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AGRICULTURAL LANDS TRIBUNAL WALES

REFERENCE: ALT 6321

TRIBUNAL: Dr Christopher McNall (Deputy Chairman)
Dr Russell Young MBE JP (Drainage Member)
Mr Evan Roberts (Farmer Member)

APPLICANT: Mr John Stephen Wrench

RESPONDENTS: Network Rail Infrastructure Limited

PROPERTY: Beeches Farm, Flint Road, Saltney Ferry, Chester CH4 0BW

AND IN THE MATTER OF:

AN APPLICATION UNDER THE LAND DRAINAGE ACT 1991

REASONS

1. These are the reasons for the Directions which we have sent to the parties.

2. The hearing on 20 June 2016 was preceded by a site visit which the Tribunal had ordered of its own initiative. The principal purpose of the site view was to inform ourselves, visually, as to the present condition of the drainage system on the Respondent's land. We consider that we were able to accomplish this purpose satisfactorily. The visit took approximately 2 1/2 hrs. The weather was intermittent light rain. It had been raining more heavily on the day before. Although we were not able to enter onto railway land (with the exception of using a level crossing) we were nonetheless able to approach and view several parts of the drainage system, which extends for about a mile alongside the London to Holyhead railway.

3. It is necessary to set out some of the background to the present application. On 27 February 2013, Mr JS Wrench, as the occupier of Beeches Farm, applied to the Tribunal under section 28 of the Land Drainage Act 1991, for an order requiring the respondent to carry out certain work to ditches on both sides of the Chester-Holyhead railway line between bridges 18A and Sandycroft Bridge. That application was given number ALT 6305: 'the First Application'. The work required was to clean ditches and culverts and grub out vegetation, including trees.

4. In accordance with the conventional approach to drainage cases, as reflected in Rule 45 of the Tribunal's Rules (Agricultural Lands Tribunal (Rules) Order 2007) an official expert - Mr S J Bell of ADAS - was appointed to produce a report containing recommendations. He made at least one site inspection, in March 2013. However, he did not produce a report, or make any recommendations, for the reasons set out below.

5. There was no formal response to the First Application. The respondent applied for, and was granted, various extensions of time whilst discussions to resolve the dispute continued between the parties. In June 2013 Mr Wrench appointed Mr Philip Meade, a surveyor, to act on his behalf in connection with the First Application. On 11 June 2013, Network Rail proposed certain works. On 21 June 2013, Mr Meade wrote that he was firmly of the opinion that the proposed work 'does not cover the full extent of the work required as set out in the [First] application'.

6. Whether that contention was right or not, the parties told the Tribunal in early July 2013 that they had reached an agreement.

7. That agreement is encapsulated in a consent order. The relevant parts read:

> "1. The provisions of this Order are accepted in full and final settlement of all claims arising out of the Application which either party may be entitled to bring against the other howsoever arising.
>
> 2. All further proceedings in this action be stayed upon the terms set out in this Order, except for the purpose of enforcing those terms.
>
> 3. Each party shall have permission to apply to the Agricultural and Land Drainage Tribunal to enforce those terms without the need to bring a new claim.
>
> 4. The Respondent will procure and manage a tracked excavator that will initially carry our three weeks of ditch clearing works through the areas shown on the attached plan. In addition to this, the Respondent will carry out the necessary repair works at the badger sett ...
>
> During this work it is expected that a quantity of trees through the ditched area will require removal and where possible this will be carried out concurrent with the ditch clearing works".

8. It is not entirely clear whether that Consent Order was ever formally approved by the Tribunal (if indeed the Tribunal's formal approval were needed). Rule 30(4) of the Tribunal's Rules refers to 'a decision document', which seems to

include a consent order, and Rule 30(5) suggests that such a decision document should be certified by the Tribunal Secretary. Be that as it may, letters from the Tribunal dated 14 May 2014 (that is, several months later) suggest that the Tribunal regarded the First Application as finalised but gave liberty to apply for directions.

9. Only days afterwards, on 23 May 2014, the applicant made the present application - ALT 6321: 'the Second Application'. It referred to the First Application, but complained that Network Rail had failed to dig out the ditches to a sufficient depth, and that the ditches were not operating properly or effectively. The Second Application relied on a report from Mr Hill of ADAS dated 11 April 2014. Mr Hill also made a second report dated 6 April 2016.

10. The Second Application attracted a response both by way of a formal Notice of Response and a long letter from its Legal Counsel both dated 9 July 2014. That letter disputed many of Mr Wrench's allegations, but agreed that a level survey would be useful in resolving the matter amicably. Such a survey was to be commissioned. If the levels were found not to be suitably graded, then Network Rail said that these would be corrected by no later than the conclusion of what it described as Phase 2 of the works - January 2015. It was said that the level survey, once it was done, would be shared with Mr Wrench.

11. Shortly thereafter, on 15 August 2014, there was a telephone hearing before the Chairman, Mr Buxton, who adjourned the directions hearing generally.

12. Something obviously went wrong in the summer of 2014 because although (we were told by Ms Barge at the hearing, on instructions) a level survey was done at the time by Network Rail, it was not shared with Mr Wrench. It was not available at the hearing before us. Hence, it is not presently possible to assess, using the level survey as the guide, whether Network Rail did in fact identify any errors in grading, and, if it did, whether it did what it said it would do, at least in terms of grading. The failure by Network Rail to follow through on the letter of 9 July 2014 when it came to sharing the level survey was unfortunate. We do not know the reason for it.

13. It was also unfortunate that there was no apparent engagement between the parties' representatives following the telephone hearing on 15 August 2014. We were told by Mr Meade that he had been promised the level survey. But he had not followed up the hearing to ask for it, or even to take the precaution of getting down in writing what he said the agreement reached with Ms Sandbach, representing Network Rail, had been.

14. This was a breakdown in communications of a completely avoidable kind. It should not have happened, especially when both parties were professionally

represented. That failure has led to a number of serious consequences. It has given rise to an atmosphere of distrust and antagonism between the Wrench family and Network Rail (which was apparent at the site view) where the parties' positions have regrettably become entrenched, jeopardising the chances for future co-operation. It also brought about at least one and maybe two hearings which could potentially have been avoided (given that one of the things which the applicant was asking for was a level survey) thereby consuming a significant part of the Tribunal's resources, which are public resources, paid for by the public purse.

15. It is apparent that the parties, at least in this one regard, had not co-operated as they should have done in the timely and cost-effective resolution of the dispute. We urge both parties to reflect on the above observations, and to resolve to use their best endeavours to co-operate in the resolution of this dispute going forward. Whilst the Tribunal's Rules, as they presently stand, do not expressly contain an overriding objective, these are nonetheless civil proceedings which the Tribunal is obliged to resolve justly, allocating to them an appropriate share of the Tribunal's resources, taking account of the need to allot resources to other cases. The parties are required to help the Tribunal further that objective. We are warning both parties that we are sufficiently troubled by their conduct of this dispute so far that we may in due course consider engaging our costs powers under section 5 of the Agriculture (Miscellaneous Provisions) Act 1954 if it should subsequently appear to us that any party has acted 'frivolously, vexatiously, or oppressively' in connection with this application, including in relation to any acts or omissions to date.

16. The Second Application is framed as a fresh application; not as an application to enforce the First Application.

17. The respondents argued at the hearing that the Second Application should be struck-out as an abuse of process. We reject that argument. Firstly, Rule 34 requires applications to strike-out to be made in writing, with the other party given at least 28 days to respond. It does not seem as if the Tribunal Rules permit applications to strike-out to be made orally, in the face of the Tribunal.

18. Moreover, and secondly, there is an pervasive underlying difficulty with all arguments about the meaning and effect of the Consent Order, and whether the Second Application is re-litigation. This affects both parties equally - whether in seeking to argue that the Consent Order has in fact been complied with, or has in fact not been complied with. The Consent Order is a contract between the parties. In interpreting it, the starting point is the agreement itself. But what had the parties in fact agreed? Without disrespect to those who drafted the Consent Order, it is far from clear. In our view, the Consent Order is hopelessly vague. There is no explanation or detail as to what 'ditch clearing

works' means, whether (for example) in terms of depth, width, level, or grading. There is no explanation or detail as to what 'necessary repair works' to the badger sett means. There are other features of the Consent Order which render it imperfect. The Consent Order is far from adequate when it comes to the actual situation on the ground, where there are ditches several hundred yards in length, lying on the land of an infrastructure provider.

19. In substance, the argument as to the meaning of the Consent Order is the same whether the Second Application is viewed as a fresh application, or as an application to enforce the First Application. We were certainly not in a position, at the hearing, to decide, one way or the other, whether 'ditch clearing works' or 'necessary repair works' had been satisfactorily completed in conformity with the Consent Order. Given the wording of the Consent Order, we doubt whether anyone could ever resolve that question. Interpretation of the Consent Order as it stands can only go so far before it comes up against the rules which restrict the scope of admissible materials which can be used as an aid to interpretation.

20. However, we do consider that the object or purpose of the Consent Order was to bring about a situation where ditches, not being functional, were to be made functional; or, put another way, where the condition of the ditches was not such (a) as to cause injury to the applicant's land; or (b) as to prevent the improvement of the drainage of any land. That adopts the wording of section 28 of the Land Drainage Act 1991.

21. In reaching that conclusion, we do not need to read down the word 'functional' into the Consent Order from correspondence entered into between the parties. In our view, it is simply the meaning which the Consent Order would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the Consent Order: see the decision of the House of Lords in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 Weekly Law Reports 896.

22. At this point, it may be helpful to the parties if we set out some of our observations made at the site visit, albeit without expressing any concluded view, at this stage, as to whether the drains are functional or not, or whether their condition is such that they are causing injury to the applicant's land or are preventing the improvement of the drainage of his land. We have already expressed these observations to the parties at the hearing, but it may be helpful for the parties, as opposed to simply their representatives, to hear them:

    22.1 The NE ditch has brick openings at both ends of about 2' in diameter. Those openings are therefore considerably wider than the single plastic pipe which is presently in that ditch, running past the badger sett. The

size of those openings, as well as fact that the plastic pipe has had to be tethered in order to stop it floating away (and one part may or may not already have floated away, under the road) strongly suggests that the capacity of the plastic pipe is inadequate for the volume of water which the ditch was expected to contain;

22.2 The 'Airbus' culvert, carrying water from Hawarden Airport, is a substantial spun concrete pipe, about 3' in diameter. It had water in it when we viewed it. It had recently had at least 6-8" of water in it, judging from the 'tide mark' inside it. Water from that culvert discharges into a system which, through the cross-culvert under the railway, may or may not emerge into the NE ditch (to which it is connected). That is again indicative of the volume of water which that ditch may need to contain;

22.3 The depth of the NE ditch, and the long SW ditch (which we did not measure) is nonetheless deceptive because of the way in which excavated spoil has been heaped up on the Respondent's land (rather than removed) leaving a high bank on that side;

22.4 At one point on the SW ditch, near the Sandycroft Bridge, it is clear that the ditch is not excavated even to one metre in depth, measured from the applicant's land, although the bank is several metres high on the respondent's side, due to the piling of excavated spoil. The impression, from what we were told of the method of work adopted at that point, and our knowledge as an expert tribunal, is that spoil was not moved far enough from the ditch, which has led to the bank slipping back into the ditch. That had obviously happened in the recent past in relation to one quite substantial section of bank, which had no vegetation on it;

22.5 The large Sandycroft field has three shallow culverts, running down towards, and discharging into, the SW ditch. At some point in the past - perhaps even as long ago as the construction of the railway (which was in the mid nineteenth century) - stones were placed in the ditch, at the foot of the bank, opposite the culvert discharges, with the obvious purpose of preventing discharge from the culvert (especially in heavy rain) eroding and undermining the bank immediately opposite - 'splash protection'. That was an entirely sensible precaution given that the ditch is adjacent and ancillary to a main-line railway. Any collapse or slip in the ditch would potentially endanger the safety of the railway line. During the ditching works, those stones - which are roughly dressed, and obviously not naturally present at the site (which is otherwise very low lying fields reclaimed from the River Dee when it was straightened downstream from Chester in the C18th) - were removed and not replaced. There are piles of them on the applicant's land. Hence, the

purpose which they served is no longer being served, and this not only affects the drainage but also, potentially, the safety of the main-line. We were somewhat surprised that Network Rail was apparently unconcerned at this particular aspect of the works which had been done and its implications. Whether that impression was accurate or not, it betokens a blase attitude to the works which had been done.

23. We are troubled by this latter aspect. The ditches are alongside the main-line from Holyhead to London Euston. This is a vital national transport link, and is heavily used, including by express trains (several of which passed during the course of our inspection). The permanent way, its embankment and ballast and ancillary structures are higher than the ditches. The condition of the ditches therefore not only potentially affects the applicant's land, but also the respondent's land, and moreover the safety and integrity of its main line. Consideration must have been given to this at all stages of the work which Network Rail was doing. We were surprised that Network Rail had not sought, in support of its argument that all works had been done, to adduce the engineers' reports and other materials which would doubtless have accompanied what was, on any view, a major project, taking several months and costed out by Network Rail at almost £150,000. We direct that this judgment be copied, in full, and as it stands, by Network Rail's legal representatives to their client and that those representatives confirm to the Tribunal Secretary, within 14 days of the date of this decision, in writing that has been done.

24. We also record, for the sake of completeness, that there is no longer any dispute that Network Rail removed several hundred trees - at least 400 - from the ditches, and that the mature trees which were present in 2013 and interfering with the ditches have now gone. Some stumps remain piled on the applicant's land, apparently with his agreement.

25. We also record Network Rail's case at the hearing that it would shortly be performing further works, including gabion basketing and reinforcement at the Sandycroft end, and a programme of weed spraying.

26. Various other features were pointed out to us at the hearing - a broken fence / fence allegedly removed by Network Rail to perform works on the SW ditch, and metal debris allegedly left on the applicant's land when the works were done. Neither of those are matters over which this Tribunal has jurisdiction. But it is obvious that the fact that these things are alleged to have happened and are alleged not to have not been put right has aggravated and not ameliorated the situation.

27. It was also argued that the Second Application should in any event be dismissed since the Applicant had not shown injury to land. Section 28 of the Land Drainage Act 1991 reads:

"(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"

28. We simply note that section 28 engages in two, distinct, scenarios - (a) injury to land and (b) prevention of the improvement of drainage. 'Injury to land' is not apparently defined in the Act, but it may well be wider than physical injury so as to include injurious affection. As to (b), this clearly contemplates a situation where non-functional ditches lead to an accumulation of water which cannot drain away, hence impeding drainage, or even raising the water table.

29. We also note that '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.

30. It is for all these reasons that we decided that the best solution - not just legally, but also pragmatically - was for the Tribunal to appoint its own official expert, in accordance with the conventional practice articulated in its Rules, who can then report and make recommendations, with both parties then free to comment and challenge. Unfortunately, given our concerns expressed above, and the fact that there has been an application of some description before the Tribunal for over three years, the Tribunal's Rules impose a fairly leisurely pace on this. If the parties wish to accelerate the directions which have been given, the Tribunal will consider any draft Consent Order put before it.

31. We have not ordered that a level survey be done. Network Rail will share its survey, referred to earlier, both with the applicant and the official expert. It will then be down to the official expert to decide whether to perform a further level survey or not. But we have ordered that the parties co-operate with the expert by providing the official expert with all information required to perform the task which the Tribunal has set.

Dated: 1 July 2016

Christopher McNall
Chairman: