

**Y TRIBIWNLYS TIR AMAETHYDDOL CYMRU**

**AGRICULTURAL LANDS TRIBUNAL WALES**

**REFERENCE:** ALT 6332

**TRIBUNAL:** Dr Christopher McNall (Deputy Chairman)  
Dr Russell Young MBE JP (Drainage Member)  
Mr J Richard Williams (Farmer Member)

**APPLICANT:** Mr Nigel T Williams

**RESPONDENTS:** Mr Roger Graham-Palmer, Mr Peter Fitzgerald, Mr Thomas  
Davies (Trustees of the Hartsheath Maintenance Fund)

**PROPERTY:** Sunnybank, Lon Castanwydden, Leeswood, Flintshire CH7 4SU

**DECISION**

For the reasons set out below, having heard from Mr Nigel Williams (the Applicant) and Mr Ralph Collins, a partner in Carter Jonas LLP (on behalf of the Respondents) at a hearing on 26 May 2016, and having considered documents provided by the parties, the Tribunal allows the Applicant's Application dated 18 December 2014 and orders certain works to be done by the Respondents to a section of ditch marked D-E on the plan in the report of Mr S J Bell.

**REASONS FOR THE DECISION**

1. The Applicant complains that his property, known as 'Sunnybank', is being affected by flooding in times of bad weather on account of the condition of a nearby ditch: 'the Ditch'. Sunnybank is registered under title number WA785650. The Applicant and his wife have lived there since February 1996.
2. The Respondents are the freeholders of neighbouring land ('Field 1') which forms part of Bank Farm in Pontblyddyn. Their freehold title is registered under title number CYM545619.
3. Bank Farm is presently tenanted by Mr George Owens. He is now in his mid 80s. Since January 1987, he has occupied Bank Farm as a successor tenant to his father. Mr Owens' tenancy is subject to the Agricultural Holdings Act 1986. The Respondents are his landlords and the Shrewsbury office of Carter Jonas LLP are the land agents. Bank Farm is made up of about 150 acres, comprising a number of large parcels around Pontblyddyn. The farmhouse at Bank Farm itself is about 1/2 mile as the crow flies from Field 1. Field 1 is at the edge of Bank Farm.

4. Although Mr Owens was named in the Application as an interested party, he has played very little part in the proceedings. He had not given any formal evidence. Nor was there anything in writing from him. He did not attend the hearing.
5. An independent expert, Mr S J Bell of ADAS, inspected the Ditch on 3 and 4 February 2015. He wrote a Condition Report of Drainage pursuant to Rule 45 of The Agricultural Land Tribunals (Rules) Order 2007: SI 2007/3105. It was completed on 10 March 2015. We repeat our expression of regret to the parties for the 14 month delay in finally hearing this Application.
6. Mr Bell's recommendation was that the ditch between points D and E should be excavated to a minimum depth of 0.75m with a top width of 1.2m, and graded out to meet the existing bed level at point E.
7. At the hearing, both the Applicant and the Respondents confirmed that they agreed with Mr Bell's recommendation. Mr Williams confirmed that he did not invite the Tribunal to order that the excavation be to a greater depth or width than that recommended.
8. Mr Bell's report is prima facie evidence of the facts to which it refers. Nonetheless, both to avoid doubt, and to give context to our discussion below, we find as follows:
  - 8.1 Although it is silted up, there is obviously a ditch between points D and E;
  - 8.2 The Ditch runs south-west to north-east, with flow from west to east, the land generally falling quite sharply towards the confluence of the Rivers Nant and Alun at Pontblyddyn;
  - 8.3 Along the north-west side of the Ditch there is a mature hedge;
  - 8.4 That hedge, together with some wire, forms a stock-proof boundary feature between Sunnybank and Field 1;
  - 8.5 There is a 'berm' of earth along the length D-E, in Field 1. This is clearly earth which was, at some point in the past, excavated from the Ditch and placed on Field 1. It is not bare earth, but grass has grown on it.
9. The only point in dispute between the parties concerns liability for the Ditch. Mr Williams says that the Ditch is on Bank Farm, and that the Respondents, as the owners of Bank Farm, are therefore liable for it. The Respondents say that the Ditch is not on Bank Farm at all, and that they are not therefore liable for it.

10. This dispute is therefore a boundary dispute. Given that the length of ditch in issue does not exceed 100m, and, even on the Respondents' view, the recommended work could be done in no more than a day (and probably, in our view, as an expert Tribunal, done comfortably within that time, and for a very modest cost) then this dispute has inevitably come to generate some of the wholly disproportionate cost notoriously associated with boundary disputes. That cost referred to does not only fall on the parties, but also on the public purse, which pays for the Tribunal's staff and facilities.
11. The thrust of the Respondents' case is their reliance on the 'hedge and ditch' presumption. It is significant that this was not the Respondents' initial position. On 20 August 2014, Mr Williams wrote to the Respondents complaining about the condition of the Ditch. There cannot have been any doubt which ditch he was referring to. He attached two carefully annotated location plans and some photos.
12. On 10 September 2014, Mr William Richards MRICS of Carter Jonas LLP, wrote back on behalf of the Respondents. His response was that *'maintenance of the ditch in question .. is the responsibility of the farm tenant to maintain under the terms of his tenancy agreement. I will therefore approach the farm tenant, Mr G Owens, to remind him of his liabilities in this matter.'*
13. It was indeed right that, if the Ditch belongs to Bank Farm, then Mr Owens has 'liabilities'. His tenancy incorporates the so-called 'model clauses', set out in the Agriculture (Maintenance Repair and Insurance of Fixed Equipment) Regulations 1973: SI 1973/1473. Paragraph 10 of the model clauses imposes on the tenant the obligation *'To dig out, scour and cleanse all ponds, watercourses, ditches and grips, as may be necessary to maintain them at sufficient width and depth, and to keep clear from obstruction all field drains and their outlets'*.
14. Mr Richards' response was clear and unequivocal - the Ditch was part of Bank Farm. Mr Richards could not attend the hearing, but Mr Collins had the file with him, and was able to consider the notes made at the time. Although Mr Collins was unable to tell us how Mr Richards had arrived at the conclusion expressed in his letter, it seems to us to be beyond doubt that Mr Richards, as a professional individual, writing on behalf of his clients, as their agent, on his firm's letterhead, must have satisfied himself that the position as he described it was correct, and that the Ditch indeed belonged to Bank Farm.
15. Mr Richards followed that up with a phone call to Mr Owens on 29 October 2014. The file note which Mr Collins referred to recorded that Mr Owens *'was adamant that the Ditch was Williams' responsibility, and was certainly not the*

*Estates'*. We were told that there was no clear file note as to why Mr Owens was 'adamant'.

16. On that same day, 29 October 2015, the Respondents (in a letter from Mr Richards) disputed that Sunnybank had been adversely affected by the condition of the Ditch at all. However, that objection is no longer maintained given the agreement to Mr Bell's recommendations. But, even if the objection had been maintained, we find as a fact that Sunnybank has been adversely affected by flooding from the Ditch. The Ditch, having silted up, is no longer in a condition to carry water away from point D. The ground is obviously wet in Field 1, due to the presence of reeds, visible both in Mr Williams' 2014 photographs and Mr Bell's 2015 photographs, which also show standing water on Sunnybank.
17. That letter raised the hedge and ditch presumption for the first time. Mr Richards said in that letter that *'Mr Owens has subsequently pointed out to me that the ditch in question is part of the neighbouring land based on the above presumption and consequently not within his tenancy agreement'*. Apart from that letter, our attention was not drawn to any note recording that to have been Mr Owens' position, presumably advanced during the phone discussion on 29 October 2015.
18. If the hedge and ditch rule applies, then the Ditch would belong to Sunnybank and not Bank Farm. In many instances, the hedge and ditch rule is deployed as a means of gaining or laying claim to land, and not giving it away or avoiding responsibility for it. But Mr Collins on behalf of the Respondents confirmed that, if the Respondents' position were correct, then Mr Williams could put up a fence along the far lip of the Ditch, along the berm, and, if he did so, neither the Trustees nor Mr Owens could object. Mr Williams could thereby fence in several hundred square metres of Field 1 and neither the Respondents nor Mr Owens could rightly protest. That is a somewhat surprising position for the Trustees to have adopted.
19. The hedge and ditch presumption is just that - a presumption. It can be rebutted by evidence, especially when that evidence shows the parties to have acted inconsistently with the presumption.
20. We accept Mr Williams' evidence to us that, when he and Mrs Williams moved into Sunnybank in February 1996, the Ditch looked as if it had been quite recently cleaned. We accept that he could see fresh earth and fresh lines as if the Ditch had been excavated. We accept Mr Williams' evidence that he had not done that work.

21. We also accept that his predecessor in title, Mr Thomas (who had been at Sunnybank from 1976 until 1996) had not himself done any work on the Ditch. That is contained in Mr Thomas' letter of 10 February 2015. We consider that Mr Thomas' recollection and account are reliable. Even given the passage of time, we consider that he would have remembered had he done the work referred to. Correspondingly, we also reject the Respondents' suggestion that any owners of Sunnybank, at least from 1976 onwards, maintained the Ditch. We find that they did not do so.
22. If the work visible in 1996 was not done by Mr Williams, and had not been done by his predecessor Mr Thomas, then it must have been done by or on behalf of Mr Owens. We find that Mr Owens, in early 1996, was performing acts of maintenance which were entirely consistent with the Ditch being part of Bank Farm.
23. We also note that, when the work was done in 1996, the spoil was put in a berm on the Field 1 side of the Ditch. That is also consistent with the Ditch belonging to Bank Farm. If it did not belong to Bank Farm, then Mr Owens, or someone acting on his behalf, would have been excavating Sunnybank's ditch, without permission, and would have taken Sunnybank's soil, again without permission.
24. That evidence is sufficient, on the balance of probabilities, to rebut the presumption. The Ditch is on Bank Farm.
25. Regardless of the above, there are other features of this case which show, to the appropriate standard, that the hedge and ditch presumption does not operate in the circumstances of this application so as to lead to the conclusion that the Ditch is part of Bank Farm.
26. Firstly, the registered titles of Field 1 and Sunnybank abut. There is no 'white space' between them. Although the official copy entry plans only show general boundaries, nonetheless both plans are consistent and show the Ditch to be part of Bank Farm, and not part of Sunnybank. Whilst this factor is not conclusive in itself, it is consistent and adds force to the findings of fact which we have already made.
27. Secondly, Sunnybank and Field 1 were, until 1884, in common ownership. As such, any hedge and ditch then existing would not have marked out the boundaries between two properties in different ownership, and the presumption would not apply. We were shown a deed dated 23 July 1884. The land now comprising Sunnybank was being sold for £130 by a Mr Chalmers (the trustee in bankruptcy of one Horatio Nelson Hughes) to one Owen Prydderch. The conveyance is clear that the land to the south of

Sunnybank, including Field 1, was retained land in the ownership of Mr Chalmers: hence, common ownership. We are satisfied that the plan, albeit on a small and unusual scale, shows a boundary feature along the line of the Ditch. Accordingly, the second presumption first identified by Laurence J in 1810 does not operate (see *Alan Wibberley Building Limited v Insley* [1998] 1 WLR 881 at 897 per Lord Hoffmann) and so the presumption does not operate.

28. Thirdly, there is some evidence, satisfying us on balance, that the Ditch is part of a longer, natural, watercourse. That is certainly the impression given by the plans relied upon by the Applicant, which show 'Issues' to the south and west of Sunnybank, and not a ditch containing standing water, but an arrow indicating the direction of flow. The natural topography of this area includes several such issues and watercourses, running roughly parallel to this one, including Dingle Wood and Queen's Farm, and flowing down to the Alun. This conclusion is not affected by the presence of a pipe which effectively culverts the watercourse discharging at Point D.
29. Section 28(1) of the Land Drainage Act 1991 empowers us to 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'. Section 28(2) provides that we can name any person who is an owner or occupier of land through which the ditch passes or which abuts on the ditch.
30. In the circumstances of this case, given Mr Owens' failure to participate or attend, and our lack of knowledge as to his circumstances, and whether he would in reality be able to comply with any order, or any notice to remediate issued by the landlords, we consider that the appropriate order should be made only against the Respondents, the owners, and not against Mr Owens, the tenant. The order is sufficient authority for the Respondents, whether by themselves, their servants or agents, to do the work specified in the order, and to enter any part of Bank Farm necessary for them to do that work.

## **ORDER**

- (1) The Respondents shall excavate the Ditch between points D and E to a minimum depth of 0.75m with a top width of 1.2m, and shall grade it out to meet the existing bed level at point E.
- (2) This Order is sufficient authority for the Respondents, whether by themselves, their servants or agents, to do the work specified, and to enter any part of Bank Farm necessary for them to do that work.

Dated 2 June 2016

Christopher McNall  
Chairman