

BETWEEN:

DUNCAN LORRIMAN

Applicant

and

Mr & Mrs BRIAN MASTERS

Respondents

SCHEDULE

Introduction

1. This is an application by Mr Duncan Lorriman [“the Applicant”], of Hillgate Nurseries, Hillam Common Lane, Hillam, Leeds, LS25 SHU, under section 28 of the Land Drainage Act 1991 [“the Act”]. The Respondents to the Application are Mr and Mrs Brian Masters, of Botany Bay, Hillam Common Lane, Hillam, Leeds, LS25 SHU.
2. The application is dated 11th April 2009, and relates to what the Applicant contends was originally a single ditch on the northern side of the parties’ adjacent properties. It is his case that this ditch was completely blocked when a new access was made to Botany Bay by the Respondents’ predecessor, Mr Cook; and that, as a result, the drainage from the Applicant’s land has been adversely affected. He therefore applies for an order for the removal of this obstruction.
3. The Respondents resist the application, their written response being dated 31st July 2009. They dispute that the two ditches now lying on either side of their access point ever formed a single continuous ditch, or that this access point is adversely affecting the Applicant’s drainage. They also point out the Applicant’s delay in making his application.
4. In accordance with the relevant procedure, the Secretary of the Tribunal requested a report from a drainage engineer acting on behalf of the Environment Agency. This report, dated 19th June 2009, was prepared by Mr Andrew Adams. Appendices 1 and 2 to this report show the layout of the parties’ properties and features of the current drainage. For the reasons fully set out in his report, Mr Adams recommends that no order should be made under section 28. The Respondents accept Mr Adams’ recommendations, but the Applicant does not, on the grounds set out in his response dated 2nd July 2009.
5. The hearing of this application took place at The Best Western Milford Hotel, Great North Road, Peckfield, Leeds, West Yorkshire, on Wednesday, 9th December 2009. The parties appeared in person. The Tribunal began by carrying out an inspection of the site of the application and features of the surrounding area as indicated by Mr Adams and the parties. We then heard evidence from Mr Lorriman, Mr Masters and Mr Adams. We also considered a number of documents, principally planning documents produced by the Respondents and an expert’s report by Mr B T Collinson dated 26th July 2007 made on the joint instructions of the parties for an earlier boundary dispute between them. In addition, Mr Adams produced two further appendices to his report [Appendix A and Appendix B], both headed “Longitudinal Section – Hillgate Nurseries”.

Background and history

6. The following general description of the area is taken from Mr Adams’ report:

- “6. The Application site is located within a rural area which is generally flat or gently sloping and around the 8 metre AOD contour. The land use is mainly a mix of arable and grassland. Drainage is very important to the agricultural use of the land and arterial drainage is provided by a pumped system managed by the Internal Drainage Board (IDB). A main drain known as the Maspin Moor Dyke provides the main pumped drain for the area. This drain runs to the west of the Application site and flows south and then east to Roe Lane Bridge.
7. Soils in the area are described as loamy with naturally high water tables. A limitation of the soils is that they can be subject to slight seasonal waterlogging.
8. Rainfall for this area is typically 730mm/annum.”

Hillgate Nurseries

7. Prior to 1986, Hillgate Nurseries was occupied by a horticultural business. The premises extended to 2 hectares, and included a 1.4 hectares arable field, protected cropping and a small orchard. The Applicant and his wife purchased the premises in 1986, and in 1987/1988 built a dwelling-house on the site. The land and buildings of the horticultural business have remained, and the arable land is currently farmed under contract by a local farmer. Running close to the northern boundary of the site is a ditch, which is parallel to Hillam Common Lane. This ditch now extends in a westerly direction as far as the access bridge to Botany Bay: to the east, it links to a series of ditches and culverts which go as far as Roe Lane, but which are in variable condition, being blocked or impeded in places. It is this ditch which is concerned in the present application. Access to the Applicant’s house from Hillam Common Lane is by means of a culverted bridge across this ditch, which is piped with two 100 mm plastic pipes. Discharging into this ditch are two further ditches, which run along the eastern and western boundaries of the premises from points part way into the arable field. So far as is known, the arable field does not contain any internal system of land drainage.

Botany Bay

8. Botany Bay was also, at one time, occupied by a horticultural business, to which access was gained from Pighill Nook Road. The site extends to about 1 hectare. In about 1972, it was acquired by the Respondents’ predecessor, Mr Peter Cook. It appears that there was no-one in occupation of the premises between about 1975 and 1989, because Mr Cook was in prison. In November 2003 Mr Cook sold the premises to the Respondents.
9. At some stage prior to the Respondents’ acquisition of the premises, the ditch, or portion of ditch, then existing on the northern boundary of Botany Bay, was the subject of drainage works which enabled it to discharge westwards into the IDB main ditch by means of a piped culvert under Pighill Nook Road. There is a dispute between the parties as to (a) when these works were carried out; and (b) whether, when they were carried out, this ditch formed part of a continuous ditch running across the northern boundaries of both their properties, or was a separate ditch from the one in front of Hillside Nurseries. (We shall discuss this dispute in greater detail below).
10. Also at some stage prior to the Respondents’ acquisition of the premises, Mr Cook created a new access to them from Hillam Common Lane. According to the Applicant, this access was first created in about 1994 and later enlarged by Mr Cook: and it took the form of a solid, unpiped bridge, which completely blocked the continuous ditch previously referred to. The Respondents do not accept this, contending that this access is across a land gap between the two separate ditches.
11. When the Respondents acquired Botany Bay in 2003, it had the benefit of outline planning permission for the erection of a three-bedroomed house on the site, granted by Selby District Council on 17th April 2003. This grant included the following conditions:
 - (a) No development should take place without the prior written approval of the Local Planning Authority of all details of means of access to the site;

- (b) The existing access should be improved by providing 6 metre radius kerbs, to give a minimum carriageway width of 5 metres, and that part of the access road extending 10 metres into the site should be constructed in accordance with the Standard Detail number E7e and the Specification of the Local Authority; and
 - (c) There should be no means of vehicular access to or from the site other than from Hillam Common Lane, unless otherwise approved in writing by the Local Planning Authority.
12. In 2004 the Respondents built a dwelling-house on the Botany Bay site, where they now live. Since then there have been a number of issues between the parties, including a boundary dispute, which was resolved in the Applicant's favour in 2008 and meant (as we understand it) that the Respondents' access had to be reduced in width so that it ceased to encroach on the Applicant's land. The Applicant has also made approaches to Selby District Council, because he contends that the Respondents' access contravenes the terms of their planning approval and is therefore illegal; and to the Internal Drainage Board, inviting them to carry out appropriate drainage improvements. Neither body has responded to his satisfaction, and he has complained to the Local Government Ombudsman about their administration of these matters. The Respondents deny that their access, in its present form, is illegal; and say that the Local Planning Authority is simply withholding its final approval of the details of the means of access to the site until all relevant disputes between the parties (of which the present application is the last) have been resolved.

The Applicant's Case

13. As already indicated, the basis of the Applicant's case is that, prior to 1994, there was a continuous ditch running along the northern boundaries of Hillgate Nurseries and Botany Bay; and that, since 1994, it has been completely obstructed by the solid access bridge installed by Mr Cook. He believes that this continuous ditch had probably existed since the 1960s, and said that he had given Mr Adams copies of two independent witness statements which confirmed this (but which were not produced to the Tribunal). His personal knowledge of the area began in 1986, when he purchased Hillgate Nurseries. He says that, at that stage, this ditch was a "double-back" ditch, with one section flowing westwards towards Pighill Nook Road and the other section flowing eastwards towards Roe Lane. The watershed point was to the east of his eastern boundary, so that the flow of the ditch across the northern boundaries of Hillgate Nurseries and Botany Bay was wholly in a westerly direction.
14. The Applicant contends that, as a result of the obstruction, the water in his part of the ditch can no longer discharge into the IDB main ditch in the vicinity of Pighill Nook Road; and that, in consequence, the drainage of his land has been adversely affected. He says, in particular, that the blockage causes water to build up in all the ditches on his land, causing local flooding and preventing maintenance of the ditches. Two periods of high rainfall, in June 2007 and January 2009, led to "overtopping" of these ditches; while the arable field has suffered significant crop losses, and has been placed into set aside this year to allow the land to recover.
15. The remedy which the Applicant seeks is the complete removal of the obstruction, and its replacement by a bridge of concrete slabs across the top of the ditch, so as to allow a completely unimpeded flow of water to the west. He does not accept that it would be an adequate solution simply to insert pipes through the obstruction. In his application he does not seek any other form of action.
16. The Applicant says that he has not made application to the Tribunal before, because he was unaware of the provisions of the Land Drainage Act 1991 until recently. He feels that, as the owner of a registered agricultural holding, he should have been informed much earlier of this legislation by MAFF or Defra.

The Respondents' Case

17. The Respondents do not accept that there was ever a continuous ditch, at least of the kind contended for by the Applicant (in his closing address to the Tribunal, Mr Masters said that he "genuinely believed" that there had always been a ditch along the northern boundaries of the two properties, but it had been a

shallow ditch which flowed towards the east like the ditch on the north side of the road). In taking this stance, they are relying on what they were told by Mr Cook, because, of course, the access to Botany Bay from Hillam Common Lane had been in place for nearly 10 years before they had any personal knowledge of the site. Mr Cook was not a witness, so we only had Mr Masters' hearsay evidence of what Mr Cook had said. This was to the effect that there had always been two separate ditches; and that when, in the 1970s, works had been carried out on the ditch on the northern boundary of Botany Bay to enable it to discharge into the IDB main ditch near Pighill Nook Road, the then owner of Hillgate Nurseries had been offered the opportunity to link his northern ditch into these works, but had declined. To refute the Applicant's suggestion that a continuous ditch (at least of any significant depth) had existed since the 1960s, Mr Masters drew attention to Mr Collinson's joint expert's report in which Mr Collinson stated that an aerial photograph taken in 1974 showed that:

“...in March 1974 the northern physical boundaries of both properties were represented by a mature field hedge which separated the fields from the highway verge. There was a single hedge, it contained a number of trees and there was no evidence of the current double hedges, ditches, bridges etc.” (page 3).

Mr Masters also relied on a letter to him from Selby District Council dated 6th November 2008, in which Diana Adamson, Acting Principal Environmental Health Officer stated:

“Having visited the area and consulted historical maps I am unable to determine if the two dykes were connected at any time and, hence, both drained in to the drain on Pighill Nook Road.”

The Respondents also dispute that the Applicant has established any damage to his land resulting from defective drainage

18. In the alternative, the Respondents say that, if this application succeeds, the remedy sought by the Applicant is excessive. When addressing us, Mr Masters made it clear that he was opposing the application as a matter of principle. Otherwise he would have no objection to inserting two pipes into his access bridge. He would be happy to carry out the work himself; and he could see no problem in doing so while completing the access to Botany Bay in accordance with any final requirements which the Local Planning Authority might impose. Such a course should be sufficient to meet any drainage problems which the Applicant might have, without the need to substitute a bridge of concrete slabs. In his final remarks, Mr Masters made it clear that, despite their differences, he had some sympathy for the Applicant's difficulties: as he put it, “We've both been left with a problem created by our predecessors”.

Mr Adams' Findings and Views

Site survey and investigations

19. In paragraph 29 of his report of 29th June 2009, Mr Adams set out the following results from his site survey and investigations:
 - “29.1 The land in the locality is flat to gently sloping and is predominantly in agricultural use. Drainage is important to the farming of the land and also to remove surface water efficiently. The drainage of the area is dependant on a network of main channels supplemented by ditches and field drains.
 - 29.2 The IDB watercourse which runs along the west side of Pighill Nook Road is a well maintained ditch which is controlled by a pump located at Roe Hill. The watercourse flows south and then turns east towards Roe Hill. Flowing east the watercourse is located to the south of a track which provides access to agricultural land including that owned by the Applicant.
 - 29.3 The watercourse at the corner of Pighill Nook Road and Hillam Common Lane has a profile of 2.3 metres top width, 0.9 metres bottom width and between 1.2-1.7 metres deep with variation from field and road banks. Downstream the profile increases, for example close to the access into the

Applicant's arable field it is on average 4.5 metres top width, 1.5 metres bottom width and 1.9 metres deep.

- 29.4 The pipe under Pighill Nook Road from the Respondents' ditch is a 225mm clayware pipe which has an invert level of 8.36 metres (from an assumed datum of 10.00 metres on the access to Hillgate Nurseries) on the upstream side and 8.19 metres on the outfall into the IDB watercourse.
- 29.5 The Respondents' ditch which is subject to this application has an average profile of 2.8 metres top width, 0.6 metres bottom width and 1.2-1.4 metres deep. The ditch in the lower section running towards Pighill Nook Road is more silted with the bed level being 300-350mm above the outlet pipe invert.
- 29.6 No pipe was found in the culvert which provides the access into Botany Bay off Hillam Common Lane.
- 29.7 Ditches within Hillgate Nurseries comprise the roadside ditch into which flow boundary ditches on the east and west of the property. These boundary ditches extend to include the nursery area and part of the arable field on the eastern side. The boundary ditches vary in profile from 0.8 metres top width, 0.3 metres bottom width and 0.3 metres deep on the southern end to 2 metres top width, 0.4 metres bottom width and 0.7 metres deep where they join the northern ditch adjacent to Hillam Common Lane.
- 29.8 Land levels taken within Botany Bay and Hillgate Nurseries indicate that the land is almost flat but with a slight fall to the south and east. Pighill Nook Road falls to the south with a gradient of 1:300.
- 29.9 The arable field of Hillgate Nurseries is not cropped but has the stubble from the last cereal crop. The ground surface shows sign of rutting and areas where water has ponded in the past. There is no known drainage system installed within the field.
- 29.10 Levels were taken along Hillam Common Lane from the junction with Pighill Nook Road east towards Roe Lane. The general trend is for the entrance to Botany Bay to be the balance point with the road falling, albeit slightly, to the west and east from this point.
- 29.11 No drain outfalls were found in any of the ditches."

Discussion

20. Mr Adams went on to discuss the disputed issue of "which way the ditch flows from Hillgate Nurseries and therefore is the culvert into Botany Bay a blockage, or not, to the normal flows of water" in these terms:
 - "32. An indicator of flow is the difference between the inverts of the pipe under Pighill Nook Road and that of the pipe under the access culvert to Hillgate Nurseries. Levels indicate that the Pighill Nook Road culvert is 0.2 metres below the invert to the access culvert. This suggests that the flow between the two sections could be in a westerly direction based on these two measurements.
 33. While the above gives a general guide there is no evidence to suggest that the level of the pipe under Pighill Nook Road was set to allow the water from Hillgate Nurseries to flow to this point. The level was set, it is understood, to allow the underdrainage of the Botany Bay Land. The Respondent makes the point that it was his understanding that the then owners of Hillgate Nurseries were approached about improvements to the ditch system but they declined to be part of the scheme. It could be that this was the assumed route of flow and no additional benefit would accrue, or, alternatively the flow may have been in a different direction. There may have also been other reasons, for example, cost which influenced the decision. I was not able to establish when the access to Hillgate Nurseries was made. The

Applicant was not able to give a specific date only that it was prior to him buying the property. The construction of the access and the twin 100mm pipes forming the culvert indicates possibly 1970/1980's.

34. The ditches around Hillgate Nurseries are maintained to flow north and then west towards Pighill Nook Road. Land levels indicate that the land is flat or there is a general fall to the south east which would suggest that whilst drainage water may at present flow in the direction as described there are other options.
35. Hillam Common Road has a slight fall to the east from around the access to Botany Bay. Inspection of the ditches and culverts to the east of Hillgate Nurseries found the ditches to be variable in condition, filled, or piped and the culverts were either not piped, piped with inadequate pipes or blocked. There is a possibility that the section of ditch between Hillgate Nurseries and Roe Lane was clear and well maintained. No detailed inspection was made but a chamber exists in the road verge of Roe Lane which takes water from the north and east and is likely to take water from the west...
36. The ditches on the east and west boundaries of Hillgate Nurseries are graded towards the ditch along the northern boundary. The ditches continue only part way within the arable field which, as far as Mr Lorriman is aware, has no underground drainage system installed. Levels indicate that the ditches could be continued along the east and west boundaries to the south and could link up with the IDB drain which is located on the southern side of the holding... I have raised the issue of new drains into the IDB network with the IDB engineer and, subject to the approval of details, no problems are envisaged...
37. The damage to the property of Hillgate Nurseries through the inadequate drainage have been described by Mr Lorriman in terms of the flooding risk to his property, prevention of maintenance of the ditches and the crop losses on the arable field. I understand from my discussions with Mr Lorriman that the main concern is the increased time the water is remaining in the ditches around his property especially after high rainfall events and the knock on effects this high water level has on the ground conditions around his property. No substantial information about crop losses suffered has been provided with regard to the arable field."

Conclusions

21. Mr Adams' principal conclusions were:

- "39. There is no doubt that the removal of the culvert together with some remedial works to the ditch which forms the northern boundary of Botany Bay would provide an outfall from Mr Lorriman's land and achieve the outcomes that he seeks from this Application. While the removal of the culvert would be relatively simple in engineering terms the replacement of the access with a bridge as requested by Mr Lorriman would be a very much more substantial engineering operation. In addition access to the boundary ditch linking the pipe under Pighill Nook Road and the culvert would require substantial hedge trimming and the removal of a fence.
40. I have no reason to doubt that the pipe under Pighill Nook Road was installed in the 1970's by the then owner of Botany Bay, Mr Cook. Whether this pipe replaced a pipe or deepened an existing pipe I have not been able to establish. There is no ditch visible along the eastern side of Pighill Nook Road which might indicate a previous drainage route prior to piping. On the basis of the information available, and my investigations carried out no firm conclusion can be made about whether the natural drainage to this area was, and continues to flow west towards the pipe under Pighill Nook Road. The general fall of the land and the route of the IDB drain indicates that the general drainage route is towards the south east and this has been confirmed through land survey.
41. The access to Hillgate Nurseries does not assist in establishing a conclusive direction of flow. The culvert is a relatively modern structure with plastic pipes whereas the pipes under Pighill Nook

Road are clayware and of larger diameter. Normal drainage practice would be to install a minimum 225mm pipe (now at least 450mm) when constructing a culvert with concrete/clayware or more recently twinwall plastic pipes. Design is important especially if the access is to be used by heavy vehicles. Although the invert levels of the pipes of the access into Hillgate Nurseries are above that of the pipe under Pighill Nook Road this is not conclusive evidence that this has always been the case.

42. Other options could be available to achieve the improvements that are required. These have been described above and involve a route to the east or ditch improvements mainly on Mr Lorriman's land with an outfall into the IDE drain to the south. These options have not been considered by Mr Lorriman as it is his view that the natural drainage route is to the west."

Recommendation

22. In the "Recommendation" section of his report Mr Adams said:

- "44. An order under Section 28 is not recommended for the removal of the culvert which forms the access to Botany Bay. Whilst the works proposed would provide the basis for the improvements which the Applicant seeks, I have not been able to conclude that the natural drainage route follows this direction of flow and therefore that the Respondent is holding up natural water flow. The general trend of drainage in the area is towards the south and east and although local variation could occur it is not conclusive in this case.
45. In addition to the removal of the culvert additional ditching works would be required both on the Applicant's and Respondent's land to give the improvements to which the Applicant seeks. No Application is made for such works. The Tribunal will also wish to consider whether the removal of a culvert falls within the scope of section 28.
46. An option would be for the parties to work together towards the solution which the Applicant seeks. Alternatively other options might be considered which have been outlined in this report..."

Evidence

23. In the course of his evidence Mr Adams frankly acknowledged that a case could be made out either way for the direction of water flow in the ditch in question. He had tried to go back to the position as it was prior to the building of the houses on the parties' properties. However, he felt that there were "a lot of things which are unknown here, and it is potentially easy to make assumptions". The historical situation could have been altered by such new factors as the interruption in land use, the building of the houses and the construction of the ditches on the Applicant's eastern and western boundaries which brought more water towards Hillam Common Lane. From the longitudinal sections he had produced it was "fairly clear that the flow could be west to Pighill Nook Road on the route as it exists today". However, he could not guarantee that the bed levels shown in Appendices A and B were what had existed originally. There was another ditch on the northern side of Hillam Common Lane which indisputably flowed in an easterly direction. Mr Adams acknowledged that he had been given two witness statements by the Applicant, but these had simply confirmed the existence of a ditch: they had contained no details such as the depth of the ditch or the direction of flow. He felt that he had gone as far as he reasonably could in determining the issues raised by the application.
24. On other matters, Mr Adams said that, unless the Applicant's and Respondents' ditches were properly cleaned out, any benefits from removing the Respondents' culvert, or piping it, would be negated. He estimated that the water on the Applicant's land and in his ditches was essentially surface water, not ground water. He had demonstrated this during the Tribunal's inspection, when he had taken a sample of earth, to one spade's depth, from the arable field: whereas the top of this sample had been wet, the bottom had been dry.

The Law

Section 28 of the Act

25. Section 28 deals with “Orders requiring the cleansing of ditches etc.”, a ditch being defined by sub-section (5) as including “a culverted and a piped ditch”.

26. Sub-section (1) provides:

“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.”

The words “may if they think fit” in this sub-section indicate that it is ultimately a matter for the discretion of the Tribunal whether or not to grant an order and, if so, on what terms – although it is, of course, a discretion which must be exercised judicially and reasonably. While there is no time limit on making an application under the section, delay by an applicant is clearly one of the factors which it may be relevant for the Tribunal to take into account when exercising this discretion.

27. By sub-section (5) “remedial work” in relation to a ditch is defined as meaning

“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”.

28. By sub-section (2)(a) an order under section 28 may name “any person who is an owner or occupier of land through which the ditch passes”.

29. Sub-section (3)(b) provides that an order under the section which names more than one person may require all those persons jointly to carry out the whole of the work specified in the order.

30. By sub-section (4), where the Tribunal make an order requiring persons jointly to carry out any work, they may, if they think fit, specify in the order the proportions in which those persons are to contribute to the cost of doing so.

Planning

31. We mention this aspect, simply in order to dispose of an issue which the Applicant has raised in these proceedings, namely his contention that the access to Botany Bay is illegal as being in breach of the Local Planning Authority’s requirements. As we made clear to the Applicant during the hearing, we are not concerned with planning issues, which lie completely outside the Tribunal’s jurisdiction. It is exclusively a matter for the Local Planning Authority to consider whether there has been a breach of planning control and, if so, to take appropriate enforcement action.

Burden and Standard of Proof

32. As we explained to the parties at the start of the hearing, the onus is on the Applicant to prove his case. However, in order to succeed, he need only do so to what is known as the civil standard of proof, that is to say on the balance of probabilities. In other words, he must satisfy us that his version of any factual

dispute is more probable (or likely) than the contrary version.

Findings and Conclusion

Was there a continuous ditch with a westerly flow?

33. As we see it, the fundamental issues of fact which we have to decide are these:

- (1) **At the time when Mr Cook first began to construct the access into Botany Bay, was there a single continuous ditch along the northern boundaries of Hillside Nurseries and Botany Bay, or were there two unconnected ditches separated by a piece of land across which the access was made?**
- (2) **If there was such a continuous ditch, what was the direction of water flow at the point where the access was constructed?**

34. Although these issues are theoretically independent of each other, they are in fact closely linked. This is because the Applicant's case on both of them is heavily reliant on his own evidence. In particular, it is the Applicant's account of what he observed in the period 1986 to 1994 which forms the main basis for his contention that, at the relevant time, there was a continuous ditch in which the water flowed in a westerly direction at the relevant point.
35. Accordingly, a good deal must depend upon our assessment of the Applicant as a witness, including his honesty, accuracy and reliability. Given that he must have had them under close observation for some 8 years, it is difficult to see how there could be any room for mistake in the Applicant's account of the continuous nature of the ditch or its westerly flow. Putting it bluntly, he must either have been telling us the truth or lying to us. It is right to say straight away, therefore, that there was nothing in what he said to us, or the manner in which he said it, which suggested to us that he was giving us a deliberately untruthful account. On the contrary, he gave us the strong impression of a man who was convinced of the justice of his case and genuinely aggrieved by his failure to achieve satisfaction. In some situations, lengthy delay by an applicant in seeking a remedy under section 28 might well raise doubts about his integrity. However, we do not think that this is so in the present case. The Applicant has provided us with an explanation for his delay which is fully consistent with his honesty. Perhaps more importantly, there appears to be no doubt that for a considerable number of years he has been pursuing other remedies in an attempt to have the access bridge to Botany Bay removed.
36. However, it is also necessary for us to examine whether there is any independent evidence which either supports or undermines the Applicant's testimony. **On issue (1) above**, there is in our view, no such evidence to which any weight can be attached either way. The aerial photograph analysed by Mr Collinson showed the position on the ground as it was some 12 years before the relevant time; and it seems clear that, on any version of events, substantial changes are likely to have taken place in the intervening period. All that remains for us to consider is some hearsay evidence, namely what we were told of the independent witness statements obtained by the Applicant, and Mr Masters' account of what he was told by Mr Cook. The Tribunal has power to receive hearsay evidence under rule 23(6) of the Agricultural Land Tribunals (Rules) Order 2007, provided that it seems to be relevant. Nevertheless, it is for the Tribunal to decide what weight, if any, should be attached to such evidence. In the circumstances of this particular case, we feel bound to say that we cannot attach any weight, either way, to any of this hearsay evidence. To be able to make any reliable assessment of it, we would need to see and hear the individuals concerned, and have their accounts tested for their honesty, accuracy and reliability.
37. **On issue (2) above**, there is, as Mr Adams has pointed out, some evidence which is consistent with the Applicant's version and other evidence which is inconsistent with it. We are grateful to Mr Adams for his careful analysis of the available information, and agree that there is no independent evidence which *conclusively* supports the Applicant's version. However, it seems to us that there at least two matters which, while *not* conclusive, *support* the Applicant's version to a material extent. The first is the levels shown in Mr Adams' longitudinal sections, Appendices A and B, which he accepted provided some

support for a westerly flow.. It is true that, as Mr Adams said, these levels could have changed over the course of time: but we have no evidence that this ever *did* happen, so this possibility remains purely speculative. The second matter is the improbability, in our view, that drainage works as elaborate as the piped culvert under Pighill Nook Road would have been carried out simply to provide an outlet for a ditch in front of Botany Bay. We think it more likely that it was also intended to facilitate the discharge into the IDB drain of a much greater volume of water water flowing westwards from Hillside Nurseries. Although the balance is a relatively fine one, we think that the combined weight of these two matters is sufficient to prevail against the contrary points mentioned by Mr Adams. Accordingly we consider that there is some independent material which supports the Applicants account to a material extent.

38. In these circumstances we are satisfied, on the balance of probabilities, that the Applicant has proved his case on these two fundamental issues. In other words, we find that:

- (1) When Mr Cook first began to construct the access into Botany Bay, there was a single continuous ditch running along the northern boundaries of both Hillside Nurseries and Botany Bay; and**
- (2) At the point where the access was made, the flow of water in the ditch was in a westerly direction from a point to the east of the eastern boundary of Hillside Nurseries.**

We are conscious that, in making these findings, we have reached a different conclusion from Mr Adams. This does not mean that we are rejecting Mr Adams' report, and involves no reflection upon him. The difference arises out of our respective functions. Mr Adams' role is essentially to investigate and report on the technical aspects of this matter. In that role, he has discharged his duties without fault, and we are most grateful for the assistance he has given us. However, it is no part of his role to assess the honesty, accuracy and reliability of the witnesses. That is exclusively a matter for the Tribunal. In reaching our conclusion, therefore, we have been able to take into account a wider range of material than is allowed to Mr Adams. In this particular instance we have reached our conclusion essentially because, for the reasons we have given, we are satisfied of the truthfulness and accuracy of the Applicant's evidence about the ditch in question in the years immediately prior to 1994.

Are there grounds for making an order?

39. On the basis of these factual findings, we think that the continuous ditch in question was clearly a ditch to which section 28 applied. It is also clear that the presence of the access bridge constructed by Mr Cook was to impede completely the westward flow of water in the ditch from Hillside Nurseries. Although the Applicant failed to produce any cogent evidence of actual injury to his land, we have no doubt that the effect of this impediment was to prevent the improvement of the drainage of Hillside Nurseries by means of a scheme enabling it to discharge into the IDB drain at Pighill Nook Road. Although orders under 28 are more commonly used to require the cleansing of ditches by the removal of silt or vegetation, we cannot see why such an order could not cover remedial work involving the removal of the material forming the access bridge (as being "any matter which impedes the flow of water") or inserting pipes through the bridge (as being "putting it into proper order"). In principle, therefore, it seems to us that the Applicant is entitled to an order under section 28.
40. Furthermore, we cannot see any good reason why we should not exercise our discretion in favour of making an order under 28 (the precise terms of which we will consider below). The only possible obstacle that we can envisage is the Applicant's delay in bringing these proceedings. Although he has had many years to make an application to the Tribunal, we do not think that this is a sufficient reason to refuse to grant him an order now. As previously indicated, he has not acquiesced in the situation and has tried to pursue a variety of means to rectify it. In addition, it is an ongoing situation which needs resolution.

What order should be made?

41. The Applicant seeks an order requiring the total removal of the present access bridge, and its replacement by an overhead bridge across the ditch. The Respondents argue that, if an order is made, it should be limited to requiring the insertion of pipes through the existing bridge. We think that the remedy sought by the Applicant is excessive, and the solution put forward by the Respondents should be sufficient to relieve any drainage problems on the Applicant's land. As Mr Adams pointed out, the course requested by the Applicant would be significantly more expensive than inserting appropriate piping. Moreover, the corresponding access to Hillside Nurseries has a piped culvert, not an overhead bridge.
42. Although Mr Masters has volunteered to carry out the necessary piping work, and we are happy that *physically* he should do so, we think that the fair and just outcome would be for the costs of the remedial work to be shared equally between the parties. This is because we consider that they are both parties having to cope with a problem which has not been of their own making, but has been created by the actions of their respective predecessors. Accordingly we propose to order that *legally* the parties should be jointly responsible for carrying out the remedial work, and that they should contribute towards the costs of that work in equal proportions (i.e. 50% each). To avoid any misunderstanding, we should make it clear that our order will not authorize either party to go onto the other party's land *without that party's prior consent*.
43. This application has always been confined to remedial work to the access bridge into Botany Bay. The Applicant has never sought to amend his claim to cover any other work (nor, given the Respondents' lack of legal representation, would it have been proper for the Tribunal to invite an application to amend at the hearing). However, as Mr Adams pointed out in his report, if remedial work to the access bridge is to be fully effective, it will also be necessary for cleansing work to be carried out to the ditches on either side of it. Since our order has to be limited to the basis of the application, it cannot include such cleansing work. Therefore, the requisite cleansing work will have to be carried out by consent and co-operation between the parties (which we hope may lead to some improvement in relations between them).

The Order

44. For the reasons set out above, we make the following order (the details of which were discussed with Mr Adams, Mr Masters and Mr Lorriman at the conclusion of the hearing):
- (1) That Mr A J Adams shall, by 11th January 2010, prepare a specification for remedial works to the access bridge from Hillam Common Lane into the Respondents' land at Botany Bay, LS25 SHU, by the insertion of appropriate drainage pipes through the same.**
 - (2) That the carrying out of the remedial works detailed in the said specification shall be the joint responsibility of the Applicant and the Respondents, but shall be physically undertaken by the Male Respondent on behalf of both parties.**
 - (3) That the said remedial works shall be carried out to the satisfaction of Selby District Council and the relevant Internal Drainage Board; and shall be completed by 11th June 2010.**
 - (4) That the Applicant and the Respondents shall contribute in equal proportions to the cost of carrying out the said remedial works.**
 - (5) That there shall be liberty to both parties to apply to the Agricultural Land Tribunal, on written notice to the other party, as to the working out of this Order.**

Robert Taylor, Chairman

M J Baker, Secretary

5th January 2010