



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER**

(AGRICULTURAL LAND & DRAINAGE)

Case Reference	:	ALT/Y/LD/2013/003
Property	:	Stonebridge Farm, Acaster Malbis, York, YO23 2PY
Applicant	:	J G & J E Knowles
Representative	:	Anna Morley MA(Cantab), MRICS, FAAV of George F White LLP
Respondents	:	Professor D Khan
Representatives		In person
Second respondent		Ainsty (2008) Internal Drainage Board
Representative		Not attending
Type of Application :		Land Drainage Act 1991 – Section 28
Tribunal Members :		Regional Judge Paul Letman Mr. Alan Gardner Mr. Stewart Brown
Date and venue of hearing		10 November 2014, York Magistrates Court
Date of Decision		5 December 2014

DECISION

Introduction

1. By an application notice dated 26 February 2013 (in Form 11) the Applicants applied, under section 28 of the Land Drainage Act 1991 (hereinafter ‘the 1991 Act’) for an order requiring the Respondents to carry out work comprising the removal of existing trees and reinstatement of a ditch or replacement culvert installation to an adequate standard within land owned by the First Respondent.
2. The grounds on which the application was made are that the condition of the culverted ditches to the north and east of field numbered 4954 owned by the Respondent, and shown on HM Land Registry plan for Title Number NYK42959, is causing injury to the Applicants’ land. The First Respondent’s property is known as ‘Twin Oaks’.
3. The Applicants own the adjacent fields numbered 5663 and 3775, as well as other contiguous land and farm buildings (as shown on Rural Land Register Map SBI-106534910, RLR/DRRO09), altogether known as Stonebridge Farm. They allege that the sections of the ditches in question that are culverted and belong to the Respondents (referred to herein as application ditches A and B) are variously blocked and inadequately maintained.
4. The Applicants are farmers and have lived and worked in the area for much of their lives. They normally keep some 40 cattle on their farm, though their animals are now in for the Winter months. The Respondents too have lived at Twin Oaks for many years (since 2001) and, as Professor Khan told the Tribunal, enjoy the rural setting and the peace it affords from his busy professional life in London.

Procedural Background

5. Further to the application an official expert report was requested and a report dated 12 June 2013 was duly prepared by Jenny Lambert BSc (Hons), Dip Ag Eng on behalf of the Environment Agency as Responsible Authority (bundle reference [24]).
6. In response to the Official Expert’s report the Applicants served an expert report dated 18 September 2013 prepared by Anna Morley née Fell MA(Cantab), MRICS, FAAV of George F White [25-32].
7. By letter dated 04 October 2013 the First Respondents set out their response to the foregoing reports [33-37]. By letter dated 26 November 2013 the Applicants’ expert responded in turn to the First Respondent’s letter.
8. In the light of these responses the Official Expert prepared her supplementary report dated 20 January 2014 [40]. By letters dated 07 March 2014 [41-43] and 22 March 2014 [44-48] the First Respondents responded to the said supplementary report. By letters dated 04 April 2014 [49-50] and 16 April 2014 [51-52] from the Applicants’ expert she responded on their behalf to the supplementary report. The First Respondents by letter dated 17 May 2014 [53-54] replied to the latter 2 letters.
9. On 16 July 2014 a (telephone) CMC was held at which directions were made by the Tribunal to prepare the application for hearing. These provided for a further report from the Applicant’s expert, including a CCTV camera survey of the Application Ditches to be filed and served by 4pm on 25 July 2014 and for a second supplementary report from the official expert Jenny Lambert, BSc(Hons), Dip Ag Eng to be filed and served by 4pm on 08 August 2014.
10. By the latter directions the Second Respondent was also given the opportunity to file and serve any observations on the reports already filed including those referred to above by 4pm on 29 August 2014, whilst the First Respondents were to file and serve any final written comments on

the foregoing by 4pm on 12 September 2014, and the Applicants and/or their expert were to file and serve any final written comments on the foregoing by 4pm on 19 September 2014.

11. The parties helpfully complied with the above directions and the matter was duly set down for hearing on 10 November 2014, preceded by an inspection of the site. The Applicants and First Defendant and official expert were all present at the inspection and the hearing at which further evidence and submissions were presented to the Tribunal in support of each party's respective case.

Jurisdiction

12. The present application is primarily made under section 28 of the Land Drainage Act, which under the heading 'Restoration and improvement of ditches' provides in so far as is presently material as follows:

'28 Orders requiring the cleansing of ditches etc,

(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 Agricultural Land 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...

(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.

13. In support of section 28 of the LDA 1991 section 29 of the said Act provides as follows;

(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:

14. In the alternative the Applicants also apply for an order under section 30 of the LDA 'Authorisation of drainage works in connection with a ditch', provides amongst other things as follows:
- (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 Agricultural Land 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 authorizing the applicant for the order—
 - (a) for the purposes 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.
15. The jurisdiction of the Agricultural Land Tribunal is now exercised by its successor tribunal, the First Tier Tribunal (Property Chamber) (Agricultural Land and Drainage). However, as regards the composition of the latter tribunal for the purposes of applications under the LDA this continues to be proscribed by section 31 of the LDA 1991, which provides as follows:
- (1) The Lord Chancellor shall draw up for each Agricultural Land Tribunal, and from time to time revise, a panel of persons appearing to him to be experienced in matters relating to drainage of land.
 - (2) For each hearing by an Agricultural Tribunal of an application under section 28 or 30 above of the members of the Tribunal
16. Paragraph 16(1) (b) of Schedule 9 of the AA 1947 provides for each ALT to include a chairman and one member from each of the 2 panels drawn up under paragraph 15, being a panel of persons representing the interests of farmers and a panel of persons representing the interests of owners of agricultural land. Accordingly, in the case of LDA applications the composition of the tribunal is modified by substituting a member from one of the latter lists by a drainage expert,
17. Thus, although at one point prior to the hearing of this application the Respondents expressed some concern over the fact that the tribunal listed to hear this application included a member from the farmers panel but not a member from the landowner panel, albeit those concerns were not pursued at the hearing by the Respondents, for completeness the Tribunal is satisfied and in so far as necessary determines that it is properly constituted for the purposes of hearing this application.

The Inspection

18. The Tribunal inspected the subject premises on the morning of 10 November 2014, accompanied by the parties, Mrs Morley and the official expert Ms Lambert. There had been some rainfall over the prior days but the weather on the day was fair, The Tribunal observed the lie of the land, and general features such as the ridge and furrow topography of the Applicants

land (field 3775), the pattern of drainage around Stonebridge Farm House, and the pond in the garden of Twin Oaks.

19. More specifically the Tribunal inspected the full run of the relevant drainage ditches upstream and downstream of application ditch A and B, shown as A- A1 and B-B1 respectively on the Location Plan at Appendix 1 of the Official Expert's first report. Thus, with reference to that plan, the Tribunal inspected the open drain from A4 to A and the location of the buried 6" pipe constituting application ditch A between A and A1.
20. The Tribunal noted that there was some standing water in the drain up to about point A2 with deepening water from about that point up to the inlet at A to application ditch A (A to A1). Two small drainage outlets were seen between A2 and A, that drain rainwater from the roofs of the nearby Stonegate Farm buildings. The water in the drain up to the trash screen at A was barely flowing.
21. As to the condition of the Applicants' land, the south eastern corner of the Applicants' field 3775 "was noticeably wet and muddy but not flooded, whilst the corner field 5663 (known as the hospital field) was relatively dry, undamaged and in good grassy condition. As regards the Respondents' land the Tribunal noted the substantial development of more than a dozen Leylandii type fir tree as well as other bushes and shrubs over the line of application ditch A (A-AO (shown in Photo 15 in the Official Expert's first report).
22. Moving to the roadside the Tribunal noted the significant and relatively rapid flow of water in the open suction of drain from points C to B, and then from B1 down to D and beyond towards point E. The Tribunal also noted the extent of the vegetation and tree growth on and about the line of application ditch B. Returning to the Respondents' premises, the Tribunal saw from the Twin Oaks side the extent of the trees, bushes and shrubs over the line of application ditch A (A-AiV The Tribunal was also able to see again the upstream of application ditch A*

The Applicant's Case

23. The application was initially supported by a report dated 19 October 2012 prepared by Mr Ben Wetherell of Drains UK 2000. The report records, amongst other things, that:

'CCTV shows large amounts of silt in the 450mm concrete pipe & also the pipe is broken/fractured from 1.7mts to 11mts, you are unable to see the inlet 2 pipe as it is a 150mm pipe and is below the water level, making its performance poor. Unable to give a true gradient of the pipe due to the amount of silt holding. CCTV of the inlet 2 pipe is poor as it is under water the entire survey, then was abandoned at 8.4mts due to an unknown reason with no picture to show. Inlet 2 is a 150mm VC pipe which we feel is an inadequate size for the amount of water which is in the ditch, as I am unaware of the amount of water of which runs down the ditch I am unable to give a sufficient pipe size, but we recommend that it should be a minimum of 375mm, which will give a good performance and be a little easier to clean.'

These matters are confirmed, with further details, in the plans attached to the report.

24. At the hearing the Applicants' case was presented by Mrs Morlcy. She referred the Tribunal to the history, recited in the Official Expert's first report. In outline, from 1957 the Applicants have farmed the land in question. At this time and up until about 1974 application ditch A and application ditch B were open ditches with grassland either side, At some time about 1974 a Mr Bert Tait built Twin Oaks. As part of the construction he installed approximately 45m of 150mm diameter pipe in application ditch A and approximately 32m of pipe in application ditch B. He filled in the ditches over the pipes with earth, planted trees and shrubs over the line of ditch A and formed a new boundary with Stonebridge Farm by erecting a fence along the line of what had been the top of the northern bank of the ditch.

25. In 1974 the Applicants bought what is now Stonebridge Farm (they had previously rented the land) and built the farm house and outbuildings. Between 1975 and about 1995 they say that they did not experience any significant drainage problems relating to the culverted drains (referred to as such herein, although strictly speaking a culvert is simply a structure that allows water to flow under a road or pathway or similar obstruction). In part they attributed this to regular maintenance carried out by Mr Tait (see also point 1.13 in the Applicants' letter dated 18 September 2013 [26]).
26. However, it is the Applicants' case that since about 1995 ditches A and B have become progressively blocked with silt, leaves and roots, with the result that the water upstream of A has been backing up and adversely affecting the adjacent fields 5663 and 3775. Thus they allege that as the condition of the ditches worsened, between 2005 and 2009 they repeatedly requested the Respondents to carry out maintenance to the application ditches, but without any satisfactory response.
27. Early in 2010 after another winter when the Applicants say water had repeatedly backed up in the ditch upstream of ditch A, they wrote to the Respondents inviting them to meet the local Internal Drainage Board ('IDB') to discuss the worsening problem with them. By letter dated 22 January 2010 the Acaster IDB wrote to the Respondents noting that ditch A was blocked and asking them to carry out the necessary works to unblock the same. In early 2010 the Respondents then met with Nathan Culpan of Acaster IDB, who reported by letter dated 06 August 2010 that 'when I inspected the area there were no obstructions within the culvert or watercourse ...[the] problem of suffering waterlogged fields however I put ...down to wet weather in general and lack of field drainage not the culvert.'
28. Similar problems were encountered again by the Applicants in 2011 and 2012. Indeed in January 2012 the Applicants say that ditch A filled and overflowed onto their land, that the water got into the buildings and their cattle and feedstuffs stood in water. They allege that even into June 2012 after they had turned out their cattle, water was backing up in ditch A and their fields were waterlogged. Mrs Morley spoke of their cattle getting infected feet and suffering from abscesses due to the wet conditions (photos 1 to 4 in the Official Expert's first report refer). Taking the matter up again with the Respondents, they agreed jointly to instruct Drains UK 2000, who produced the October 2012 report referred to above.
29. As noted above on the basis of the Drains UK report the Applicants commenced this application in February 2013. Seemingly this led to the Respondents to engage York City Council in May 2013 to jet the application ditches. This was done and the Respondents assured by the Council that the pipes were clear and running. This was and is not accepted by the Applicants, who pursued this application relying on the Drains UK's warnings of the likelihood of a blockage existing or otherwise the susceptibility of the culvert to blockages due to the ingress of roots through open butt joints, the deposition of leaves twigs and branches, as well as silting up of the outlet of the 'inadequate' 150mm pipe at its junction with the 450mm pipe of ditch B.
30. Presently the Applicants rely upon the up to date survey report dated 11 July 2014 prepared by Excel Drain Care [72], to which Mrs Morley referred the Tribunal. As she pointed out this recorded 60% standing water in ditch A from 0.1-7.0m, and '100% blockage roots and debris' at 7.0m. Images of the survey and blockage are contained on a CD provided to the Tribunal; with still images of the blockage reproduced in the subsequent report of the Official Expert. Further, Mrs Morley took the Tribunal to Excel's conclusion which states 'The 150mm clay pots that run under the tree line have roots growing in them at 7 meters [sic] and probably beyond that. In the time we were on site the water level in the pipes never reduced in level at all. The size of the existing 150mm pipe without being blocked is not sufficient in diameter to carry the flow of the dike in heavy rain fall.'

31. As regards the appropriate remedial works Mrs Morley rejected the Respondents' claim the problem could be solved by regular jetting of the pipes. She relied upon Excel's Recommendation that says 'Removal of tree line and replace exciting [sic] pipes with 300mm twin walled surface water ducting'. Thus she maintains that the best solution is the restoration of ditches A and B as open ditch drains along their existing lines. She disavowed the alternative more northerly route across the Applicants' land indicated by Drains UK 2000. On the contrary she suggested another solution might be a more southerly drain across the Respondents' front driveway (a belated proposal wholly rejected by the Respondents).
32. In summary Mrs Morley maintained that the 2 CCTV surveys before the Tribunal show that the existing pipe in ditch A is blocked and fractured, that as a result the Applicants' land is suffering injury, and that altogether there is more than sufficient evidence to justify making an Order under section 28 primarily for the application ditches to be reinstated as open drains.

The Respondents' Case

33. The Respondents are wholly opposed to the making of any order under section 28 or section 30. Before the Tribunal Professor Khan for the Respondents began by pointing out that there had been a number of changes of ownership of Twin Oaks between 1995 and 2001, when the Respondents purchased, so that it could not have been the case that the trouble free operation of ditches A and B was simply a matter of maintenance by one owner over the years as suggested by the Applicants. He submitted that this indicated the pipes were adequate, save perhaps in cases of exceptional rainfall. As further evidence of the adequacy of the installation Professor Khan pointed to the fact that it was not unusual for his land to be flooded whilst the Applicants' land appeared relatively dry (Photos 6 and 7 (correctly dated 25 November 2012) refer).
34. Thus the Respondents' case is that application ditches A or B have not been obstructed as alleged by the Applicants. In support of this he referred to and relied upon the assessment made by Mr Nathan Culpan of the Acaster 1DB as set out in his letter dated 06 August 2010 (see above) which puts the problems down to wet weather in general and a lack of field drainage. Professor Khan was clear that in the many years that he has owned Twin Oaks he has never seen ditch A full to overflowing or actually overflow in to the Applicants' fields.
35. Moreover, Professor Khan does not accept that the pipe in ditch A has become blocked by tree roots as alleged. In this regard he relies upon the advice of a horticulturalist who informed him that '...conifer roots generally spread when they meet an obstacle, and therefore would not go through a pipe' (see paragraph 58 of the Official Expert's first report). Finally, he maintains the absence of any obstruction is confirmed by the "York City Council jetting contractors whose recent Private Works Orders dated 18 November 2013 [55] and 21 July 2014 [84] record respectively that the ditches were 'running all clear' and 'all ok.' Although it was not known the extent to which the jetting hoses had been inserted into ditch A.
36. Consistent with the foregoing Professor Khan submitted that the only works required are periodic jetting to remove any debris or silt. He was clear that this is work he would be happy to carry out as frequently as every 3 months. However, if the tribunal were to find that ditch A is blocked and causing injury to the Applicants' land, the Respondents say that the appropriate solution is that recommended by Drains UK, installing a new drain on the Applicants' land, northwards of the existing drain A [37].
37. The Drains UK solution would save digging up the established trees and undergrowth. It would be the least expensive option, cause the minimum disruption, and preserve the Respondents' privacy and the very secluded position of Twin Oaks. By contrast the Applicants' proposals, which Professor Khan described as like a mountain to solve a molehill, would mean the removal of the trees and cause significant disruption. Equally, he was opposed to the belated proposal for a more southerly route for a new drain across his driveway, arguing that this was

impractical and would be no less destructive than the remedial works advocated by the Applicants.

38. In summary the Respondents maintain that there is no evidence of either application ditch being blocked nor any evidence that the condition of the ditches is causing injury to the Applicants' land, Professor Khan had never seen water to flood over and stated that it always drains away over a period of time. Alternatively, if the tribunal finds to the contrary, the appropriate remedial works are those recommended by Drains UK 2000. He was wholly opposed to the remedial works proposed by the Applicants. Further, in closing Professor Khan made an open offer to pay for half of the costs of the Drains UK works if the Applicants would agree to compromise this application on terms that these were the remedial works to be carried out.

The Official Expert's Reports

39. The first report of the official expert in this matter Jenny Lambert BSc (Hons), Dip Ag Eng is dated 12 June 2013. She first inspected the site on 22 April 2013, and describes in that report the 2 sections of culvert already referred above; the 150mm butt jointed clay drain of application ditch A having its outfall into application ditch B the 450mm diameter concrete pipe laid within a watercourse running alongside the road.
40. The report states that the said watercourse is maintained by the Second Respondent. The IDB maintained watercourse flows southwards from Ditch B for a further 100m before being culverted under the road in a 900mm diameter concrete pipe. The watercourse then flows eastward for some 60- 70m before being culverted under an airfield in an approximately 450mm diameter pipe. It eventually flows into the River Ouse which is some 1.7km away.
41. The Official Expert's first report, prepared as it was shortly after the May 2013 jetting of the application ditches, recommended the following (1) joinder of the Second Respondent (2) that at that time an order should not be made against the Respondents under section 28 'as the previous blockages appear to have been removed by the recent jetting works. However this drop in water level may be a consequence of the current dry weather (3) that the case should be left open for a length of time so that the effectiveness of the recent jetting could be properly monitored.
42. The Official Expert's supplementary report dated 20 January 2014 [40] recommended, amongst other things, that the Applicants should be given a reasonable period of time to provide evidence that, since the jetting took place in May 2013, a significant blockage has persisted and that their land was still suffering from consequential waterlogging. At the same time she advised that the Respondent be notified that a yearly jetting would not necessarily be sufficient to prevent future blockages, and that a more intensive maintenance regime would likely be required, including clearing the trash screen at the inlet to ditch A, rodding, repair and replacement works.
43. More recently Ms Lambert prepared a further report dated 05 August 2014. The report reviewed the findings of the Excel survey report, and reproduced still photos captured from the Excel CD. In particular it shows at Photo 6, 'the clay pipes some 7.0m downstream from the inlet with water levels below half bore. Debris can be seen occupying the whole of the bore of the pipe.' Based on the evidence provided by the Camera Survey Ms Lambert concludes that as of July 2014 there was a blockage in application ditch A, only partially passable by water. Further, that the increased water levels occurring in ditch A are in her opinion adversely affecting the drainage of the Applicants' land.
44. At paragraph 16 of her report Ms Lambert states that, whilst a jetting, root cutting maintenance operation could again be undertaken by the Respondent in a further attempt to clear the blockage, root ingress would continue to occur and is likely to become increasingly aggressive

as the vegetation above the pipes matures. Furthermore the root ingress is likely eventually to cause structural damage to the pipes themselves. In the circumstances she recommends that an order is made under section 28 requiring the Respondents to replace the 150mm diameter open jointed clay pipe with a suitable section of sealed pipe or reinstate the open ditch that existed previously.

45. Before the Tribunal Ms Lambert confirmed her opinion and recommendations as set out in her most recent report (above). At the outset of her submissions she described how through capillary action an increase in water levels in ditch A would increase the water levels in the surrounding ground and result in the saturation of the Applicants' neighbouring fields. She then explained how her views had developed through her 3 reports. In particular, how on her second visit, following the May 2013 jetting, when the water levels above ditch A and below ditch B were very similar and there was no water standing upstream of ditch A, she could not be clear whether there was any impediment to flow between point A and the culvert under the road at point D. However, that in the light of the most recent CCTV she was satisfied that there was a substantial blockage in ditch A. Thus she confirmed in terms to the Tribunal that in her view the current condition of ditches A and B is causing injury to the Applicants' land.
46. Further, Ms Lambert gave evidence of her observations and findings on the site inspection (on the day of the hearing), interested as she was in establishing conclusively what was driving the water levels in the application ditches. Her measurements showed that the water level upstream of point B was 3cm below the water level in the 150mm pipe in ditch A, the water level downstream of ditch B was 10cm below the water level at the invert of the 150mm pipe, and the water level at point D was 17cm below the water level in the 150mm pipe. From this she deduced that the water level in the IDB ditch is not controlling the water level in ditch A, and there must, therefore, be a blockage in ditch A. In these circumstances she pointed out also that it would not take much of a change of water level in ditch B to cause the water in ditch A to back up still further.
47. Ms Lambert stated that in her view the ideal solution is to reinstate ditch A and B as open ditches. Alternatively, she thought that the pipe in ditch A could be replaced with a minimum 225mm pipe, provided steps were taken to ensure that the outfall into ditch B could be seen. This could be achieved by taking a few lengths of pipe out of ditch B and opening it up, or introducing an inspection chamber at the junction, although in her view this was not such a good option. In answer to questions from the Tribunal she confirmed that to replace the 150mm pipe would almost inevitably require removal of the trees and vegetation above, and that when replanting care should be taken to ensure that large trees do not grow within 5 metres of the new pipe. She concluded by reiterating her preference for reinstatement of the application ditches as ditches.

Discussion

48. No issue has been taken and in any event the Tribunal are satisfied that application ditch A and application ditch B are within the ownership of the Respondent and are properly treated as ditches as defined for the purposes of section 28. The first issue arising therefore is whether the condition of either or both application ditches is such as to cause injury to the Applicants' land as alleged.
49. As regards condition of the ditches, the Tribunal is satisfied that application ditch A is substantially blocked by tree roots growing into and invading the pipes. This conclusion is clearly supported by the Excel survey report, and the photographs provided. It is a conclusion also clearly supported by the evidence of the Official Expert. Further, the Tribunal accept the survey evidence of Ms Lambert measuring the relative water levels between ditch A and ditch B on the date of the hearing, and her opinion that these show the level of water upstream of

ditch A was not being controlled by the flow in ditch B, and the inference to be drawn that there is, therefore, a significant obstruction in ditch A.

50. Further, the Tribunal find that the impediment to flow constituted by the said obstruction in application ditch A is compounded by the relatively small 150mm diameter of the pipe in that ditch and the non-alignment of the pipe sections apparent in the Excel CCTV survey, a problem that is only likely to worsen over time. Indeed as pointed out by the Official Expert the current CCTV only got as far as 7m along the 40m length of ditch A from point A, and it is likely that there are other blockages downstream of this one.
51. To be clear therefore the Tribunal rejects the Respondents' assertion that there is no material obstruction in ditch A. The letter of Mr Culpan relied upon dates back to 2010, and is now outdated and of no real assistance to the Tribunal. Further, the Tribunal is not persuaded by the reports of the jetting contractors. The description 'running clear' is not detailed or supported in any way, and the observed flow, such as it was, may simply have been a result of the very high pressures usually employed in jetting. Certainly, in the Tribunal's view these brief reports from unidentified operatives are insufficient to contradict the clear photographic and other evidence referred to above establishing the poor condition of the pipe in ditch A.
52. In addition, to make their case, it is incumbent upon the Applicants to prove on the balance of probabilities that the condition of ditch A as found above is such as to cause injury to their land. The injury alleged being the waterlogging and flooding of their land. In this regard the Tribunal agree with the Official Expert, that the condition of the pipe in ditch A will inevitably result in elevated water levels upstream of A that will have the effect of waterlogging and even flooding the Applicants' land. The elevated water levels upstream of ditch A are graphically shown, for example, in the photographs from August 2012 (Photo 1) and again in April 2013 before the jetting in May 2013 (Photo 12). The consequences for the Applicants land are amply demonstrated by the episodes of flooding in recent winters, as shown for example in Photos 2 to 4.
53. Accordingly, the Tribunal accept and in so far as necessary find that with the passing of the years and the maturing of the trees and vegetation planted over the line of ditch A, the roots of those trees have invaded and will continue to invade the pipe in ditch A. ever more aggressively given the nature of root growth, and the condition of the ditch will worsen and the waterlogging and flooding of the Applicants' land will recur with greater frequency. Suffice to say, therefore, that with the pipe blocked as determined above the Tribunal finds that ditch A is presently in such a condition as to cause injury of the kind complained of to the Applicants' land even under ordinary weather conditions.
54. Notably, no equivalent complaint was pursued in relation to ditch B before the Tribunal. The concern raised with regard to that ditch relates only to the junction between the existing pipes. As referred to at paragraph 89 of the Official Expert's report, the gradients of the ditches are slack with consequential low water velocities, so that there is a tendency for the outlet of the 150mm pipe into the 450mm pipe of ditch B to silt up with a corresponding risk of blockage/partial blockage. Given, that there is little that can be done regarding the gradients, the implications of this are limited so it appears to ensuring that the outlet of ditch A (at A1) is properly accessible for maintenance purposes (as to which see further below).
55. The Tribunal must, therefore, consider whether to exercise its discretion under section 28 to make an order requiring the Respondent to carry out specified remedial works. As regards the appropriate remedial works to cleanse ditch A or remove the obstructions or otherwise put the ditch into proper order. In this regard given the condition of the ditch, the inadequate diameter, misaligned joints and the invasive root growth now blocking the pipe, in the Tribunal's judgement merely jetting or an attempt at root cutting is not sufficient. The Tribunal accepts that if an order is to be made the 150mm pipe in ditch A will need to be removed and replaced.

56. Given the requirement for the Tribunal to specify works, it is necessary to determine whether putting ditch A into proper order requires the ditch to be reinstated as an open ditch with suitably battered sides and open access to the outlet into ditch B or whether ditch A should again be culverted and piped with a larger diameter pipe and interceptor chamber. Faced with the fact that in practical terms the removal of the 150mm pipe will involve the removal of the trees and vegetation between A and A1, a point relied upon rather than contested by the Respondents, the Tribunal considers that it would be appropriate to follow the works preferred by the Official Expert, and require the reinstatement of ditch A as an open ditch with an open or at least fully accessible outlet into ditch B.
57. Should the Tribunal make such an order? As set out above the Respondents argue that to make any such order would be excessive, resulting as it would in the removal of the mature trees on their land and loss of privacy and seclusion. They point out that the Applicants could readily construct a new drain through their land north of ditch A, and have even offered to pay half of the costs of such works. These are powerful points, well made by Professor Khan. However, they must be weighed against the stark facts, that the application ditches for which the Respondents are responsible are the long established means of drainage for the surrounding lands, and that over time ditch A has fallen into a condition where it is now causing injury to the Applicants' land,
58. It is acknowledged that the proposed remedial works would cause the loss of trees and privacy, but whilst upsetting to the Respondents this can be cured in time with new planting and growth. Further, the Tribunal does not have jurisdiction to order by way of remedial works under section 28 or 30 the construction of the new replacement ditch over other land (belonging to a different owner than the application ditches) as referred to by Drains UK and advocated by Professor Khan, and the Tribunal does not think it would be appropriate to decline to make an order simply in the hope of the parties reaching some agreement for the execution of such other works.
59. In the circumstances, weighing the competing interest of the parties, in the Tribunal's judgement it is reasonable for the Respondents to be required under section 28 to carry out the appropriate remedial works that are required now to put ditch A into proper order. All such works to be done to a good and proper standard and subject to all necessary statutory consents and approvals, including an environmental survey and IDB approval as appropriate (matters upon which the Official Expert may be able to provide some guidance to the Respondents should they so request).
60. It follows also that it is unnecessary for the Tribunal to consider further or make any order under the alternative section 30 of the Land Drainage Act 1991.

Conclusions

61. For the reasons set out above the Tribunal thinks fit to make an order requiring the Respondents to carry out the remedial works specified below in order to put ditch A into proper order and for protecting it.

Order

62. Pursuant to section 28 of the Land Drainage Act 1991 the Respondents are required to carry out the following remedial works:
- 1) To remove the 150mm open jointed pipe in ditch A and reinstate the ditch as an open ditch with battered sides and draining into ditch. B.

- 2) To construct an outlet from ditch A into ditch B that is fully accessible for inspection and maintenance purposes, by removing the culverted pipe and reinstating as open ditch the section of ditch B upstream of its junction with ditch A or otherwise as is most practicable.
- 3) To provide a stock proof fence on the boundary between the Stonebridge Farm and Twin Oaks north of the reinstated ditch A and along the existing fence line.
- 4) All such works to be done to a good and proper standard using materials that are fit for their intended purpose. No pipework to be less than 300mm diameter.
- 5) All such works to be carried out subject to obtaining all necessary statutory consents and approvals, including as appropriate an environmental survey and IDB approval.
- 6) In accordance with section 29 of the Land Drainage Act 1991 if at the end of 3 months (together with such further period as may be required by law for the carrying out of the said work) the work specified above has not been carried out, the appropriate Minister or any drainage body authorised by him, may carry out the work as provided therein and may recover from the Respondents the expenses reasonably incurred

Notification of the Right to Appeal

The parties each have a right of appeal against this decision in accordance with Part 6 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ('the Tribunal's Rules'). An application for permission to appeal must be made in writing to the Tribunal within 28 days after the latest of the dates that the Tribunal sends to the person making the application (a) these written reasons for the decision (b) notification of amended reasons for, or correction of, the decision following a review; or (c) notification that an application for the decision to be set aside has been unsuccessful, subject that is to any extension of time if granted by the Tribunal.

Dated: 5 December 2014