

Y TRIBIWNLYS TIR AMAETHYDDOL CYMRU
AGRICULTURAL LANDS TRIBUNAL WALES

- REFERENCE:** ALT 6321
- APPLICATION:** An Application under the Land Drainage Act 1991
- TRIBUNAL:** Dr Christopher McNall (Chairperson)
Eur Ing Dr Phebe Mann CEng MICE FRICS (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
- HEARING:** Sitting in public at Beaufort Park Hotel, Mynydd Isa, near Mold/Yr Wydddrug, Flintshire/Sir y Fflint on 14 May 2019, with written closing submissions dated 30 May 2019 (the Applicant) and 3 June 2019 (the Respondent)
- REPRESENTATION:** Mr Nigel Thomas of Counsel (instructed by Davis Meade Property Consultants) for the Applicant
- Mr Jamie Sutherland of Counsel (instructed by Eversheds Sutherland (International) LLP, Birmingham) for the Respondent

ORDER

The Application is granted, but only to the following extent:

1. By no later than 3 months from the date of the release of this Order, the Respondent shall undertake and complete the following works:
 - 1.1 Any slipped material at the Sandycroft outfall shall be excavated, and the bank shall be secured using gabion baskets;
 - 1.2 The partial slips to the Down Side bank sides identified in Network Rail's letter of 23 February 2016 (being Down Side at 184m 1431yds; 184m 1388yds; 184m 1016yds; 184m 0737yds) and any other partial slips on the Down Side and Up Side shall be excavated and suitably reinforced with gabion baskets.
 - 1.3 The length of ditch to the south side of the railway, from Sandycroft Bridge through points T, U, V on the Location Plan,

and from points B-D-E-F on the Location Plan (as shown in bold on Beeches Farm Drainage Plans 1 2 and 3 dated 16 June 2016) and including the cross-culverts at C-L and F-G shall (in the case of the ditch) be cleared to the original bed or level of the invert and (in the case of cross-culverts) shall be cleansed (and, once cleared and/or cleansed, as the case may be, shall be kept clear and cleansed by some appropriate programme of inspection and maintenance) and, in any event, this ditch shall be profiled at a suitable gradient or gradients to ensure water flow along its entire length.

- 1.4 The length of ditch to the north side of the railway, as shown in bold on the Beeches Farm Drainage Plans 1, 2 and 3 (all dated 16 June 2016) running R-Q-J-H-G and including the cross-culvert at T-R shall (in the case of the ditch) be cleared to the original bed or level of the invert and (in the case of the cross-culvert) shall be cleansed (and, once cleared or cleansed, as the case may be, shall be kept clear and cleansed by some appropriate programme of inspection and maintenance) and in any event shall be profiled at a suitable gradient or gradients to ensure water flow.
- 1.5 Any remaining tree stumps in those ditches shall be ground out or suitably plugged so as to prevent regrowth.
- 1.7 Any drain outfalls from the Applicant's land into the ditch on the southern side of the railway and which lie on Network Rail's land (and not on the Applicant's land) shall be cleared of any debris or obstruction, so that these outfalls are not less than 30cm above the level of the invert, and, once cleared, shall be kept clear by some appropriate programme of inspection and maintenance.
- 1.8 The ditch E-D-C-B shall be graded so that water passing into the ditch from E to D shall discharge appropriately into the side culvert C-L
- 1.9 The three-way catchpit at Point L shall be securely covered.
- 1.10 The pipe at Point L heading towards Point C shall be replaced with a pipe of at least 600mm diameter which shall be securely fixed (i) so that it does not move; and (ii) so that it has an appropriate gradient to move water from Point C to point L.
- 1.11 A second 300mm pipe shall be installed along the badger sett run, which shall have a straight/uniform gradient/fall.
- 1.12 A new outfall be provided at location R, to replace or to add to the present small metal grillage on the railway side, with a tidal

flap valve to link with the tidal outfall to the River Dee or the railway ditch upstream of the Factory Bridge culvert.

- 1.13. A flap valve be fitted to the outfall of the Factory Road Bridge culvert to prevent inflow of tidally impounded water into the reach.
 - 1.14 The tidal flap valves at F and G shall be put into repair, and, once in repair, maintained.
 - 1.15 Dated high-resolution colour photographs of all work done and completed by the Respondent pursuant to this Order will be taken, and a digital copy provided to the Applicant and to the Tribunal by the Respondent promptly upon completion of that work.
2. Either party has liberty to apply as to the timing and implementation of this Order. Any such application, to be supported by reasons, is to be made no less than two clear weeks' notice to the other party.

The detailed reasons for the Order are given below.

REASONS FOR THE ORDER

1. These are the reasons for the unanimous decision of this panel.

Introduction

2. This application was made on 23 May 2014. This is the second decision which this Tribunal has given in relation to it. The first decision was given on 29 June 2016, following a site inspection on 20 June 2016, and a public hearing later that day. Dr McNall and Mr Evan Roberts sat on that panel as well as on this one. On that occasion, the third member of the panel (the drainage member) was Dr Russell Young MBE JP, who sadly died in 2018.
3. Much of the Tribunal's first decision dealt with (and rejected) Network Rail's argument that the compromise of an earlier application (27 February 2013) by way of a Consent Order deprived the Tribunal of jurisdiction.
4. In June 2016, the Tribunal made certain observations as to the physical features of the land and drainage, which, where appropriate, and for the sake of reference, are set out in the main body of this decision below.
5. However, we emphasise that we have considered the matter afresh, and on the basis of the evidence and materials before us now, including our own observations at the site view in May 2019, and not in 2016. We have treated the Tribunal's earlier findings as no more than interlocutory and non-binding. Indeed, those were expressly made *"without expressing any concluded view ... 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."* Moreover, this approach is appropriate given (i) the focus of the earlier hearing (notwithstanding the preceding site visit) was whether Mr Wrench could still lawfully apply to the Tribunal; (ii) almost three years had elapsed since the first hearing; and (iii) the panel in 2019 was differently constituted to that in 2016.

The Farm

6. We were much assisted by a large scale Location Plan (being the plan numbered CES433/1, dated 11 June 2017) (**'the Location Plan'**) and

also a plan of most (but not all) of the fields, with the fields numbered, and areas added, with a legend (**'the Numbered Plan'**). The Numbered Plan has one major deficiency, which is that it does not give numbers to three large fields (each being made up of smaller parcels of land) running between Broughton Brook and the south side of the railway up to Sandycroft Bridge (also known as Factory Lane Bridge) and which are farmed by Mr Wrench. These are (from west to east): 6095/4603; 7579/6454; 9866/8241/7526 (**'the Three Fields'**). We also had a large 'scroll', approximately 15 feet long, prepared by Mr Wrench, which set out, in a useful composite way, the whole length of the ditches in question with photographs and drawings attached at appropriate points.

7. Mr Wrench is the tenant of Beeches Farm (**'the Farm'**). His landlords are the Hawarden Estate. The Farm is on low-lying land between Broughton Brook to the south and the River Dee to the north. Both Broughton Brook and the River Dee have long straight sections. The latter was created during the canalisation of this section of the River Dee, downstream from Chester, in the 1730s. This stretch of the River Dee has also a man-made bank or levee along its southern bank.
8. Much of Beeches Farm is just under 5m Above Ordnance Datum (AOD). The Mean High Water Spring Tide of the River Dee is about 4.1m ASD. Hence, Beeches Farm is less than a metre above that. The land has a gentle slope, with little to no fall, from south to north. Many of the fields are rectangular. The cropping is a mixture of arable and permanent pasture.
9. The farm is approximately bisected, from east to west, by the railway line ('up' side - to London - to the north and 'down' side - away from London - to the south) from Chester to Holyhead and its associated infrastructure. There is a level-crossing in the farm complex, which is at grade; but to the west the railway line is increasingly elevated, on a man-made embankment, rising several metres above the farmland to a high point near Sandycroft Bridge. There are also signals and subterranean railway infrastructure.
10. A further feature is a highway - Flint Road (also called Saltney Ferry Road) (B5129) - which runs from Sandycroft along to a junction with Manor Lane, before making a hard turn northwards, before turning again to cross the railway.
11. The farm is bounded on its eastern side by Hawarden Airfield and associated facilities (including the Broughton plant of Airbus), which

have grown considerably in recent years, but which land is not owned by Network Rail.

The site visit

12. As is usual in a case of this kind, the Tribunal undertook a site visit on the morning of the hearing. This took about 3 hours. We were guided by the parties as to the particular things which they wanted us to see. Conditions were fine and dry. The fields were quite dry underfoot. Most of the ditches were empty, or with very little water.
13. This has both advantages and disadvantages. One advantage is that we could see (and, but only in some instances, walk along) the bottom of the ditches. That is an important exercise where it is alleged that the bottom of the invert is in such a condition as to materially interfere with the effectiveness of the ditch. One disadvantage is that it interferes with assessment of the direction of flow. That is (at least, potentially) significant where the parties actually disagree as to the direction in which water actually flows into or along a ditch. Where that is the case, the Tribunal has to rely more heavily on factors such as expert evidence, inherent likelihoods, the knowledge and experience of its own drainage expert, and other topographical features.
14. A point which arose at a fairly late stage was the requirement (raised by Network Rail shortly before the hearing, and therefore, on the face of it, contrary to Paragraph 11 of the Tribunal's directions dated 29 June 2016) that, in order to access railway land, each member of the Tribunal would be obliged to complete, in advance, a lengthy questionnaire inquiring as to that person's physical and mental health as well as other details such as that person's date of birth and National Insurance Number. It was not made clear to the Tribunal what would be done with these questionnaires nor what, for example, would happen if Network Rail was concerned with any of the answers. It was not clear to the Tribunal why Network Rail would require the date of birth, or National Insurance numbers, of any members of the Tribunal. The Tribunal raised these matters with the parties in correspondence. The Chairperson decided that he would not complete the form, insofar as it related to him. He did not regard it as appropriate to place any of his personal information in the hands of a litigant to a dispute before the Tribunal. The Chairperson did not have any jurisdiction to direct the other panel members to complete, or not complete, the forms; nor, for that matter, to direct the Tribunal's Secretary and Clerk (who are employees of the Welsh Government) in that regard.

15. But, as was made clear to the parties, the effect of the Chairperson not signing the form would be that there could not be any access to railway land by the Tribunal's panel as a whole. In that regard, the Chairperson was prepared to assume - as a matter of common sense - that there was a good reason for Network Rail exercising controls on access to its land in this way (irrespective of the manner in which Network Rail effectuated those reasons) and that this would not be an appropriate occasion for the Tribunal to insist on exercising its statutory power (given by Parliament, and not qualified by reference to the nature of the land, its use, or ownership) to authorise any of its members (or any other person) to enter onto land to inspect it: see section 31(4) of the Land Drainage Act 1991.
16. Nonetheless, having visited the land previously, the Chairperson had some confidence that a meaningful inspection could nonetheless be made on this occasion without the need to go onto the railway land.
17. That confidence was vindicated, in that the three members of the panel were all able to see and observe what we considered to be necessary for the fair and just resolution of this Application. For the sake of completeness and transparency, all three members of the Tribunal did in fact enter certain parts of the railway land, but only by climbing over fences to get a few feet onto it to inspect any features at closer hand. One particular thing which we did look at at close quarters, which was not otherwise easily visible from the surrounding land (given the height of the vegetation), was the pipe run along the badger setts and the catchpit at the northern end of the cross-culvert C-L.

Evidence

18. The Tribunal read witness statements from the following witness for the Applicant:

Mr John Stephen Wrench, dated 14 May 2019, and its attachments

19. The Tribunal also considered letters from Mr Kirk Hill, a Principal Soil and Water Engineer, dated 11 April 2014, 6 April 2016, and 18 March 2019, who also gave oral evidence.
20. The Tribunal read witness statements from the following witnesses for the Respondent:

Mr Stephen Raj, a Senior Asset Engineer (Drainage and Off-track), dated 9 May 2019, who also gave oral evidence

Mr Atif Hamid, a Track Maintenance Engineer, dated 9 May 2019, who also gave oral evidence

Mr Christopher Bibby, a Track Maintenance Engineer, dated 17 June 2016, who did not give oral evidence.

21. We also read evidence from a drainage expert appointed by the Welsh Ministers at the request of the Tribunal: Mark A Roberts BEng CEng FICE of Civil Engineering Solutions Ltd, contained in a written report of which the final version is dated June 2017 (i.e. over 18 months before the hearing). He also gave oral evidence.

The law

22. Both parties had filed helpful Skeleton Arguments (each dated 10 May 2019) in advance of the hearing, and written closing submissions subsequently. We are grateful to both Counsel for the efficient and well-focussed way in which they conducted the hearing, and for their succinct oral and written advocacy.

23. Sections 28-30 of the Land Drainage Act 1991 provide:

"28 Orders requiring the cleansing of ditches etc.

- (1) Where a ditch is in such a condition as
 - (a) to cause injury to any land; or
 - (b) to prevent the improvement of the drainage of any land,the appropriate 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.
- (2) An order under this section with respect to a ditch may name
 - (a) any person who is an owner or occupier of land through which the ditch passes or which abuts on the ditch; and
 - (b) any person who, though not such an owner or occupier, has a right to carry out the work specified in the order or any part of it.
- (3) Where an order under this section names more than one person it may either—

- (a) require each of those persons to carry out a specified part of the work specified in the order; or
 - (b) subject to subsection (4) below, require all those persons jointly to carry out the whole of that work.
- (4) Where the appropriate tribunal make an order requiring persons jointly to carry out any work, the Tribunal, without prejudice to those persons' joint liability, may, if they think fit, specify in the order the proportions in which those persons are to contribute to the cost of doing so.
- (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.
- (6) For the purposes of this section, “appropriate tribunal” means—
- (a) where either the land or the ditch is in England, the First-tier Tribunal; and
 - (b) where either the land or the ditch is in Wales, the Agricultural Land Tribunal.

29 Effect of order under section 28.

- (1) An order under section 28 above shall be sufficient authority for any person named in the order—
- (a) to do the work specified in relation to him in the order; and
 - (b) so far as may be necessary for that purpose, to enter any land so specified.
- (1A) Where, in the case of an order made under section 28 by the Agricultural Land Tribunal in relation to land in Wales, the Welsh Ministers, at any time after the end of three months or such longer period as may be specified in the order, have reasonable grounds for believing that any work specified in the order has not been carried out—
- (a) the Welsh Ministers, or

- (b) any person authorised by them, either generally or in a particular case,

may, in order to ascertain whether the work has been carried out, enter any land which it is necessary to enter for that purpose.

- (2) Where at the end of three months, or such longer period as may be specified in the order, any work specified in an order under section 28 above has not been carried out, the appropriate Minister or any drainage body authorised by him, either generally or in a particular case, may—

- (a) carry out the work;
- (b) enter any land which it is necessary to enter for that purpose; and
- (c) recover from any person named in the order the expenses reasonably incurred in carrying out under this subsection any work which ought to have been carried out by that person;

and those expenses may include any compensation payable in connection with the work under subsection (5) below.

- (3) A person entitled by virtue of this section to enter any land—
 - (a) may take with him such other persons and such equipment as may be necessary; and
 - (b) if the land is unoccupied, shall, on leaving it, leave it as effectually secured against trespassers as he found it.
- (4) Before entering any land under the powers conferred by virtue of this section the person entering it shall give not less than seven days' notice to the occupier of the land.
- (5) Where any person sustains any injury by reason of the exercise of any power conferred by virtue of this section then, unless the power was exercised in or for the purpose of the carrying out of any work which that person was required to carry out by an order under section 28 above, the person exercising the power shall be liable to make full compensation to the person sustaining the injury.
- (6) In the case of dispute the amount of the compensation payable under subsection (5) above shall be determined by the Upper Tribunal

[...]

30 Authorisation of drainage works in connection with a ditch.

- (1) Where the drainage of any land requires—
- (a) the carrying out of any work in connection with a ditch passing through other land;
 - (b) the replacement or construction of such a ditch; or
 - (c) the alteration or removal of any drainage work in connection with such a ditch,

the appropriate tribunal, on the application of the owner or occupier of the first-mentioned land, may if they think fit make an order under this section.

- (2) An order under this section is an order authorising the applicant for the order—

- (a) for the purpose mentioned in subsection (1) above, to carry out such work as may be specified in the order; and
- (b) so far as may be necessary for that purpose, to enter any land so specified.

- (3) Subsections (3) to (7) of section 29 above shall apply in relation to the powers conferred by virtue of an order under this section as they apply in relation to the powers conferred by virtue of that section.

- (4) In this section “ditch” has the same meaning as in section 28 above.

24. Our jurisdiction is discretionary (we 'may'; not that we 'must') and is to be exercised only if we see fit. The Land Drainage Act 1991 does not give any further explicit guidance, and we were not referred to any case law (of which there is very little). But it seems to us that, where we are satisfied that we should exercise our discretion to make an order, we should nonetheless do so in a manner which is proportionate, and which (amongst other factors) appropriately reflects, amongst other things, (i) the area of affected land; (ii) the use to which the affected land is ordinarily put, or would be put but for any drainage difficulties found to exist; (iii) the degree of severity with which any land is affected; (iv) the frequency with which land is affected; (v) the diminution in value of the land or its rental value occasioned by its drainage condition; (vi) the likely dis-benefit if no order is made; (vi) the likely benefit if an order is made. Insofar as there is evidence before us,

we have taken account of these factors in arriving at our conclusions as to the appropriate orders to make.

25. The Act is quite carefully drawn in relation to the things about which an order can be made: see section 28(1). That refers expressly to ditches (although this goes beyond open ditches to include culverted and piped ditches) but does not refer to things other than ditches. 'Ditch' is an ordinary English word. According to the Oxford English Dictionary, 'ditch' means 'a hollow dug out to receive or conduct water, especially to carry off the surface drainage of a road or field'.
26. Taking a step back, it seems to us that we not strain to read the Act over-restrictively or over-literally, but rather we should read the Act purposively and pragmatically. The latter approach has much to commend it where the Tribunal is a specialist one, entrusted and empowered by Parliament to decide cases of this kind instead of the normal civil courts, and where the Tribunal includes (as two members of the panel of three) specialists in farming and drainage. We therefore consider it appropriate to read the reference to "remedial works" as including works to put the ditch into proper order, and making good where (for example) works previously undertaken have not been done effectively and/or can be shown themselves to have caused damage. This approach also draws support from the analogy of obligations to remedy in the law of landlord and tenant.
27. A further point which it is appropriate to add is that it would not be right for us to ignore any features of the drains on the Applicant's land which themselves could potentially contribute to the overall drainage situation. We have not been shown the lease whereby Mr Wrench holds this Farm, and so we do not know the details of the repairing and maintenance covenants in it. But if (for example) a field drain under the Farm were in disrepair, the responsibility to put it and keep it in repair would definitely lie either with Mr Wrench, or his landlord, and would not in any event lie with Network Rail. Mr Wrench cannot obtain indulgence from the Tribunal, or any more favourable order, were he failing adequately to maintain own drainage. During our site visit, we did identify ditches - on Mr Wrench's land, and (whether his responsibility or not) definitely not the responsibility of Network Rail - which were not being kept clean and clear. One ditch, running down along the three fields, was heavily overgrown with vegetation and had very slow water flow. It had a duck nestled in it which we disturbed when we approached.

28. We also recognise, both generally and in relation to this particular application, that Network Rail's ability to drain water from the Farm may, in turn, be affected by downstream drainage over which Network Rail has no control and/or tidal locking from the River Dee. In relation to the first point, the answer is the same for Network Rail as it is for Mr Wrench. It is responsible for the drains on its own land. As to the second point, the larger drainage system in the area ultimately discharges into the Dee, and there can be tidal locking. Recognition of this is in the form of tidal 'flaps' which, read purposively, as described above, we consider to be part of the drain for the purposes of this Act.
29. Ultimately, we remind ourselves that we are not acting as a roving drainage commission or board of inquiry. We do not have the power to do so. These are adversarial proceedings, and therefore our primary focus must be on the things identified by the Applicant, and why those are said to justify the making of an order.
30. Finally, where matters of fact are in dispute, we remind ourselves that the Applicant bears the burden of proof, and that the applicable standard of proof is the civil standard - namely, the balance of probabilities.

The History

31. The first application, dated 27 February 2013, was made under section 28 of the 1991 Act, and complained of the condition of the "ditches on both sides of Chester to Holyhead Railway line between Bridges 18A and Sandycroft Bridge SJ3466."
32. On the face of it, that relates only to certain ditches on the farm. The application alleges:
- (i) *"Lack of maintenance of ditches and culverts over many years, causing build up of silt and vegetation and trees growing in them is a regular concern ..."; and*
 - (ii) *"Adjacent to field ST3466/8730 the ditch is blocked by badgers digging - this is adjacent to one of the blocked culverts..."*

All these add up to the backing up our field ditches which we maintain regularly and cause water logging to the land."

33. The work called for was for the Respondent *"to clean ditches and culverts and grub out the vegetation (e.g. trees)."*
34. A Map ('Map 1') was attached to the application, and showed two stretches of ditches coloured red: those correspond to the sections B-F on the south side of the railway and M to a point between H and G on the north side, together with the cross culvert at C-L. A second map showed the main run of the north and south ditches up to a point near Sandycroft Bridge.
35. That application was stayed, on the terms of a consent order, of which the material portions read:
- "4. The Respondent will procure and manage a tracked excavator that will initially carry out 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 (Line ref CNH3 at 183m 1650y)
- The works will commence in October 2013 (the exact date to be agreed between the parties). 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, however further works may continue through to April 2014..."
36. There was a dispute as to the true meaning of that consent order; and whether or not the works under it had in fact been done.
37. The second application, dated 23 May 2014 (that is to say, shortly after the April 2014 date mentioned in the consent order) alleges that Network Rail *"have failed to dig out the ditches to a sufficient depth to enable them to work properly"*. Mr Wrench sought an order under section 28 that Network Rail *"carry out a proper level survey and undertake the necessary works including dredging and cleaning out the ditches to a proper level to ensure that the drainage system from Beeches Farm is effective. The work required is more specifically identified in ADAS report dated 11 April 2014."*
38. That refers to a letter from Kirk Hill BSc, a Senior Soil and Water Engineer of ADAS UK Ltd, dated 11 April 2014, which was written following a meeting with Mr Wrench on 27 March 2014. That letter does not set out a list of things which Mr Hill considered should be done. Rather, those things must be extracted from the letter, removing comment and observation. As we read it, those things are:

- (i) Cleaning the ditches to at least 1m deep so as to allow field drains to release their flow into the ditch;
 - (ii) Cleaning the ditches down to the original bed/invert to prevent the accumulation of soft sediment;
 - (iii) Grading the slope of the ditch beds to ensure water flow and to discourage pooling;
 - (iv) Maintenance through the periodic removal of obstructive vegetation;
 - (v) In relation to the ditch past the badger sett, laying a length of unslotted pipe of sufficient diameter;
 - (vi) Cleaning the culverts.
39. In his application, and the event that Network Rail did not perform the works, Mr Wrench sought an order under section 30.
40. Network Rail's Reply is dated 9 July 2014. It disputed the application, for the reasons set out in a letter of that same date, and did not agree that any order was required. The thrust of Network Rail's opposition was that works were ongoing, but that the ditches in any event were not causing injury to Mr Wrench's land. In particular,
- (i) NR disputed that the ditches should be 1m deep;
 - (ii) NR asserted that the badger sett piping was complete and comprised twin 300mm unslotted carrier drains, and water was said to be able to flow freely through and around the pipes;
 - (iii) NR asserted that the cross-track culvert (C-L on the Location Plan) *"is largely redundant other than to spread water across both sides of the railway"*, and is useful only when the ditches to either side are surcharged.
41. However, one area of consensus did eventually emerge, which was that NR agreed that a level survey would be useful. A level survey has now been done. The figures were helpfully transposed onto the 'scroll' which is referred to above.

42. On 23 February 2016, Network Rail wrote, following an inspection on 3 February 2016, setting out a list of nine 'maintenance issues', recognising that 'some re-grading work needs to be carried out to achieve the correct 'fall' throughout the ditch' (albeit without any admissions that there was 'any significant impact on the current operation of the ditch') and setting out its plans to excavate places where the banks of the ditches had slumped 'narrowing the flow of water'. Network Rail said that gabion baskets, intended to act as reinforcement, both at the Sandycroft outfall and at various points in the ditch banks, had been ordered, and were scheduled for delivery 'within the next 30 days' (i.e., by no later than March 2016) with works to be completed by 30 April 2016.
43. On 6 April 2016, Mr Hill wrote another letter, following a site visit on 7 March 2016. This referred to "a few points where defects were clear or suspected:
- (i) Continuing concerns with the pipe through the badger sett;
 - (ii) A stretch of ditch along the north side of the railway.
44. As part of its order dated 29 June 2016, the Tribunal, pursuant to Rule 45(1) of the Agricultural Land Tribunals (Rules) Order 2007, requested that the Welsh Government appoint an official expert to provide the Tribunal with a report "*on the matters to which the application relates, and in particular whether the ditches on the Respondent's land near Beeches Farm, the condition of which is the subject matter of this Application, are presently functional or not, and to make recommendations to the Tribunal as regarding the Application*". Various consequential directions were given. Paragraph 5 of those directions was "*The official expert's report will be prima facie evidence of the facts to which it refers.*" The appointment of an expert took some time because the usual expert nominated for appointment was Mr Hill, who was already acting for the Applicant.
45. That report was undertaken by Mark A Roberts BEng CEng FICE of Civil Engineering Solutions Ltd, the final version of which is dated June 2017 (i.e. over 18 months before the hearing). He had undertaken an inspection, in the company of the parties, on 1 December 2016. During that inspection he made a GPS survey of ditch and invert levels which were subsequently transposed onto the Location Plan and the scroll.
46. His overall conclusion - as matters stood on 1 December 2016 - was that "*The drainage ditches and culverts on NR's land were in a good*

state of repair. Vegetation had been cleared and it is important that this continues to be maintained to prevent a reduction in conveyance in the future."

47. That recognises that Network Rail, over the course of several years before December 2016, had indeed undertaken an extensive programme of works along this stretch of railway, including the removal of hundreds of trees. Unfortunately, other works which it had said that it intended to do (for example, the reinforcement of parts of the banks of the ditches with gabion baskets - referred to both in Network Rail's letter of 23 February 2016, and at the Tribunal hearing in June 2016) had not been done - and indeed still have not been done.
48. But, the situation in December 2016 was, on any view, significantly better than it must have been previously, including in 2013 when the original application was made. However, the fact that works (irrespective of their extent) were done in the past does not suffice to answer the application, because (for example) those works might not have been finished, or might not have been done properly, or might not have been enough. It is also the case that Network Rail itself identified, in February 2016, a detailed list of nine 'maintenance issues'.
49. Mr Roberts still considered that there was inadequate provision of drainage capacity under the railway between Points F and G. Point F is to the south of the railway, to the east of the main body of the farm, and is on the airport side of the railway. Point G is in the south-east corner of Field 0421. He considered it *"entirely possible that this water contributes to the flooding identified by Mr Wrench above Location A whilst adding water through the 600mm x 600mm brick culvert between Locations C and L to the northern drainage ditch"*.
50. He also identified inadequate provision for drainage of the northern railway ditch system at Location R, with the configuration of culverts and ditch invert levels between H and R preventing easy evacuation of the ditch through G.

Discussion

General observations as to the evidence

51. The witnesses all gave their evidence honestly.
52. Mr Wrench has a detailed knowledge of his own farm and of the drainage. At the very beginning of his oral evidence, he identified, with

some force, what he regarded as the simplest explanation, which is that if the long ditches are not kept clear, then the risk of flooding and water-logging increases. He has adjusted the crops which he has planted to work around flooding and water-logging issues. For instance, he has planted early varieties of maize (such as Cougar) in some fields, as a spring crop, which can be sowed as soon as the land has drained, and can be harvested before the winter rains, and which is not affected by high soil pH. We accept his evidence that, in the past, he was able to perform ditching works himself, which to some extent mitigated difficulties with the ditches silting-up or becoming obstructed. But latterly he cannot do these things, because he is not allowed onto railway land (for the same reasons the Tribunal encountered). His factual evidence was substantially unchallenged by Mr Sutherland.

53. Mr Raj and Mr Hamid were obviously both competent professionals. However, two themes clearly emerged in the course of their oral evidence, and which affect our assessment of their evidence overall in this case, and the weight which can be put on it. These are (i) neither of them was an expert on drainage (although we note that, in fairness to them, neither of them held themselves out to be so) and (ii) more importantly, the primary concern of both of them was *the railway* itself - that is to say, the permanent way, the embankment, and the infrastructure between the two fence lines. The ditches alongside the railway were a peripheral concern, and were not their focus so long as the railway line itself did not flood (which it has not done) and/or the operation of the railway was not impeded. This focus undermines the overall weight which can be attached to their evidence.
54. Mr Raj and Mr Hamid were both in some difficulty insofar as it was clear that neither of them seemed aware of the letter sent by Network Rail's Legal Counsel on 23 February 2016 setting out the problems identified and the works which it was said were going to be done. For example, neither of them was able to explain why the works involving the gabions - said in February 2016 to be imminent - had not been done. That letter did not exist in a factual vacuum: the clear recollection of Dr McNall and Mr Roberts was that the intended location of the gabions at Sandycroft Bridge had been pointed out to the Tribunal in June 2016, both at the site visit and in the hearing. We did not see any gabions at our site visit in May 2019. Nor could either of them comment on the calls which Mr Wrench said he had made to Network Rail.
55. We formed the overall impression that Network Rail should have come more firmly to grips, in a practical way, with the condition of these ditches back (at the latest) in early 2016. Reading the February 2016

letter at face value, at that time there was a real likelihood of a detailed programme of action. But unfortunately, and for some reason which did not become clear to us - and despite the clear observations made by the Tribunal in its decision in June 2016 - the practical approach inherent in that letter changed markedly, becoming one whereby Network Rail instead sought to challenge the justiciability of the application and did not carry through with the programme of works which NR itself, in February 2016, had said it regarded as desirable.

56. We wish to be clear that we do not attribute the blame for this change of approach to either Mr Raj or Mr Hamid. Nor were we invited to do so. At its highest, it seems that a decision was taken - somewhere, by someone, but not by either Mr Raj or Mr Hamid - that, despite Network Rail's own letter of 23 February 2016, no further substantial works should be done until the Tribunal reached its decision. That approach would perhaps have been understandable where the next Tribunal hearing, in June 2016, was imminent. It is less understandable where, as the parties knew, it was most unlikely that there would be a Tribunal hearing for many months, due to the need to instruct an expert. We do not know whether the Tribunal's order (in June 2016), which was binding and unappealed, that its earlier decision and reasons be drawn to the attention of the governing minds of Network Rail (for example, its directors) and not just to the attention of its lawyers, was complied with.

The condition of the land

57. Section 28(1) of the Land Drainage Act 1991 is clear that, in order for an order to be made, a ditch must be in such a condition as (a) to cause injury to any land or (b) to prevent the improvement of the drainage of any land. As such, the first question to ask concerns the condition of the land.
58. There is sufficient evidence as to the actual condition of the land, and that it has been affected by the presence of water:
- 58.1 The observations which we made during our own site visit;
- 58.2 The photographs taken on 18 March 2019 (Photographs 9 to 13 in the bundle, at pages 9-18 to 9-20) which show water up to Number 5 on the marker board in the corner of one of the three fields; and standing along the edge of the field, which has a slight depression (perhaps marking the line of an old, filled-in, ditch). Those only show water at the edge of the field, although given the very shallow fall of the field, it is possible that the water-table was quite high under the field;

- 58.3 We should add that Mr Wrench said that he had 'hundreds' of other photographs taken of the flooding of his fields, 'taken every month for the last four years', but these were not placed before us in evidence, and so we cannot have any regard to what they may, or may not, have shown.
59. A Mr Tripney of ISoils Ltd wrote a letter dated 19 April 2019. He referred to taking samples in March 2019. He was not called to give oral evidence. His assessment was that "there is evidence that these soils are experiencing wet conditions longer than is suitable for good agricultural land". He refers to the presence of orange colour in the soil, arising from iron oxide, with a target range of 19-189 mg/l. He also refers to excesses of sulphur and sodium..
60. His findings are not challenged, and there is no contrary expert evidence as to the condition of the soil from Network Rail.
61. Unfortunately, there is no plan in the bundle to enable all the fields which he tested to be identified. Some of the field names do not appear on the legend of the Numbered Plan. However, and despite the absence of some field numbers in Mr Tripney's notes, it is nonetheless sufficiently clear that a broad swathe of fields between Broughton Brook and the railway show broadly similar levels of iron oxide.
62. Water has come onto some of those fields in the past (for instance, in early 2013) from Saltney Ferry Road. 2012/13 was an exceptionally wet winter, and it does not seem to us as if any system of drainage would have been realistically able to cope with the sheer quantity of water. Some recognition that this part of the carriageway is or has been prone to flooding is shown by a stretch of drain-holes in the concrete kerbstones, which appear to have been installed relatively recently and a road warning sign. There are certainly signs from the growth of the grass and vegetation in Mr Wrench's nearest field that there has been some water-logging.
63. Network Rail is not responsible for the road. But, it is important and relevant to note, and we so find, that, once water from this direction comes onto the fields at Beeches Farm, the direction of flow is from the corner near Manor Lane (which is a high point) north and westwards towards the railway, i.e., across the Farm and into the railway ditches. Hence, the condition of the railway ditches is relevant to the drainage of the block of fields tested and referred to by Mr Tripney. The condition of those ditches does affect the drainage of water coming from Manor Road.
64. Similarly, if Broughton Brook is surcharged, water will flow in a northerly direction across the Three Fields towards the railway ditches.

The condition of the ditches

Along the railway: north and south sides

65. In June 2016, we wrote:

"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."

66. At the site visit, there was still standing water in the ditch on the Applicant's land in the corner of the field near to Sandycroft Bridge, as there has been in March 2019 when the Applicant took some

photographs. Water is not draining from that ditch into the railway ditch. That is because it is obstructed by something on Network Rail's land. We do not know what this obstruction was at the date of the site visit because this was part of the land which we did not enter onto.

67. A pile of stones (about a 100 or so of them) is still there. We are satisfied that the ditch along the southern side of the railway will, as originally constructed, have had a stone or otherwise solid base along a large part of its length. The inherent likelihood is that both the north and south ditches were constructed in the same manner. We accept that the stones piled in the corner of one of the three fields, near Sandycroft Bridge, were removed from the ditches by Network Rail as part of its works over the last few years. The ground here is alluvial, and not naturally rocky. Some of those stones are obviously (even if roughly) dressed. They are not part of the naturally occurring geography of the area. We cannot say whether they are 'kerbstones' or not, but they belonged in the ditch, where they came from, and where they were serving a useful purpose, as intended by the original builders.
68. From our own observation through the fence we could see that the bed of this south-side ditch in places has grass growing in it, and other vegetation. That must be because there is still silt or soil or some other organic medium in the bed of the ditch. At least some of this is being washed into the ditch from the railway embankment, being the problem identified by Network Rail in early 2016, calling for the use of gabions, but still not addressed. Parts of the embankment are still (as they were in June 2016) bare earth, which is exposed to the elements. The embankment is high and steep. It is inevitable that material will wash down into the inverts.
69. The presence of extraneous material in the bed of the ditch and the likelihood that the ditch has a stone, or solid/compacted base to the invert, is consistent with Mr Kirk's evidence, which we accept. He said that, when he walked the ditch, he was able, pushing a rod into the ground, to detect resistance (which he thought was stone) underneath the mud and vegetation in the bed of the ditch, at various points along T-U-V.
70. We also accept the evidence that the bed of this ditch is, at points, higher than the outfall of the drains from the fields. Mr Hill's letter of 18 March 2019 refers to one instance of this: where the AOD ditch level is 3.4m (3.406m) but is 8 inches or so above the outfall invert. It seems to us that the likeliest explanation of this is not that the outfalls were built

below the invert of the drain, but rather that that invert of the drain has gradually built up through deposition and alluvion, so as to impede or obstruct the discharge. Again, this is consistent with our above findings. As they stand, the ditches are not deep enough.

71. There is a second problem. Neither of these ditches has a consistent gradient or fall. Both undulate - they have peaks and troughs. The level survey confirms this, as do our own observations at the site visit. We consider it inherently unlikely that these long lengths of ditch were designed in this way. The changes in level are due to (i) failure to cleanse and scour the ditch properly to the original base of the invert; (ii) removal of stones from the ditch which has reduced lateral support, weakening the walls of the ditch. Humps and troughs cause water to pool, and also lead to the deposit of silt and other materials, thereby impeding the flow. The problem is exacerbated when those high points happen to coincide with a cross-culvert under the railway.
72. We note Mr Roberts' findings that, in relation to the south ditch P-R, he considered that there was a 'break point' along the central section of this ditch whereby water drains in two directions: in the west, westerly, and in the east, easterly. Although he does not identify where this break point is, or was, we accept this evidence. Our own observations suggest that the break point is at the railway crossing within the Farm.
73. Although Mr Wrench gave evidence about the footings of a signal gantry having "gone through the track drainage" at CR 207, there is no sufficiently firm evidence that this has happened. The furthest it goes is that Mr Wrench says that he was told this by an employee of Network Rail. Neither Mr Raj or Mr Hamid knew about it. But, even if Mr Wrench was told this, and it was true, we still do not know how (if at all) thus 'track drain' interacts with the railway ditch: see the document at 9-10 in the bundle, and so we cannot make any findings (i) as to whether this has happened; and (ii) if it has, whether it has played some part in the flooding of Mr Wrench's land. Moreover, the obligation on Network Rail is simply to keep the railway ditch in a condition where it does not injure or interfere with the condition of Mr Wrench's land. In our view, our powers do not extend to making Network Rail dig up its railway signals.
74. As part of our pragmatic and purposive approach, we also order that Network Rail do what, in its letter of 23 February 2016, it said it would do, namely that it would excavate slip material at the Sandycroft outfall, and elsewhere along the south side of the railway, and secure the bank at Factory Bridge and elsewhere using gabion baskets. We do consider

this to be within our statutory 'remedial works' jurisdiction. Moreover, it is doing nothing more than ordering what Network Rail itself said in February 2016 it would be. In his oral evidence, Mr Hamid accepted that the work with the gabion baskets needed to be done. In our view, that was a very sensible concession, and was entirely in line with Network Rail's stated position. He accepted that 'the job is still in our job bank, but it needs to be delivered'. We agree.

The badger setts and the catchpit

75. The section of drain H-J-K-M runs through the area of the badger setts. In relation to this length of drain, we wrote in 2016:

"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"

76. There are still problems with this section of drainage.

77. A three pipe 'catchpit' has been installed at M. However, the cover is loose and not secured. It does not fit and is held down by a rock. Moreover, the black plastic pipe leading from the catchpit to L is 300mm diameter. Given the dimensions (600mm x 600mm) of the brick/masonry cross-culvert, this is self-evidently of insufficient diameter/capacity to deal with the amount of water which the cross-culvert is designed to carry.

78. Network Rail itself seems to have accepted that this cross-culvert is not redundant: see its own observation on 9 July 2014 that the cross-track

culvert *"is largely redundant other than to spread water across both sides of the railway"* and is useful only when the ditches to either side are surcharged. 'Largely' redundant is not the same as wholly redundant. The cross-culvert is there for the very reason identified by Network Rail: to move water from one side of the railway to the other. It is always of use, but especially when the ditch on the south side is surcharged. The pipe has to be much wider. Moreover, the present pipe is not properly secured and the new pipe must be.

79. Through the area of the badger set, a single 300mm diameter plastic twin walled pipe has been installed with an invert level of 4.16mm. We do not know whether this is a slotted pipe or unperforated. As Mr Roberts reports, this has been constructed in an attempt to convey flows alongside a protected badger sett and without maintaining a graded ditch invert. But he reports, and we accept, that the pipe 'does not necessarily follow a straight/uniform gradient.' We accept that this is because it was not laid on a solid firm bed, and has 'pivoted'. The pipe should be laid in such a way that it does not pivot, and should follow a gradient, and we so order. Moreover, it seems to us that the same situation in this section still exists now as it did in 2016. In our view, one 300mm pipe along this stretch was not and is not enough. Indeed, Network Rail itself, in its letter of 9 July 2014, considered that "twin 300mm unslotted carrier drains" were what was needed, albeit recording (we find, wrongly) that twin 300mm carrier drains had in fact been laid when they had not been. A second 300mm pipe must be installed. Here, we acknowledge that we are ordering Network Rail to excavate a pipe already laid, but we consider that this does fall within the "remedial works" jurisdiction. What was done initially was not good enough - even in the then-view of Network Rail. Its own inadequate works cannot give it shelter from our jurisdiction.
80. The matter of whether Network Rail did or does or did or does not have the appropriate environmental or wildlife licences to work on this section is not a matter for us. Our order is directed to Network Rail and it is bound to carry our order into effect, including the acquisition of any relevant third-party licences or permits. We have given liberty to apply as to the timing and implementation of our order, and will consider any such application in the light of any evidence in support.
81. Finally, we were able to climb into and walk along E-D-C (C being the southern end of the cross-culvert which leads to the catchpit at M). The condition of the ditch D-C is not satisfactory. It contains vegetation, soil and silt which are impeding its effectiveness. This should all be cleared.

The cross-culvert C to L

82. The ditch from B-D leading comes off B-D at a right angle. The condition of this section of ditch is not satisfactory. It has an earth invert and contains vegetation, soil and silt which are impeding its effectiveness. In our view, it is visibly too narrow and shallow for the amount of water which it potentially would need to contain: see our remarks above as to the dimensions of the portal of the culvert. There is also a difference in level between the invert of this length of ditch and B-D which should be re-excavated and graded appropriately.

Other works: The tidal flaps

83. We have already remarked that this is low-lying land, near to the River Dee, with a potential for the overall drainage to become 'tidal-locked', and especially in terms of tidal waters from the Dee, for example at high waters, to enter this drainage system, adding to the overall water load. This is a further feature which has to be taken into account.
84. Mr Roberts recommended that a new outfall be provided at location R, with a tidal flap valve to link with the tidal outfall to the River Dee or the railway ditch upstream of the Factory Bridge culvert. We agree that this is an appropriate step to take, because it reduces the risk of water entering the drainage system from the Dee. We consider that it falls within our statutory jurisdiction.
84. He also recommended that a flap valve be fitted to the outfall of the Factory Road Bridge culvert to prevent inflow of tidally impounded water into the reach. For the same reason as above, we also consider this to be an appropriate step to take. We consider it to be a form of remedial work within the scope of our jurisdiction.

Other matters

85. In this case, we have decided not to adopt a number of the recommendations made by Mr Roberts. In deference to him, and to the parties, it is important for us to say why.
86. His report concentrates on the reduction of flood risk, which in our view is not precisely the same thing as the question which we are being asked to consider. We must simply focus on the application, and, in relation to it, answer the statutory question, which is whether 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, justifying us in ordering remedial work.

87. To this extent, we are bound to agree with Mr Sutherland's submission that some of the recommendations made by Mr Roberts seem to go beyond the strict scope of section 28. But, and even if they did not, we nonetheless remind ourselves of the above directions as to the law.
88. However, one matter where we agree with Mr Roberts is that it is at least arguable that there is a potential for water from Hawarden airport drainage system to overload the culverts under the railway, and overflow into the railway ditches. But, beyond this general observation, there is no evidence that this is what actually happens; or, if it does, the volumes of water actually or potentially involved. It also seems to us that is a matter which concerns Network Rail and its upstream neighbours, perhaps including the owners and occupiers of Hawarden Airport. That is not a reason for us to decide to do nothing, but our focus must be on whether the condition of the drains, as they stand, is good enough to move water once it comes onto the Farm.
89. We accept that there may be challenging questions (both legal and factual) as to the application of the Land Drainage Act where development upstream or in the catchment area increases the area of hard-standing and reduces the soakaway capacity. That increases the amount of run-off and the amount of water to be carried away, in the C21st, by a drainage system designed and built in the C19th.

Dr Christopher McNall
Tribunal Chairperson

Certified as a true copy of the Tribunal's Decision

Adrian Evans
Tribunal Secretary

10 October 2019