

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

BETWEEN:

ROBERT JOHN GRIFFITHS

Applicant

and

TIMOTHY JOHN VAN REES

Respondent

In respect of injury to OS No 5727, 5924 and 6228 Glanirfon Bungalow Llanwrtyd Wells

WHEREAS an application was made to the Agricultural Land Tribunal (Wales) dated 4th November 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 W N Waters MBE (Drainage Panel) and Mr H Pugh (Farmers 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 Abernant Lake Hotel, Llanwrtyd Wells on 9th and 10th August 2004

AND WHEREAS Mr S J Bell of the Agricultural Development and Advisory Service (ADAS) attended on behalf of the Minister

NOW THE TRIBUNAL having considered the evidence given by and on behalf of the Respondent, the Report submitted by Mr W J S Marks and evidence given by Mr S J Bell, having inspected the ditch and the land concerned, the Tribunal order that the Respondent shall carry out the work specified in the Schedule below before the 30th September 2005

THE SCHEDULE

The bed of ditch A - B to be lowered to the design levels shown on the attached plans. The ditch should start from the point "X" with the cross-section shown. From this point it should be graded to the inlet of a 300 millimetre diameter culvert under the Glanirfon access road to an outfall in the existing headwall at point B. The new culvert should not be connected to the existing outfall but the headwall should be modified so that the new pipe outfalls alongside the existing one.

Signed this 10th day of March 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 to the Tribunal

B E T W E E N:

ROBERT JOHN GRIFFITHS

Applicant

and

TIMOTHY JOHN VAN REES

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 4th November 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 W Neville Walters, MBE, from the drainage panel and Mr Hedd Pugh from the farmers panel.
9. Representations. The Applicant was represented by Mr Dominic Boothroyd, Barrister at Law, of Messrs Jeffreys & Powell Solicitors Brecon and the Respondent represented himself.
10. The hearing took place at the Abernant Lake Hotel Llanwrtyd Wells on the 9th and 10th of August 2004.
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 9th October 2003 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 Griffiths the Applicant
 2. Mr Gwesyn Aneurin Davies
 3. The Respondent, Colonel Van Rees
13. "Remedial Work". The Chairman asked Mr Boothroyd on behalf of the Applicant and Colonel Van Rees whether, if the Tribunal having considered the evidence and the submissions, was minded to make an order under section 28 it would be appropriate for the Tribunal to ask Mr Bell to prepare a brief specification setting out the "remedial work". Both Mr Boothroyd and Colonel Van Rees agreed that this would be appropriate and consented to it.
14. Having heard the evidence and inspected the Applicant's and the Respondent's relevant properties before hearing the Tribunal we find as follows.
15. The Applicant bought his property and moved in in 1978 and claims that there was no drainage problem until in 1988 or 1989 the Respondent changed the drainage system in his field number 4635 which field is adjacent and to the west of Mr Griffiths's property. Mr Griffiths's property consists of the enclosures numbered 6036 and 6728 on the current edition of the ordnance survey map. The parts of his land which he complains are affected by the condition of the ditch in question are those numbered 5727 and 6228 and 5924 on his application plan. He told us that there was no problem until the Respondent changed his system in 4635 in 1988 or 1989. He told us that in 1978 there was a ditch between the points marked A and B on the plan referred to at Appendix 1 of the report of Mr W J S Marks. Mr Griffiths the Applicant said in evidence that the ditch was not consistent in depth but was deeper at the south or roadside end and that water could be seen in it at times of high rainfall. He said that the ditch was overgrown with no obvious flow and there were puddles at the southern part. He said that it led into a culvert under the road which is the road which leads from west to east and is adjacent to the southern boundaries of the Respondent's field 4635 and the Applicant's property. He told us that the culvert under the road was faced with stone and had a stone arch.
16. Was there a ditch between A and B before 1988 or 1989? The Respondent when he gave his evidence described what the Applicant had called a ditch as a gutter rather than a ditch and as being "insignificant". He said it was possible that the "gutter" was continuous between A and B but said that for most of its length it was "insignificant".

17. In cross examination Mr Boothroyd put it to the Respondent that on the evidence of the aerial photograph which the Applicant had produced (the photograph is marked at the bottom "The National Assembly for Wales Ordnance Survey 75-387 16-9-75 Crown copyright") the field 4635 appears to have been well drained when the photograph was taken. The Respondent agreed with this and said that he could not specifically recall flooding affecting field 4635 between 1975 and 1989.
18. The Respondent said that the only major work that he had carried out was to install a pipe between the points A and B and to install a culvert under the road. He said that there was no culvert under the road until that time and that the Applicant was mistaken about it.
19. Mr Boothroyd asked the Respondent whether it was his case that the culvert which he claimed to have put under the road in 1988 or 1989 was intended to connect the drainage pipe which he had installed between points A and B to the outfall on the other side of the road and then to the river Irfon and he agreed that this was the case.
20. Mr Boothroyd asked the Respondent to look at the aerial photograph and to compare the line which is apparent on the west side of the boundary between field 3034 and 4635 with the line that appears on the eastern boundary of 4635 where it adjoins the Applicant's land. The Respondent accepted that the photograph showed a ditch along the line within field 3034 and also accepted that the line shown on the photograph looks very much like the line on the inside of 4635.
21. We accept the evidence of Mr Griffiths that there was a ditch between A and B before 1988 or 1989. Mr Griffiths's evidence is corroborated by the aerial photograph.
22. Having found that there was a ditch between A and B until about 1988 we also find that after 1988 there was a piped ditch also between A and B.
23. The piped ditch does not satisfactorily deal with the removal of water from 4635 during periods of heavy rain. This is confirmed by the evidence of the Applicant of the action which was taken by Powys County Council in October and November 2000 when the county council ordered jet washing to be carried out to inject a pressure spray into the pipe at or near point B in order to clear it. This was done on the 31st of October or the 3rd of November in 2000.

24. In his report Mr Marks indicated that since some of the ditches had been improved in 2000 no flooding had occurred although intense rainfall was reported in October 2000. Mr Marks does not appear to have been told about the pressure washing which was carried out in October or November 2000.
25. Furthermore, after Mr Marks prepared his report there were further problems in February 2004 about which evidence was given by Mr Griffiths. Mr Griffiths referred to photographs numbered 35 and 36 taken on the 4th of February 2004 which he said showed that water accumulated on the Respondent's land on the boundary between 4635 and 5727 and then flowed through the hedge into field 5727 as shown in the photographs.
26. In the light of what occurred in February 2004 it is clear to the Tribunal that the pipe A - B which we find was installed in about 1988 does not adequately deal with the problem of the incursion of flood water from the Respondent's land to the Applicant's land in conditions of heavy rainfall.
27. We accept Mr Griffiths's evidence that the incursion of water from the Respondent's land to the Applicant's land has caused injury to that land and if conditions recur similar to those in February 2004, this is likely to happen again.
28. Mr Griffiths told us when he gave his evidence that the injury which his land had suffered was certainly not minimal and drew attention to the evidence afforded by photographs 35 and 36 (February 2004). He had been unable to grow trees on his land and was unable to carry out the horticultural activities for which he had taken a course and he, therefore, claimed that injury has been and will be again caused to his land. We accept this evidence.
29. When Mr Bell gave evidence he said that he largely agreed with Mr Marks's report. He said that opening the ditch from A to B would, however, ease the problem. He put it that opening the ditch would ease the symptoms without taking away the cause. He said that he could see the point of opening the ditch A to B and described it as a relief feature. When he was asked about the aerial photograph he said that the line on the inside of field 4635 where it adjoins the Applicant's land "looks like a ditch to me". His attention was drawn to photographs 30, 31 and 32. He said that the opening of the ditch between A and B would relieve the state of affairs revealed but would only work if the culvert under the road was cleared with an outlet at point B. In reply to the Respondent he said that it would help to cure the symptoms but not the problem itself.

AGRICULTURAL LAND TRIBUNAL – WALES

Land Drainage

THE MATTER OF an application under section

2005 / 2006

Thomas

Applicant

onski

Respondent

IN RESPECT OF Injury to Tresi-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.

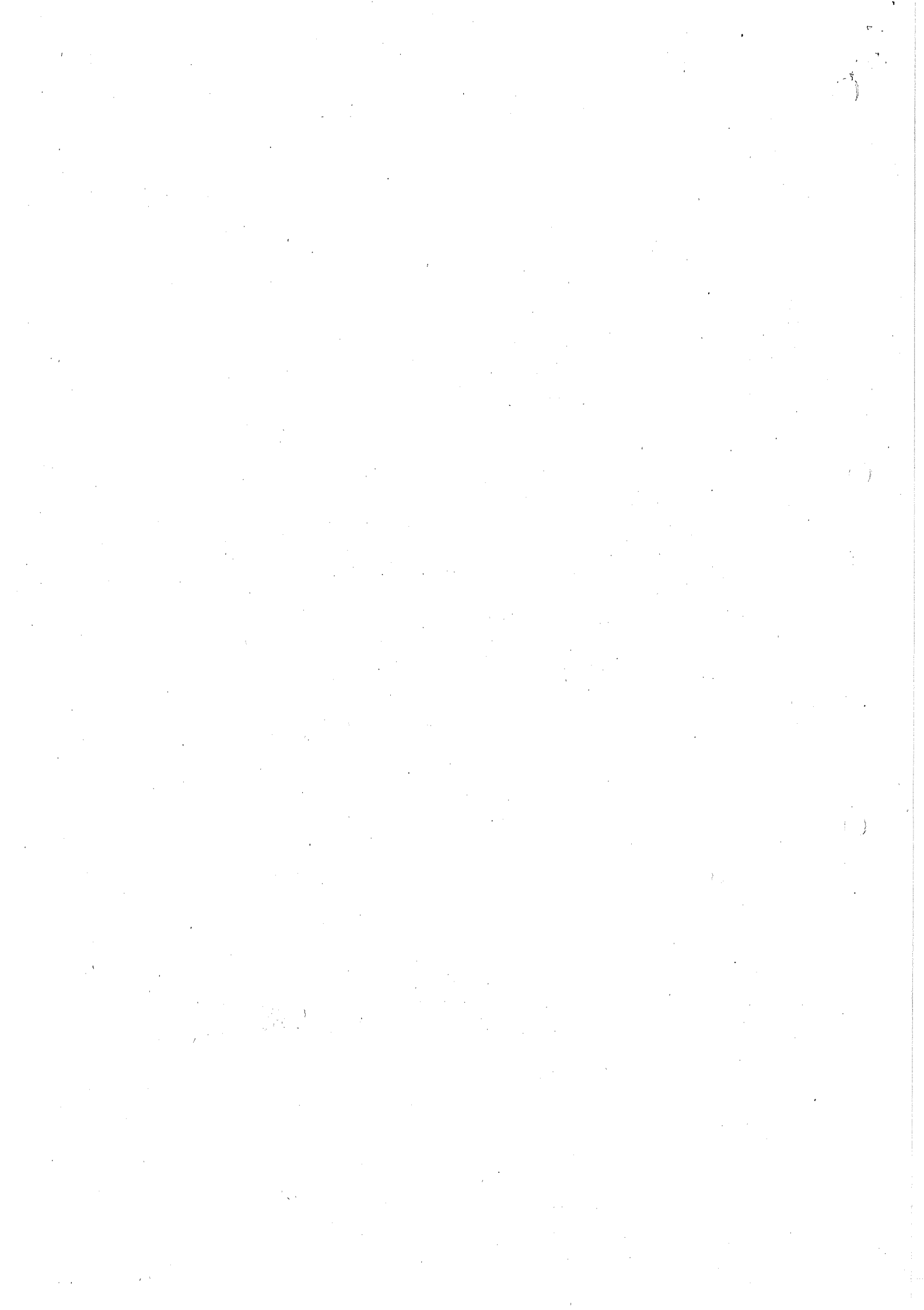
AND WHEREAS Mr W J S Marks, of the Agricultural Department and Advisory Service (ADAS) attended on behalf of the Minister on 20th October 2003, and Mr S Bell of ADAS attended on behalf of the Minister on 27th and 28th April 2005.

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



BETWEEN:

JOHN HOWARD THOMAS

Applicant

and

MARGARET HARONSKI

Respondent

REASONS FOR THE DECISION OF THE TRIBUNAL

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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

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

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 Tresri 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

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).

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.