

AGRICULTURAL LAND TRIBUNAL – WALES

DECISION OF THE TRIBUNAL IN THE MATTER OF an application under section 28 of the Land Drainage Act 1991

BETWEEN: John Howard Thomas Applicant
Tresi – Aur
Golwg-y-twr
Llanarthney

AND Margaret Haronski Respondent
Tirllandre
Llanarthney

IN RESPECT OF Injury to Tres-i-Aur, Golwg-y-twr, Llanarthney, Carmarthenshire

WHEREAS an application was made to the Agricultural Land Tribunal (Wales) dated 19th August 2002 under Section 28 of the Land Drainage Act 1991 for an Order requiring the carrying out of work specified in the aforesaid application.

AND WHEREAS a Tribunal comprising Mr W J Owen (Chairman), Mr John Hughes (Drainage Panel) and Mr R M Francis (Landowners Panel), duly appointed in accordance with the provisions of the Agriculture Act 1947 (as amended), to hear and determine the said application, sat at The Ivy Bush Hotel, Carmarthen on 20th October 2003 and at Pantglas Hall, Llanfynydd on 27th and 28th April 2005.

AND WHEREAS Mr W J S Marks, of the Agricultural Department and Advisory Service (ADAS) attended on behalf of the Minister on 20th October 2003, and Mr S Bell of ADAS attended on behalf of the Minister on 27th and 28th April 2005.

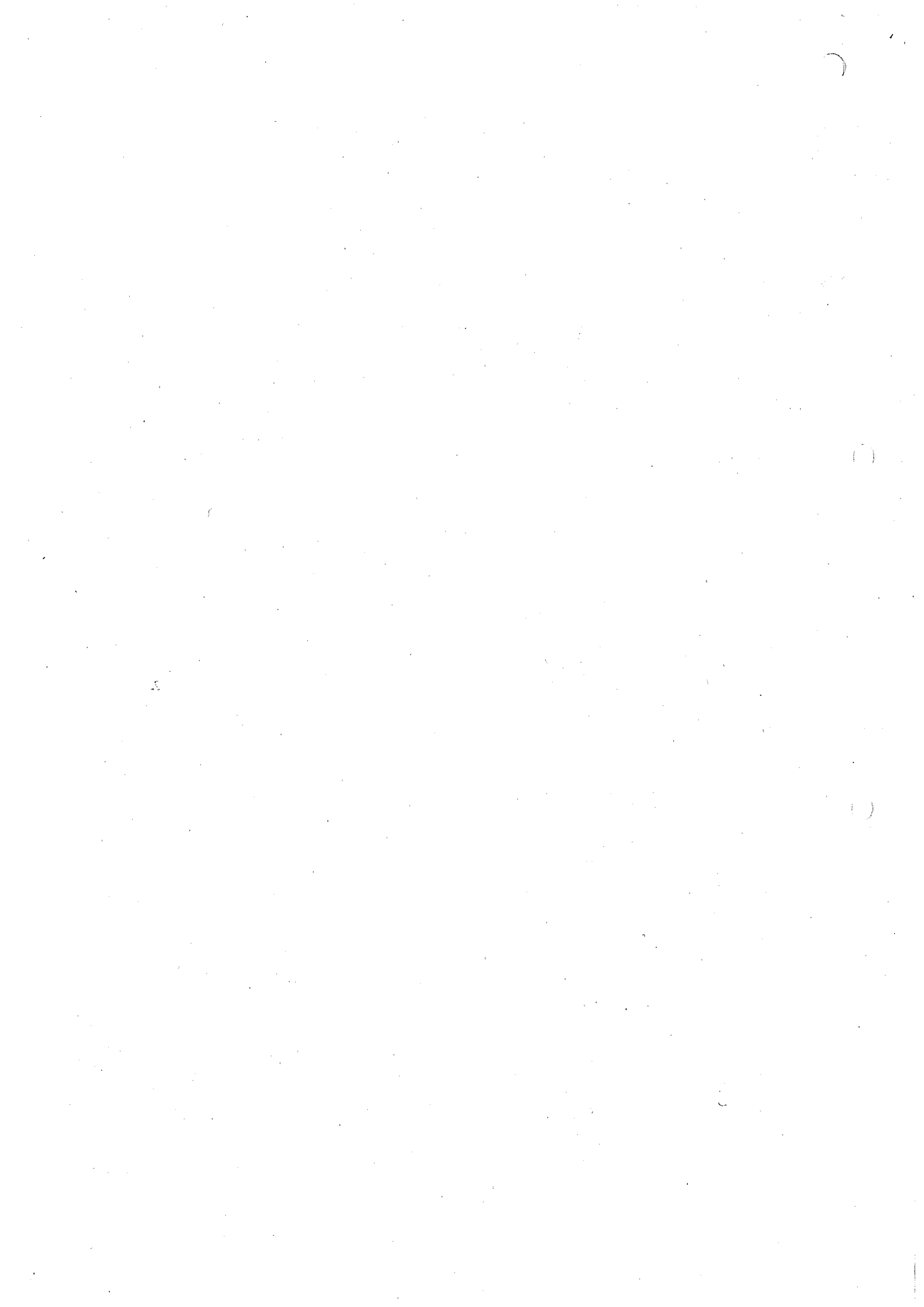
HAVING considered the evidence given by and on behalf of the Applicant, the evidence given by and on behalf of the Respondent, the Report submitted by Mr W J S Marks (ADAS) and evidence given by Mr S J Bell (ADAS), and having inspected the ditch and the land concerned, the Tribunal has decided not to make an Order under Section 28 of the 1991 Act for the reasons set out in the schedule hereto.

Signed this 21st day of November 2005

.....
W J Owen
Chairman of the Tribunal

I hereby certify that this is a true record of the order made by the Tribunal.

C A Davies
Secretary of the Tribunal



B E T W E E N:

JOHN HOWARD THOMAS

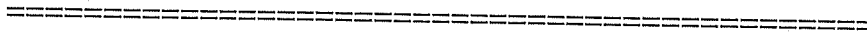
Applicant

and

MARGARET HARONSKI

Respondent

REASONS FOR THE DECISION OF THE TRIBUNAL



1. This is an application under section 28 of the Land Drainage Act 1991.
2. The application to the Tribunal was made by the Applicant and was dated the 19th of August 2002.
3. The legislation. This is to be found in section 28 of the Land Drainage Act 1991, the relevant provisions of which are as follows:-

28. - (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) Goes on to say:-

“(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.

4. The standard of proof is the “civil standard”, that is on the balance of probabilities - in other words what is more likely than not to be the case.
5. The burden of proof lies upon the Applicant.
6. What does the Applicant have to establish on the balance of the probabilities?
7. (1) That there is a ditch.

(2) If so, that such ditch is in such a condition as to cause injury to any land or to prevent the improvement of the drainage of any land as alleged in the application.
8. The Tribunal consisted of Mr W J Owen Chairman, Mr J W Hughes from the drainage panel and Mr R M Francis from the landowners' panel.
9. Representations. The Applicant was represented by Mr John Harry Astill and Respondent by her husband Dr Boleslaw Haronski.
10. The hearing took place at Pantglas Hall Llanfynydd Carmarthen on the 27th and 28th of April 2005.
11. The Report contemplated by Rule 21 of the Agricultural Land Tribunals (Rules) Order 1978 was made by Mr W J S Marks, I Eng, MIAE of ADAS. Mr Marks's Report followed his inspection on the 20th September 2002 but was undated. By the time the hearing took place Mr Marks had retired but his colleague Mr Stephen Joseph Bell, a drainage consultant with ADAS and the holder of a degree in agricultural engineering, attended to give evidence and to be cross examined on the contents of the report.

12. Further evidence was given by:-
 1. Mr John Harry Astill.
 2. Mr John Howard Thomas the Applicant.
 3. Mr John Henry Maddox Edwards (called by the Respondent).
 4. Mr David Thomas Jones (called by the Respondent).
 5. Dr Boleslaw Haronski (called by the Respondent).
13. Having heard the evidence and inspected the Applicant's and the Respondent's relevant properties before the hearing the Tribunal we find as follows.
14. When Mr Bell was cross-examined by Mr Astill he agreed that a ditch existed between the points B and T on ("the Plan") scale 1/750 at Appendix 2 in the Report of Mr Marks. He also accepted that at point T there was a culvert under the access road to the Applicant's Tir Llandre House and that water finds its way to the River Gwynon by its own devices.
15. When Mr Astill cross-examined Mr Bell about the existence of a ditch between the points A and C on the same plan in field 5816 Mr Bell said that there was no existing ditch between those points.
16. Mr Bell referred to the levels shown in a table on the same plan between points numbered 1 (near point T on the plan) and point 39 (near point C on the plan). He said that the levels showed that at point 34 near the base of the hedge the level taken by Mr Marks was 13.33 whereas at 35 (in the lane itself) the level was 13.23. In other words the level of the alleged ditch was higher than the level of the land alongside it. When cross-examined he said that there was some sort of depression in existence at the curve of the lane but he said that this was not wet when he inspected it and agreed that it was arguable that the inside wheel of a tractor could have caused the depression rather than the depression being indicative of the previous existence of a ditch.
17. In his Application made on his behalf by Mr Astill as his agent and dated the 19 August 2002 the Applicant alleged that injury to his land was being caused or the improvement of the drainage of his land was being prevented by the condition of the undermentioned ditch namely "ditch C-A-B-Bi" in O.S numbers 5816, 5324 and 5829 and went on to say that the drainage of his land required the Respondent to cleanse and regrade ditch C-A-B-Bi. He went on to allege that the "ditch C-A-B-Bi" is neglected and silted up, in some places

almost to the point of being no existent and claimed that the work required to be carried out was "that ditch C-A-B-Bi" be maintained to an average depth of 1.0m with properly battered side slopes and graded bed to flow to point of discharge in the Afon Gwynon.

18. When he gave his evidence Mr Thomas the Applicant told us that following heavy prolonged rain ponding occurs across the Respondent's field number 5816 (as shown on the Plan) and comes back on to his lawn and that this started happening in the year 2000. Mr Thomas said that he and his family had lived at his property which is a detached dwelling called Tresi Aur, Llanarthney since October 1995. What he described as saturation started in the year 2000. Mr Thomas said that he had not seen any permission granted to Carmarthenshire County Council to put a pipe under the Respondent's land.

19. When he gave his evidence Mr Astill the Applicant's expert witness who has considerable experience in land drainage matters, told us that he had inspected Mr Thomas's property on the 27 March 2002 and that he had walked along the Respondent's field 5816 where he could see what he described as water logging points. He told us that he had walked across the field along the supposed line of a 225mm drain and had inspected both ends of that drain. We shall refer to the 225mm drain as ("the Drain").

He said that he found that the pipe was sound and that there was no problem with the pipe per se but the bed of what Mr Astill described as the "receiving ditch" was higher than the insert level of the pipe and therefore the pipe could only discharge by velocity of water but not freely.

20. Mr Astill said that he had discussed matters with the Local Authority who had cleared the pipe with flushing equipment at some stage because it had become blocked with silt from road washings etc.

21. Mr Astill said that he was satisfied that there was a ditch in fairly poor condition and in need of maintenance.

He said that when he inspected the line Ai-A-B-Bi he found what he described as the remains of a ditch with traces of vegetation indicative of wetness.

22. Mr Marks when he prepared his Report (referred to earlier) described the ditch in question as being in field 5829 and along the south western boundary of field 5324 section A-Bi on the Plan and went on to say that it was the ditch claimed to be along the west side of field number 5816 which he showed on Section A-C on the Plan.

23. In his Report Mr Marks says at 2.1 "the ditch in field 5324 terminates at point B and there is no open ditch in field 5324 beyond point B. At 2.3 he states that point B is where the Drain outpours. He describes the Drain as being that which carries surface water from the residential development known as Golwg-y-twr.
24. At 2.4 Mr Marks says that there is evidence of a ditch on the west side of field 5816 at point A the ditch being tight to the base of a wall forming part of a structure belonging to Paxton Inn, the ditch extending southwards from point A for approximately 11 metres. He goes on to say there is no evidence of an open ditch south of this point.
25. At 2.5 Mr Marks says that it is concluded that the ponding occurs on field 5816 because there is no constructed route for water to flow from the field to the ditch at point B.
26. In paragraph 5 Mr Marks says that Mr Thomas (the Applicant) insists that the flooding problem at Tresi Aur is due to the present condition of the ditches in fields 5816, 5324 and 5829 and that the length Bi-C shown on the Plan should be maintained to an average depth of 1 metre.
27. Mr Marks summarises Dr Haronski's statements to him on behalf of the Respondent his wife. He says that Dr Haronski was adamant that no open ditch had ever existed along the west side of field 5816 between point A and C and that Dr Haronski had concluded that the problem had been solved by the installation of a new drainage system to serve a former council housing estate called Tirlan.
28. Mr Marks went on in paragraph 7 to give the results of his site inspection and survey. He said "no open ditch exists between point B and the south corner of field number 5324 at present.....there is no visible channel by which water can flow from field 5816 to ditch B-t. It would appear that water might only get from field 5816 by seeping through the soil."
29. He said that evidence of an open ditch could be seen near point A at the base of a masonry wall which forms part of a structure belonging to Paxton Inn. This ditch extended some 11 metres southwards towards point C.
30. Mr Marks went on to say that no evidence of an open ditch could be seen along the western boundary of field 5816 beyond the 11 metres previously mentioned and confirmed that levels taken along this hedge showed the land to be higher at the base of the hedge than at 5 metres in field. A shallow depression was

seen in the field running north west from Tresl Aur towards point A where water could be seen ponding after heavy rain.

31. He went on to describe the levels he had taken which are clearly set out in Appendix A to his Report which show that the general fall of land is from east to west and surface run off from at least half of the field will end up in the hollow running from Tresl Aur to point A.
32. Mr Marks referred to the building of the housing estate at Golwg y twr built by T I Davies of Cardigan and says that he spoke to an employee of that builder over the telephone who said that he had been engaged in laying the Drain to point B and said that when laying the Drain several land drainage pipes were encountered in field 5816 and said that the land drains were repaired where disturbed but none were connected to the Drain. Mr Marks said that the exact route of the Drain was not known but was assumed to be a straight line between the inlet on the road at Golwg y twr and the outfall at point B.
33. Mr Marks concluded that ground and surface water in field 5816 cannot drain away at a satisfactory rate following heavy rain because there is no positive conduit between the field and point B resulting in surface ponding and saturation of the land.
34. Mr Marks recommended that "the ditch B-T is extended from point B into field number 5816" meaning that the Drain might have to be removed requiring the consent of Carmarthenshire County Council. Mr Marks talks of the bed of the new and existing ditch. In his evidence Mr Astill said that the bed of the receiving ditch which received water from the Drain was higher than the insert level of the pipe. In his written submissions to the Tribunal Mr Astill said that he thought that the discharge point of the drain was nearer to the boundary of O.S 5816 than Mr Marks thought meaning that there was no need for any modification to the pipework or to involve the County Council. In his written submission of the 30 June 2003 he stated "however the main point here is to ascertain that the pipe discharges freely and that the flow is satisfactorily conveyed away.....". He went on to say that his contention was that there was a ditch between points A and C in the past.
35. This contention was rebutted by the evidence of Mr J H M Edwards. Mr Edwards who had been a tenant for some years of land including field 5816 said that there had been no problem with wetness since a new sewerage system was constructed by Carmarthenshire County Council for its housing estate at Tir Llan in early 2002.

36. Further evidence was given by Mr David Thomas Jones whose property overlooks Golwg y twr of which the Applicant's property forms part. He said that he was 68 years of age and had known the Respondent's property for some 35 years and that surface water from field 5816 used to drain into the River Towy and that he did not remember a ditch at all in field 5816 and that water ran on the other side of the hedge. By which he was referring to the hedge on the western side of 5816 before the Council estate was built at Tir Llan. Until then the property on which Tir Llan was built was a field and water ran away on the western side of the hedge between what is now Tir Llan and 5816 to point Ai on the plan and then on towards point B on the plan and that surface water from Ty Uchaf a property which can be seen on the Plan and which predated the Council Estate also ran to the corner of what is now the Paxton Inn (which used to be called the Emlyn Arms) at about point A then down to the woods and into the River Gwynon. The foul drainage at Ty Uchaf (which predated the council housing estate) was to a cesspool and that property was connected to the Council drain when the council estate was built.
37. As previously stated Mr Bell's evidence (summarized in paragraph 16) was that the level of the alleged ditch at 35 on Mr Mark's figure was higher than the level of the land along side it. If it is correct that before the Council estate was built surface water ran on the western side of the dividing hedge there would probably have been no reason for there to be a ditch between point C and point A.
38. Furthermore the status of the Drain is unclear to the Tribunal. Mr Astill made efforts to find out exactly what had happened. The furthest he got was a letter from Mr Cleaton the Highways Adoption Engineer for Carmarthenshire County Council dated the 10 December 2003 referring to the Drain which was marked G-F-A on a Plan. Mr Cleaton's letter says "I can confirm that the surface water drain marked G-F-A was adopted as highway maintainable at public expense". That cannot be correct and the sentence presumably contains a typing or similar error. Mr Cleaton went on to say "I believe Mr T I Davies [the developer who developed Golwg y twr Housing Estate] had written consent from the landowner to lay the pipe F to A but unfortunately I have been unable to locate a copy of any consent in our files. An easement was requested but never provided by the developer".
39. The essence of the Applicant's case is that his problem is being caused by the failure of the surface water drainage system on the Respondent's land to accept surface water from the Drain (GFA in Mr Cleaton's letter) during periods of heavy and prolonged rain. (See Mr Astill's "Schedule of Injury" annexed to the application to the Tribunal).

40. When Dr Haronski gave his evidence he said that he had not seen any documentation regarding a right to have the drain under field 5816. Dr Haronski said "we assumed that there had been agreement with the previous owner". He said that his wife's uncle, a Mr Williams from whom she had inherited the property had never said anything about having given consent to put in the Drain and Dr Haronski thought that it had been put in during the period of his wife's ownership. His wife had never discussed any request to put it in with Dr Haronski nor had he seen any document relating to it. They merely accepted it as fait accompli. He went on to say that Mr Williams his wife's uncle had died on the 13 June 1991 and that he believed that the Drain was put in in late Summer or early Autumn of 1992 as there was certainly nothing of the kind there in 1991.
41. The Tribunal are satisfied on the evidence that the Drain was put in by the developer in 1992 during the period of the Respondent's ownership of the land in question.
42. The Tribunal are not able to conclude that Mr Davies the developer obtained any consent or any grant of easement to put the Drain under the Respondent's field 5816.
43. The Drain has not been there long enough for its users to have obtained prescriptive rights to an easement.
44. Accordingly it has not been established to the satisfaction of the Tribunal on the balance of probabilities that the Respondent has any legal obligation to accept surface water from the Drain on to her land.
45. The Tribunal can make an Order only where a ditch is in such a condition as to cause injury to any land or to prevent the improvement of the drainage of any land.
46. Mr Astill's own submission in his Schedule of Injury annexed to the Application to the Tribunal, was that the problem which the Applicant complains of is caused by the failure of the Respondent's land to accept the surface water which flows through the Drain. He said:-

"This ditch has been neglected and its bed is much higher than the pipe invert, water stands in the ditch at this point to a depth of 50mm above the top of the pipe. As a result the pipe is unable to discharge its flow freely. In time it is likely that the 225mm diameter drain will become silted up. This will not only adversely affect the property Tresi Aur [the Applicant's property] but also the other properties in Golwg y twr

the roof and surface water drainage of Tresl Aur discharges to a soak-away of a type common to most dwellings. When the soils in OS number 5816 become waterlogged as a result of the poor condition of ditch (C – A – B) the soak-aways are unable to function.”

He goes on to allege that the domestic foul drainage system of the Applicant's property discharges to a point “E” then to a soak-away near point “D” and for the same reason this soak-away is unable to function properly. The remedial work which he proposed in the Application was to “ensure that surface water and piped drain discharge entering it can flow freely into the Afon Gwynon”.

47. Section 28 of the 1991 Act means that the Tribunal before it can make an Order must be satisfied that any injury being caused to the land in question is as a result of the condition of the ditch in question or that the improvement of the drainage of the Applicant's land is being prevented by the condition of the ditch.
48. We are not satisfied that this is the case. There cannot in the view of the Tribunal be obligations under Section 28 where the owner of the ditch in question is not under any legal obligation to accept a flow of water onto that owner's land.
49. Our findings of fact are:-
 - (a) There is and has been no ditch between points “A” and “C” on the Plan;
 - (b) There is no evidence that the owner of field 5816 granted any consent or easement for the installation of the Drain and hence for the acceptance of surface water from the Applicant's property as summarized in paragraph 46 above;
 - (c) There is no evidence of the effect of the installation of the Drain and indeed of the development of the housing site of which the Applicant's property forms part, upon the quantity of water passing from the direction of the Applicant's property to the ditches which exist to the north (roughly) of the outfall of the Drain;
 - (d) There was no evidence about the effect of the changes in the drainage situation described by Mr D T Jones when he gave his evidence, namely that previously any flow had been to the “other” side of the hedge on the eastern boundary of field 5816.

50. As stated in paragraph 48 above there cannot be an obligation under Section 28 of the 1991 Act where the owner of the ditch in question is not under any legal obligation to accept a flow of water into that owner's land and no evidence has been adduced that any such legal obligation exists.
51. On the basis of our findings of fact and for the reasons given above the Tribunal are not satisfied that the Applicant has made out his case and decline to make an Order under Section 28 of the Land Drainage Act 1961.

Dated this *21st* day of *November* 2005.

(Signed)

(Chairman)