal, on the application of the owner or occupier of the land, may if they think fit make an order requiring the person or persons named in the order to carry out such remedial work as may be specified in the order.

(2) An order under this section with respect to a ditch may name—

(a) any person who is an owner or occupier of land through which the ditch passes or which abuts on the ditch; ...

(5) In this section—

“ditch “includes a culverted and a piped ditch but does not include a watercourse vested in, or under the control of, a drainage body; and “remedial work”, in relation to a ditch, means work—

- (a) for cleansing the ditch, removing from it any matter which impedes the flow of water or otherwise putting it in proper order; and
- (b) for protecting it.

11. Section 29 contains provisions for the carrying out of an order under section 28:

(1) An order under section 28 above shall be sufficient authority for any person named in the order—

- (a) to do the work specified in relation to him in the order; and
 - (b) so far as may be necessary for that purpose, to enter any land so specified.
- (2) Where at the end of three months, or such longer period as may be specified in the order, any work specified in an order under section 28 above has not been carried out, the appropriate Minister or any drainage body authorised by him, either generally or in a particular case, may—
- (a) carry out the work;
 - (b) enter any land which it is necessary to enter for that purpose; and
 - (c) recover from any person named in the order the expenses reasonably incurred in carrying out under this subsection any work which ought to have been carried out by that person

13. Section 30 provides, inter alia:

(1) Where the drainage of any land requires—

- (a) the carrying out of any work in connection with a ditch passing through other land;
- (b) the replacement or construction of such a ditch; or
- (c) the alteration or removal of any drainage work in connection with such a ditch,

— the appropriate tribunal, on the application of the owner or occupier of the first-mentioned land, may if they think fit make an order under this section.

(2) An order under this section is an order authorising the applicant for the order—

- (a) for the purpose mentioned in subsection (1) above, to carry out such work as may be specified in the order; and
- (b) so far as may be necessary for that purpose, to enter any land so specified.

- (3) Subsections (3) to (7) of section 29 above shall apply in relation to the powers conferred by virtue of an order under this section as they apply in relation to the powers conferred by virtue of that section.
- (4) In this section “ditch” has the same meaning as in section 28 above

The land

14. Hethel is a small community lying a few miles east of Wymondham. The area is generally flat. The land in the vicinity is generally heavy clay and not particularly free draining.

15. The land comprising Mr Gray’s tenancy is divided in two ways. Cranes Road, a public road running north-south, separates field no. 4391 from the remainder of the holding. Field 3979 lies to the west of the road, opposite field 4391. Fields 2879 and 2797 lie to the west of field 3979. A private unmetalled road, Rectory Lane, which is also a public footpath, runs in a westerly direction from its junction with Cranes Road, and immediately to the south of fields 2897 and 3979. Immediately to the south of the road junction is field 4664, a small field with its northern boundary to the private road and its eastern boundary to the public road. Immediately to its south is field 4351, which contains a small pond in its south eastern corner, adjacent to the public highway. The south westerly section of Mr Gray’s land, field 1361, lies to the south of the roadway; its boundary to the roadway is in part directly opposite field 2879.

16. Mr and Mrs Rudd’s house, formerly the Hethel Rectory but now known as The Moat House, was sold by the Church Commissioners in 1950. It comprises a little over 6 acres. Mr and Mrs Rudd have lived there for over 30 years. They also own land to the south of The Moat House and of field 4351 which is divided into four small fields laid to pasture.

Drainage of the properties: our inspection

17. There are no material differences between Mr Beel and Mr Adams in their description of the drainage system of the parties’ respective properties. In our description of the area we refer to the various location points contained in the map, Appendix 2 to Mr Adams’ reports, as a matter of convenience. The amended application seeks an order for works to be carried to remove all obstructions between point A and point B, between point B and point Ci, between point A and point E and between point B and point H.

18. Some of Mr Gray’s land had been cultivated following harvest when we inspected the site. We could see that it is what is often called “hard” or “strong” land, where the creation of a good seed bed requires skill in its cultivation and we can readily accept that it is the sort of land which, when generally flat, is prone to seasonal waterlogging.

19. The drainage of Mr Gray’s land west of Cranes Road is generally towards point A. Downstream of point A the ditch enters the ownership of third parties who are not parties to the application. At point A the main ditch, running from point B, is joined by the ditch from point E. Upstream of point A the main ditch runs east-west for a short distance. Following a sharp turn the ditch runs broadly north-south between Mr and Mrs Rudd’s paddocks, through a culvert at point a.

20. Point B is a slightly complex area. The ditch runs slightly east and then curves round to the west, to avoid a high bank which lies between the outer moat to The Moat House and Field 4. The bank appears to have been in existence for many years. Whether it was deliberately created to slow the flow of water or for some other purpose is unclear. At this point the ditch,

which becomes an arm of the outer moat running north-south, is joined by the other arm of the outer moat which runs approximately south-east – north-west.

21. Above point B the outer moat runs north-south to the control sluice at point m1. Above the sluice is the inner moat around the house, which is fed by water running through a pipe under Rectory Lane from a grating at C2. This takes surface water from parts of Rectory Lane as well as water from the pipes laid as part of Mr Gray's recently completed drainage works around field 3979 and from other fields. The application does not seek work to the drainage system between points m1 and C2.

22. The application as amended seeks the removal of all obstructions between points B and C1. C1 is the point at which a culvert runs under Rectory Lane. A number of maps in the bundle indicate that historically the culvert channelled water from the ditch running from the shallow ponds in field 3979 into a ditch running south from C1. As we walked from point C1 to point B there was little evidence of a continuous extant ditch between points C1 and m1. At point m1 there was evidence of this ditch entering the outer moat directly below the sluice.

23. Following the inspection the Tribunal and the parties travelled to Norwich for the hearing.

The Applicant

24. In his witness statement, whose truth he confirmed when giving oral evidence, Mr Gray stated that he was 61 years of age. He farmed some 300 acres of land, growing combinable crops and sugar beet. He described himself as an experienced and successful farmer, and having walked the fields in question and heard his evidence we accept that. He was also perhaps slightly dismissive in evidence of Mr Rudd's response to the application. He was well aware from his own experience that waterlogged fields inevitably led to lower yields, so gave careful consideration to land drainage matters.

25. Mr Gray had been familiar with the land for many years. He had worked on it between 1969-75. He maintained that historically it was better drained than now because Mr and Mrs Rudd had not maintained their ditches effectively since they had acquired The Moat House. He considered that to effectively farm the land he needed them to attend to their responsibilities.

26. He farmed the land pursuant to a farm business tenancy for a fixed term of six years which commenced on 11 October 2009. The land included in the tenancy extended to some 50 acres. He anticipated being able to negotiate a further term from the Board.

27. In relation to the particular fields, the crops in 2011 and 2013 had been particularly poor in field 4351. Only a small part of field 4664 was usable. The drainage works in field 3979 in 2011 had improved that field significantly. He had talked about the historic arrangements with Mr and Mrs Rudd who had confirmed that historically the field had been drained via the culvert at point Ci. Since 2011 he had managed to harvest crops from 95% of the field, and fields 2879 and the eastern part of field 2797 had also benefitted.

28. He agreed with Mr Beel's proposals. He referred to alternative suggestions previously made by a local contractor, Mr Bilton, and which he had been willing to discuss with Mr and Mrs Rudd. However those proposals were not before the Tribunal as part of this application.

29. In oral evidence Mr Gray confirmed the waterlogged nature of parts of field 4351 and 4664, suggesting that the land was not worth farming. He thought there were land drains,

though did not say why he believed that to be the case, but no effective capillary action. By comparison field 1361 was the easiest field to farm.

30. Mr Gray considered that Rectory Lane was not properly drained, causing water to flow into the field. The Tribunal notes that there appeared to be a measure of agreement about problems with the drainage of that road, though the reasons are unclear and under the usual principles of land ownership, responsibility for the northern half of the Rectory Lane lies with the owner of fields 2879 and 3979. He confirmed that the culvert at Ci was purposely blocked because the ditch southwards was not able to take water away. Mr Gray believed the culvert at C2 would drain the fields to the north of Rectory Lane if the outlet down to point A worked effectively. The ditch from C1 to m1 was not included in his tenancy.

31. When Mr Gray had spoken to the owners of land to the south of Field 1 they appeared to have no knowledge of the ditch between points A and d1.

32. In cross-examination Mr Gray said he had removed 400 tonnes of material from field 3979, which he had used to fill the depressions or shallow ponds in the field. This had allowed him to take a good crop of sugar beet. He believed soil had been placed to the north of the culvert at Ci to feed the moat at the expense of field drainage. He had a powerful tractor which was used on the land most years and allowed him to cultivate more deeply.

33. Mr Gray agreed that the drainage of field 4391 had nowhere to discharge water at point F. He had lost a rape crop from field 2879 in March 2012 because of waterlogging.

Mr Rudd

34. As noted, Mr Rudd had not prepared a witness statement. In his oral evidence he said that he and his wife had lived at the property for 33 years. Prior to retirement he had many years' experience in designing and installing water controls throughout the UK including flood defences.

35. There was no evidence of flooding from the ditches and if the ditch between points C1 and m1 had been cleared water would have flowed from the northern fields. The culvert at C1 was totally blocked. They had cleared the section between points B and H about 3 years ago. When a tree fell between points A and D in the winter of 2013-14, they had removed it from the ditch.

36. After receiving the letter from Mr Rattenbury of Birketts dated 21 May 2012 he had told Mr Rattenbury that the ditch between C1 and m1 was not within his ownership and that the ditch had been ploughed up by Mr Gray. The pipe at point C1 also needed to be larger. When he had refused to carry out works Mr Rattenbury had threatened to get a charge over The Moat House. After the further letter from Mr Rattenbury of 1 August 2012, he spoke to Mr Rattenbury referring to the flow of water and to Mr Knowles' suggestions in his letter of June 2012. His response was that neither Mr Rudd nor Mr Knowles were experts. With the reference to Mr Gray having funding to pursue the claim and to the reference to his lack of expertise (partially, we note, ill-founded in fact) he considered it very difficult if not impossible to have a sensible conversation with Mr Rattenbury. We note that whilst it is true that Birketts' correspondence suggested mediation, the tone of the correspondence to a litigant in person was unfortunate in some respects and unlikely to advance the prospect of an amicable settlement of the dispute.

37. Filling the pond in field 3979 with ditch spoil was poor practice and the ditch on its east side was not properly graded. Too much silt was entering their moat as a result of Mr Gray's works.

38. In response to Mr Beel's report, in his view the drainage capacity allowed flows to get away, the culverts on his land all flowed and it was not clear any waterlogging was caused by the condition of his ditches. Mr Gray's improvements to field 3979 could not have occurred if water was not flowing adequately. Mr Knowles' suggestions were reasonable.

39. Mr Orford of Miles Waterscapes, Mr Knowles and Mr Adams had all seen the vegetative cover between points B and A which acted as a screen and helped to keep the base of the hedge clear. He had walked the length of the ditch from A-B last winter. He and his wife removed fallen elms and cut down other trees, together with an ash at point A. It was totally untrue to say they had done no cleansing of the ditches. The culvert concrete was dated 1940 and had always been there during their ownership. Fields 1 and 2 had formerly been cropped but fields 3 and 4 had always been pasture.

40. Mr Gray had ploughed up the ditch between C1 and m1. The adjacent fields would have drained if he had reinstated it. He, Adams, Orford and Knowles all noted that water was not being held back by the condition of his ditches. Mr Adams' reports showed all falls were adequate to take water flows. C2 was taking flow from the north quite adequately.

41. He had pointed out during the Tribunal's inspection the proximity of electricity poles to the end of Rectory Lane, which suggested that work could be carried out to create a new ditch between B and m1 if found to be necessary.

42. He was not aware of the moat enjoying any statutory protection.

43. Mr Gray had farmed the land for 14-15 years yet had only decided to carry out drainage improvements half way through his tenancy.

44. In the course of his evidence Mr Rudd produced a series of video clips taken in February 2013 showing water flowing at various points around the system including at points A and B.

45. In response to questions he said it was clear that on a lot of Mr Gray's land, water was draining from the surface and the soil was dry lower down. Field 4351 had had land drains installed by Mr Wharton in the 1980's. He did not know if they were still working. There were occasions when Rectory Lane flooded because of blockages in the system at the southern end of field 2879. If the culvert at C1 was unblocked it would more than halve the water at C2, creating extra capacity to take water from field 3979. The pipe at C2 had been in place for generations; if Mr Gray chose to dig his ditches deeper that was a matter for him.

46. It could be seen during the site inspection that trees and silt had been removed from the section between points B and bi since the taking of photograph 7 in Mr Adams' report. The culvert at b2 was partly blocked by silt, but it was adequate.

47. Along the section A-E, the section between points d-d1 had been dug out from southern side by someone with a mini-digger. He thought some of the ditch bed had been removed from that section, but the ditch flowed well.

48. Between A-B, the stump of the ash they had cut down did not cause an obstruction. Water flowed through the ditch.

49. In his view Mr Gray's fields were waterlogged because of inadequate sub-soiling and mole drainage. Even when there was a rapid thaw after snow there was no flooding. He accepted that since the works in field 3979, Mr Gray had found that yields had increased.

Mr Beel

50. Mr Beel produced his reports. His first report, having set out the terms of section 28 contained a section relating the rights and responsibilities of riparian owners, which is not of direct relevance to this statutory process.

51. When he first inspected Mr Gray's land, on 8 October 2012, he did not have permission to inspect Mr and Mrs Rudd's property. He observed that no water was flowing at point A from the north and concluded that no flow was occurring upstream from point B. Whilst he noted the ditch from A-B was heavily overgrown, he did not state in terms that was the cause of the lack of flow. The ditch was completely blocked at B, and although the ditch between points B and C1 had been partly cleared of undergrowth it was unable to function properly because of the obstruction. Clearing the culvert at point C1 would be beneficial subject to the works downstream being carried out.

52. He found the second drainage route between points A and E to be partially working, but the upstream face of the culvert at point E was submerged. The route then continued to point F and was well maintained by Mr Berney, the occupier of that land.

53. He considered little maintenance work had been carried out to the ditch between points B and H for some time. He could not locate a culvert in the vicinity of point H.

54. He then set out brief conclusions, followed by recommendations, to include:

- clearing the ditches of all obstructions along the ditches between points A-B, A-E and B-H following a comprehensive survey of all relevant levels
- consideration be given to further clearance of the ditch between points B and C1, alternatively the laying of a pipe between those points
- further cleansing of the route between points E and F to benefit field 439
- further investigations of the road culvert at point H.

55. In his first supplementary report, following consideration of various documents and a further visit on 26 March 2013, Mr Beel noted that Mr Adams' survey did not extend downstream to the culvert beneath Church Lane, or the ditch between points B and C1 or the ditch on the eastern boundary of fields 4351 and 4664. However we note that as the ditch downstream is not in the parties' ownership, Mr Adams had no power to survey it, and at the time of his first report neither of the other ditches were included in the application, although the ditch between B and C1 was subsequently added.

56. Some works had been carried out at point B since his first inspection but he considered the ditch was not sufficiently deep to provide adequate drainage. He said he was still of the opinion that no culvert existed beneath Rectory Lane at point H, a slightly strange statement we thought, given his first report stated he was not able to precisely locate the culvert.

57. The roadside ditch of Rectory Lane between points C2 and hi required maintenance. However, that was a matter for the Diocesan Board.

58. In his third report, produced after Mr Adams' second report which addressed the amended application, Mr Beel produced a survey which had been carried out between points Ai and A, which showed a satisfactory gradient. He was of the view that the ditch between points A and B and from A to E required excavating to a section of sufficient depth to improve the drainage of Mr Gray's land. Further excavations, compatible with the gradient from A-A1, would be advisable between points A and B to improve the gradient between B and C1. It was not acceptable for works to be carried out on the field side between points B-m1.

59. In evidence, Mr Beel doubted if any clearance work had been carried out between points A and B for 20 years. The culvert at point a was much smaller than would be provided now, though the existing culvert would be acceptable with a cleaned ditch. He believed the hard bed was at culvert invert level.

60. Mr Adams' cross-section 7 in Appendix 7 showed the difference in levels between the lowest part of field 4351 and the ditch at that point was insufficient. He thought the ditch between B and ml had not been dug out for some years. Works should be confined to the existing ditch along this length because of the presence of electric cables in field 4351.

61. Whilst the route C2-ml was a better route to drain Mr Gray's fields, it depended on Mr Rudd operating the sluice. C1 also had a lower invert level than C2.

62. The ditch between points B-H should be dug out to enable better flow. The tile drains in field 1361 would drain better if this ditch was lowered.

63. In cross-examination he agreed that if work was carried out at point E, Mr Berney would have to lower his ditch to achieve proper flow.

Mr Adams

64. Prior to his attendance on site at the commencement of the hearing, Mr Adams had met Mr Gray and his solicitor in February 2013. At their meeting the land was walked and the issues discussed. Mr Adams also met Mr and Mrs Rudd and walked over the property with Mr Rudd on the same occasion. He subsequently met Mr Beel on site in August 2013.

65. Mr Adams' second report effectively incorporated the relevant material from his first report. On his first inspection in February 2013 the culvert at point Ai was filled with water and water was not flowing from point A1 at a rate to clear upstream flows. This implies that point A1 or more probably the land downstream from it, which is not of course in Mr and Mrs Rudd's ownership, formed an impediment to flow. On his second inspection he found some evidence of siltation on either side of the culvert at point A1.

66. At the time of his first inspection the ditch at point A was in good condition with good flow. The channel was clear and the gravel base was visible, especially upstream. Land drains from Field 1 were working well, lying well above ditch invert level.

67. At point a the piped culvert was below water levels. On the second visit Mr Adams was able to see that the central section of the culvert had been partially cleared, with some siltation immediately upstream and downstream. It appeared that the outer sections of the culvert, which were dated 1940, had been added later. He was able to establish that the invert of the culvert

was 0.5m below the ditch bed measured 2m from the culvert indicating that the ditch was unlikely to have been at invert level, at least for many years. We note this lends credibility to the suggestion that the culvert may have been laid below ditch bed level some time prior to 1940.

68. On both visits the ditch channel between points A and B had a clear channel which was likely to remain so throughout the year. As noted, Mr Adams went into the ditch during our inspection. The channel was clear and without siltation.

69. At point B Mr Adams found evidence of siltation, some high level flows and debris on the banks. Water was flowing, but there was some 225mm of silt, with the corner of field 4315 being 0.75m above the hard ditch bed. Above point B Mr Adams noted the channel becoming part of the outer moat to Mr and Mrs Rudd's property.

70. Going up the branch from B towards point H, Mr Adams noted that the culvert at point bi was flowing well within its capacity. There was some siltation but a clear channel. He noted several land drains outfalling from field 1361 flowing freely, which allowed for the possibility of further drains being installed if thought necessary. Mr Adams referred to various possibilities regarding drainage in the vicinity of point H and whether it might in part drain land north of Rectory Lane.

71. From B-C2 Mr Adams noted that the section from B to point m1 was part of the outer moat, similar in appearance to the section B-b1. However, siltation on this arm of the outer moat, which was running water at the time of his inspections, was no more than 150 mm below the sluice at m1, although there had been a build-up of silt upstream of the sluice between his first and second inspections.

72. Other than the silt immediately upstream of the sluice, the section to C2 comprised the moat and then a pipe between m2 and C2. At C2 piping from Mr Gray's recent works outfallen below the inlet level to the pipe from C2-M2. Mr Adams' report indicated nothing of note about this area.

73. Regarding the section from point B to point C1, Mr Adams found there was no ditch on the field side of the section B- point m1. Between m1 and C1 there was great variability in the depth and width of the ditch and there was evidence of standing water. We note that the cross-sections contained in Appendix 7 indicate that there are lengths between these points where nothing that could be sensibly described as a ditch exists, as we noted on our inspection, although there is evidence of an outlet into the outer moat at point m1.

74. Regarding the section A-E, the ditch was flowing between A and d3, albeit slowly between points d2 and d3. There was little siltation. At point E the ditch was fed by a pipe running beneath Cranes Road and taking water from an upstream ditch. The pipe was noted to be submerged at both ends, and the cross-section at Appendix 5 suggested that the pipe had been laid below the natural ditch bed level, confirmed by the bed height at point d1, which had been recently cleaned, being above the invert level of the pipe.

75. On his first inspection, Mr Adams noted standing water in parts of fields 4664 and 4351 as shown on appendix 2. However in relation to field 4351 he saw no evidence of the ditch overtopping at point B and no evidence of land drainage at that point from field 4351. However, at 30cm below ground level the soil was dry, suggesting to Mr Adams that standing water was caused by a combination of recent wet weather, soil compaction and surface runoff. So far as field 4664 was concerned, there was no evidence of apparent outfall from the roadside ditch to

Cranes Road. He considered the wetness in this field to be caused by the high water level in the roadside ditch together with the same causes as for field 4351. He also found evidence of soil compaction in field 1361.

76. Mr Adams found field 2879 to be wet, probably caused by same combination of soil conditions and seasonal wetness together with problems with the ditch on the north side of Rectory Lane, which appears to be included in Mr Gray's tenancy. It was certainly not owned by Mr and Mrs Rudd. In his view it was likely that the wetness in this field was caused by a combination of the works carried out by Mr Gray and lack of drainage combined with the wet season.

77. Significant work had been carried out to field 3979. Such wetness as there was in the field was probably a combination of the works carried out and lack of drainage together with seasonal conditions. The ditch from point C1 to B was probably the main drainage route historically and was the preferred route.

78. In Mr Adams' view work to clear some silt and obstruction to flow would be beneficial, particularly at points B, a, and between d3-d1. Various proposals in relation to the section between points B1 and C1 were advanced. Whilst lowering the ditch at point a in connection with those proposals would be ideal it would not be a requirement.

79. In answer to questions, Mr Adams said his suggestion of a new ditch between points m1 and B was to keep the ditch length in one ownership and prevent someone being dependent on their neighbour.

80. He agreed it was possible water might find its way from field 4391 to the ditch at point E. In relation to waterlogging generally, water could move in many different ways, including tramlines and the waterlogging of lines of cultivation.

81. He considered the application did not put forward good reasons to deepen the section A-B. There was plenty of spare capacity in the drainage system. The current state of the ditch was a type of management system. His appendix 4 showed how the ditch flows, with the opportunity for minor improvements. He was referred to the survey between points A1 and A appended to Mr Beel's third report and said that he was at gravel bed level at point A. There was very little silt when he inspected point A.

82. Whilst it would be better to improve the ditch at point B significantly if the whole length of the ditch was dug out, it was not otherwise necessary to carry out serious works at that point.

83. The ditch between points B and H was essentially a moat and there was massive over capacity. Water was finding its way around obstructions. Mr Rudd needed to keep on top of maintenance works, such as the build-up of silt under the culvert at b1.

82. On neither of his visits was the ditch between points A and E causing significant problems. The hydraulic gradient kept water moving.

83. With regard to Mr Gray's land he did not know what drains were in place, their condition, or what works had been carried out to them over the years. Any changes to Mr Gray's land would not overwhelm the culvert at point a.

Discussion

86. We found Mr Gray and Mr Rudd to be truthful witnesses doing their best to assist the Tribunal. Mr Gray has become slightly rigid in his view as to the form ditch maintenance should take. Mr Rudd has not kept quite on top of ditch maintenance in recent years. The existence of the dispute has not helped either appreciate the concerns of the other.

87. This application turns largely on the differing approaches of the two experts. We generally prefer the evidence of Mr Adams to that of Mr Beel. First, his report analyses the drainage system of the area in much greater detail than Mr Beel, who did have an opportunity to do so after he was able to gain access to Mr and Mrs Rudd's land prior to the preparation of his last report. There were also some features in Mr Beel's evidence suggesting a lack of attention to detail. For instance, his drainage plan (Figure 5 to his first report) shows a ditch running through the land between field 4391 and Mr Berney's land when it was clear from the site inspection that none existed and there was no evidence that such a ditch had existed previously. It also seems slightly surprising that Mr Adams' inspection in early February found that despite siltation and the presence of some branches and scrub, which appeared to result from work to create access to the electricity system near the corner of field 4351, water was flowing at point B, whereas Mr Beel referred to the ditch being completely blocked at point B when he inspected the site in October 2012. It is possible that during the period between October 2012 and February 2013 Mr Rudd had cleared point B sufficiently to allow water to flow and that the ditch had then been partially blocked again as a result of scrub clearance from field 4351, but there was no evidence to that effect. Further, if point B had been completely blocked for some period of time we would have expected evidence of much more extensive standing water on Mr Gray's fields lying to the north of point B than was actually the case.

88. Second, Mr Adams' evidence exhibits a much greater awareness of the limitations of the Tribunal's powers in the case of a section 28 application. Third, we noted a slightly dismissive tone in Mr Beel's evidence on occasion, and during Mr Adams' evidence there was a joint reaction by Mr Gray and Mr Beel to one of his answers which was not what might be expected from an expert witness in court. Lastly, Mr Adams' approach is more pragmatic. For example he described the maintenance of a vegetative canopy over the ditch between points A and B as "a" management system", even though we can understand that some farmers might prefer to adopt a "cleaner" system, as can be seen around field 3979 for instance.

89. Neither party has sought to involve the Board in these proceedings by applying to join them as a party or to call a representative of the Board to give evidence. It is clear, however, from the correspondence that the Board, in the person of its surveyor Mr Knowles, was fully aware of the application. Other than to correspond with the parties the Board has not expressed a firm view regarding the application. Mr Rudd has suggested in correspondence that the Board's lack of involvement militates against the application. Whilst one can envisage circumstances in which the attitude of the freehold reversioner would be a consideration to be taken into account in determining an application of this sort, particularly where the current tenancy ends in about a year after the hearing, we take the view that it is not a matter which is material to the current application.

90. In exercising its powers under section 28, the Tribunal is not specifically directed to consider the reason for the landowner's desire to improve its drainage. However, the use of the words "if it thinks fit" indicates the breadth of discretion given to the Tribunal, and in our view we are entitled to take into account the landowner's motive. In this case, whatever feelings may now exist between Mr Gray and Mr and Mrs Rudd we accept that Mr Gray's application is

motivated by a genuine desire to improve the drainage of the fields he currently occupies for the benefit of its agricultural productivity.

91. The section refers not only to a ditch being in such a condition as to cause injury to land, but to its condition preventing the improvement of the drainage of land. Drainage is not defined, but given water is transferred by capillary action in the soil, as Mr Gray reminded us during his evidence, as well as by surface run off, improving the drainage of land may include, for instance, the laying of new land drains, the deepening of existing ditches or the creation of new ditches. However, the Tribunal does not have *carte blanche* to direct such works as it might think would prevent injury to or improve the drainage of land. Such works as it directs must be within the powers granted to it by section 28.

92. By section 28 the work which the Tribunal may direct a person with a relevant interest or right in other land to carry out is specifically limited to “remedial work.” The definition of remedial work in sub-section 5 (and putting aside paragraph (b) which does not appear relevant to the application) includes works which are specifically identified: cleansing a ditch, or removing matter impeding the flow of water. These are matters which a responsible landowner, whose ditch drains another person’s land, might be expected to carry out from time to time as matter of course. Putting a ditch into “proper order” carries a similar connotation. It may be the case that works ordered under section 28 may lead incidentally to elements of renewal or improvement of a drainage system, just as in the case of works of repair to a building. However that does not mean works can be authorised under section 28 which are intrinsically works of improvement to a drainage system.

93. By comparison works which may be authorised under section 30 are much broader in scope, both in terms of the broad reason for which work may be authorised and in terms of the nature of the works which may be authorised. It might, for example, include the laying of a new network of ditches to enable nearby land to be developed. Works directed under section 28 are to be paid for by the respondent to the application, whether by doing the works himself or, in default of doing so, by being required to compensate the person or body carrying out the work pursuant to section 29(2). By comparison works carried out pursuant to an order under section 30 are to be funded by the applicant: they may well require new drainage to be provided on nearby land so that the drainage of their own land can be enhanced and its value correspondingly enhanced.

94. In approaching the application, therefore, both with regard to the scale of the works and the reasons put forward for carrying them out, we must keep in mind the confines of section 28.

95. So far as the ditch between points A and B is concerned, the evidence confirms that there is an effective flow of water. There is no significant siltation along the great bulk of this section. The access culvert at point a is considerably lower than the ditch bed on either side. Given the limited siltation noted by Mr Adams downstream but also the siltation remaining in the culvert after partial clearance work by Mr Rudd we agree with Mr Adams’ advice that the culvert at point a is cleared and ditching work carried out upstream and downstream for at least 5 metres in each direction to ensure free flow into and out of the culvert and so direct. On the basis of the evidence we think it may be technically possible to lower the ditch along the section from A-B, although given there is no power to direct works between points A and Ai, it would result in a shallow gradient between points a and A. On the evidence before us we find that regrading the level of the ditch between points A and B would not lead to any material improvement in the drainage of Mr Gray’s land.

96. Even if we were satisfied that reprofiling the ditch between points A and B would be helpful we would be concerned whether such works would be within the terms of section 28. Mr Beel refers in his second report to the culvert at point a not being in place prior to the adjoining fields being laid to grass paddocks. He did not accept that the culvert had been placed at a greater depth than the normal ditch bed level and observed that the regular maintenance of fields 1 and 2 when arable would have been at the existing culvert level, though no evidence to support that proposition was advanced. It seems clear on the evidence that the culvert has been in place for many years. The outer concrete sections bear the date 1940. Mr Adams suggests the culvert might have been placed at a lower level in anticipation of future changes to the ditch. Given the lack of significant siltation throughout the section A- B, it seems unlikely that the difference in levels has been caused solely by a significant change in ditch bed level over the years. Unless we could be satisfied that the ditch had originally been at culvert invert level, to direct reprofiling between points A and B appears to be beyond the terms of section 28 and we are inclined to agree with Mr Adams that it is likely to be the Diocesan Board or the Applicant who would be responsible for such work. If needs be an application under section 30 could be made.

97. So far as point B is concerned, Mr Adams noted the presence of some 225mm of silt in the vicinity and it was clear from our inspection that some clearance had taken place on both sides of the ditch in this area. There was at least one tree on Mr and Mrs Rudd's land which had been felled but the stump left in situ. We are satisfied that some clearance of the ditch in the vicinity of point B is required, commencing at the point at which the western arm of the outer moat meets the limb of the outer moat running from the sluice and continuing as far as the point at which the ditch enters the straight section at the northern boundary of fields 2 and 4. The work should include the removal of silt, the removal of any cut plant material from the vicinity of the ditch and the removal of vegetation growing in the ditch, including trees stumps and we so direct.

98. Both experts have addressed the advisability of improving drainage between points B-C1, both in the context of recreating the point of entry through the culvert at Ci, the regrading of the old field ditch along the western boundary of fields 4351 and 4664, and Mr Adams raised the possibility of creating a new drainage system to avoid discharge at ml and provide a new point of discharge at point B. However, this became academic once Mr Sutherland formally conceded that the ditch C1-m1, or what remains of it, was not owned by Mr and Mrs Rudd. He nevertheless invites us to form a view about the works which would be appropriate. We consider that it would be clearly wrong to do so. Mr Gray and his advisers were aware from an early stage that Mr and Mrs Rudd were of the view that the ditch belonged to the Board. On 16 May 2013 the Tribunal reminded the parties that they were entitled to apply to add further parties to the proceedings. No party took that step. The Board thus took no part in these proceedings, nor was evidence adduced from any of its officers. We do not even know whether the ditch is necessarily within Mr Gray's tenancy or whether there might be argument between the Board and Mr Gray as to their respective responsibilities. To form a view about works in those circumstances would be improper, and we could certainly not entertain Mr Sutherland's suggestion that we could presume the Board would not challenge views we might express.

99. So far as the section upstream of the point where the two limbs of the outer moat meet, Mr Adams makes no specific recommendation for work, in the absence of wider works to the section downstream from point C1. We observed this section to be very much as Mr Adams described it, with a relatively thin layer of silt and no obvious obstruction to flow. In those circumstances there is no reason to suppose that in itself it constitutes an impediment to drainage. Accordingly we make no order in respect of it.

100. We should add that if Mr Gray and/or the Diocese carry out work to improve drainage between points mi and Ci and it then proves necessary for Mr and Mrs Rudd to remove some siltation from the section B-m1, Mr Rudd's evidence was that the site is not registered as an historic monument so that the question of historic monument consent would not arise. There is no evidence as to whether The Moat House is a listed building. If it were, the main moat would clearly be part of its curtilage. The outer moat might be. However, if as a result of work between points ml and C1 and other works which might be carried out, it was necessary to profile the outer moat below the level of siltation, it is arguable that such work might be beyond the ambit of section of 28 and fell within section 30.

101. So far as the section B-H is concerned, it is clear that, despite some early speculation, this section does not have any drainage function in relation to the fields to the north of Rectory Lane. So far as Mr Gray's land is concerned, its only function is to drain field 1361. Mr Adams does not consider that any work is required. We saw evidence of several field drains running into this section of ditch and Mr Gray described this field as being the easiest of all to work; it was very similar to his own land which he could work far more readily. Accordingly we make no order for work to this section of ditch.

102. So far as the ditch from point A to point E is concerned, Mr Adams, whilst noting that there were delays to efficient flow of water in the section d1-d3, found a flow of water occurring and no evidence of overtopping of the ditch. He did not recommend any remedial measures and we adopt that approach. However, a more fundamental point is that there is no evidence this ditch has ever performed a drainage function for any part of Mr Gray's land. There is a pond at the south-eastern corner of field 4351 but no evidence that there has been any direct drainage relationship between it, or the rest of that field, or field 4664, and the ditch at point E. Similarly, there is no ditch or apparent culvert between field 4391 and Mr Berney's ditch. To direct works to be carried out which would drain parts of Mr Gray's land which have not been drained historically by drains in Mr and Mrs Rudd's ownership would take the Tribunal well beyond the ambit of section 28.

103. For these reasons we make orders for works of cleansing and the removal of debris from the culvert at point a and for 5 metres upstream and downstream of point a as necessary and for cleansing and removing debris from the point at which the two arms of the outer moat meet to the point where the ditch commences its straight course from B towards point A, but not for other works sought by the Amended Application. We will direct that the works are carried out by 30 April 2015 in a workmanlike manner in accordance with good drainage practice and with all necessary consents in place. Mr and Mrs Rudd may wish to consult the Environmental Agency as to the need for any consents.

104. Although not mentioned in Mr Adams' report, we observed some degree of debris along the side of the ditch banks at the turn in the vicinity of point A, including what appeared to be the stump of a tree. We do not direct that specific works are carried out at this point. Mr Rudd may wish to consider whether, in the course of carrying out the works we have directed, whether he wants to carry out some cleansing of this area. We appreciate that a balance has to be maintained between ditch clearance and bank stability.

Detail Plan

Application ditches

Pipes

Outfalls

 Low Areas

Drawn By: AJA
Date: 28/2/2013
Revision No: 1
Scale: 1:3000@A3

Adams Land Management

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