

DECISION OF THE TRIBUNAL

In the Matter of an application under Section 28 of the Land Drainage Act 1991  
("the Act")

BETWEEN:

VICTOR PARRY

Applicant

and

RODNEY COATES

Respondent

WHEREAS application was made to the Tribunal on form 11 on the 11<sup>th</sup> of June 2002 for an Order requiring drainage work to be carried out in field ordnance survey number 242 as specified in the aforesaid application

AND WHEREAS a Tribunal comprising Mr W J Owen (Chairman), Mr W N Waters, MBE, JP, and Mr J R Williams duly appointed in accordance with the provisions of the Agriculture Act 1947 (as amended) to hear and determine the application sat at the Beach Hotel, Trearddur Bay, Holyhead, Isle of Anglesey on the 23<sup>rd</sup>, 24<sup>th</sup> and 25<sup>th</sup> of June 2003.

NOW THE TRIBUNAL having considered the evidence and having inspected the land and for reasons set out in the annexed document entitled "The Reasons for the Decision of the Tribunal" hereby order that the Respondent Professor Rodney Frederick William Coates shall carry out the remedial works specified in the schedule following within 9 months of the date hereof

The Schedule

The bed of ditch to Mr Marks's report section A - B to be lowered to the design bed level shown on the plan attached. A 150 mm perforated drainage pipe to be laid on the bed and clean stone having no dimensions greater than 50 mm or less than 5 mm backfilled level with the base of the boundary wall.

The bed of ditch section B - C to be lowered to the design bed level given on the same plan.

Signed this 24<sup>th</sup> day of October 2003

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

BETWEEN:

VICTOR PARRY

Applicant

and

RODNEY COATES

Respondent

THE REASONS FOR THE DECISION OF THE TRIBUNAL

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This application is made under Section 28 of the Land Drainage Act 1991 ("the Act").

The Section provides as follows:-

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

Sub-section (5) states that "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.

The burden of proof is on the Applicant and the standard of proof is on the balance of probabilities (in other words what is more likely than not to be the case). Accordingly the Applicant in order to succeed must satisfy the Tribunal that it is more likely than not that:-

1. There is an identified ditch.
2. The ditch in question is in the ownership or occupation of the Respondent.
3. The ditch in question is in such a condition as to cause injury to the Applicant's land.
4. Remedial work should be ordered and, if so, what remedial work.

If on the balance of probabilities the Tribunal are so satisfied then they may make an order requiring the Respondent to carry out appropriate remedial work.

The Applicant made his application on form 11 to the Tribunal on the 11<sup>th</sup> of June 2002.

In his form 11 the Applicant applies for an order under Section 28 of the Act requiring the Respondent to carry out work mentioned in paragraph 6 of the application on the ground that the land mentioned in paragraph 3 of which the Applicant is the owner/occupier is being injured.

In paragraph 3 the Applicant identifies the land affected by the application as field number ordnance survey 243 totalling 5.054 acres at Llam yr Ebol Trefor Holyhead Isle of Anglesey.

In paragraph 4 he says that injury to his land is being caused by the condition of the ditch in question in OS242 insofar as it fails to arrest waters that seep through a pond embankment sufficiently and has been constructed contrary to an agreement made via NFU which he enclosed.

In paragraph 5 he alleges that the condition of the ditch and its effect on his land is that the ditch is ineffective and allows waters to seep on to his land and make it waterlogged.

In paragraph 6 he says that the work which is required to be carried out is as follows:-

“Attention is required to the said ditch but since I have no authority to enter OS242 I am unable to advise what precise work is required to halt the

waterlogging - save to say that the ditch in my view should be extended into OS241 and exiting in the roadside ditch. The ditch in OS242 probably also requires deepening and cutting further away from my OS243”.

In paragraph 8 the Applicant says that the application affects the interests of the Respondent who is the owner/occupier of the land mentioned in paragraph 7.

In his reply the Respondent submitted form 11R stating that his main reasons for resisting the application were as stated on an enclosed schedule. a copy of which is attached to this Decision.

At the hearing which took place at the Beach Hotel Tearddur Bay Holyhead Isle of Anglesey on the 23<sup>rd</sup>, 24<sup>th</sup> and 25<sup>th</sup> of June 2003 the Applicant was represented by Mr Peter Rogers.

The Respondent Professor Coates conducted part of his own case himself with the assistance of Mrs Coates.

Mr Rogers and Mrs Coates were duly appointed in writing to represent Mr Parry and Professor Coates respectively.

#### Prior to the hearing.

Pursuant to Rule 21 of the Agricultural Land Tribunals (Rules) Order 1978 a report (“the Report”) was provided prepared by Mr Wynford John Ssamuel Marks of Agricultural Development Advisory Service

The Report after summarising the application, Mr Marks's site inspection and his conversations with the parties gave his conclusions and recommendations.

At the time of his inspection the weather was dry, the level of water in the ponds (which will be briefly described later) was low, and none was overflowing.

He said that a damp area was visible in the Applicant's field 243 near the boundary with 242 in the proximity of point B on the plan annexed to the report which led him to the conclusion that it was apparent that the water moves from OS242 onto OS243.

He concluded that the reasons for the movement of water were:-

1. There was no clear channel to take water away from point B on the plan.
2. The present bottom of ditch A - B is higher than the surface of field 243.

3. The fall of the land is from 242 towards 243.

His recommendation was that the Tribunal should issue an order as follows:-

“The bed of ditch A - B (on his plan at Appendix B to his report) to be lowered to the design bed level shown on the plan attached. A 150 mm perforated drainage pipe to be laid on the bed and clean stone having no dimensions greater than 50 mm or less than 5 mm backfilled level with the base of the boundary wall. The bed of ditch section B - C to be lowered to the design bed level given on the plan attached”.

His recommendation went on to say that the work should conform fully with the relevant statutory regulations.

Rule 21(6) of the 1978 Rules quoted above states:-

“A report under this Rule shall be prima facie evidence of the facts set out therein, but the maker of the report shall, unless the Tribunal otherwise direct, attend any formal hearing of the application for the purpose of being examined and cross-examined on the contents of the report”.

### The Hearing

Mr Marks attended the hearing accordingly and was cross examined by both parties

We heard evidence on oath or affirmation from:-

1. The Applicant himself.
2. Mr E R Hughes, Technical Adviser for Wales to the National Farmers Union (called by the Applicant).
3. Mr Marks.
4. Mr Keith Lindley (called by the Respondent).
5. Mr Graeme George Nash (called by the Respondent).
6. Mr Robert Ian Buxton-Matthews (called by the Respondent).
7. Mr Roger Colin Butters (called by the Respondent).
8. The Respondent himself.

Under Rule 21 of the 1978 Rules Order the Report "shall be prima facie evidence of facts set out therein". In paragraph 7 of the Report Mr Marks stated that it was very difficult to have a clear view of ditch A - B - C due to thick overgrowth but section A - B was found to be deeper and more well defined than section B - C. Earlier in the Report Mr Marks stated (paragraph 2):-

"There is a ditch approximately 80 metres long on the southern side of field number OS242. The fall of the land is from north west to south east".

- 2 The ditch is marked on the plan at Appendix B as section A - B - C and is on land owned by the Respondent Professor Rodney Coates.
- 3 Section A - B of the ditch is well defined but section B - C is shallow.

Mr Marks was cross-examined by Mrs Coates on behalf of the Respondent. She asked him what his evidence was for concluding the existence of ditch A - B - C and his answer was "From my experience". He said that section B - C would be recorded as a fieldside ditch for purposes of the Environment Agency and if he was doing a survey for that Agency he would record the feature A - B - C as a farm ditch. He said that there was certainly a depression which got less at point C. Silt would have built up making the depression less obvious. In answer to Mrs Coates he said that there was no guarantee that deepening the ditch A - B - C would prevent injury to the Applicant's land. When Mrs Coates asked him what the purpose of opening the ditch to point C was he said "Water comes from field 245 and if it gets into the ditch beyond point A at the moment it cannot get away as the ditch comes to a dead end". He repeated that the ditch previously flowed to point C but agreed that he did not see this happen. After point C he said that it would go along the right hand side down the Respondent's drive to the low point on the drive.

The Respondent produced a report prepared by Mr Simon Simcox a Chartered Surveyor from Bangor who carried out an inspection on the 11<sup>th</sup> of October 2001 and gave a report. That inspection and report pre-dated Mr Marks's Report when he saw some water lying in what he described as "the new ditch" which appeared to be working satisfactorily.

The Respondent also consulted Mr David Noble a Consultant Engineer through the Country Land and Business Association. Mr Noble has not carried out an inspection and we were not provided with particulars of the information which had been supplied to him.

In paragraph 4 of his letter Mr Noble stated "A key issue is the drainage to field number 243 which on the plan indicates that a main under-drain has been installed through the field to relieve localised drainage problems rather than to provide an

overall improved drainage standard to the entire field. Very notably the drain extends to the very area which ADAS confirm as being that in which dampness was most evident. The drainage was installed in 1974 since when it can be reasonably be assumed that no maintenance will have been undertaken which may be necessary to overcome general deterioration, movement/siltation or even a significant localised failure”.

Mr Noble's comments on the “main under-drain” are, of course, speculative as he has not inspected the property at all.

Mr Rogers asked Mr Marks whether there had been any need to check the “herringbone” (the herringbone is the feature illustrated in Appendix E of the Report “Plan of existing drainage system”). Mr Marks said that he could see no point in checking the “herringbone” as he had inspected on a dry day. The drainage system in field 243 could well be a metre deep and what one could see if one dug it up with a JCB would not prove much unless one took the whole thing up. He said that lots of drains installed in the 1970s still work. Others may not due to the ingress of ochre from a build-up of iron deposits from the soil or weed roots. He said that such drains normally fail either from damage from vehicles or from silting up where there is limited fall or fine soil.

Mrs Coates asked Mr Marks “In your findings after conversations with the parties were you convinced that opening the ditch A - B - C was a solution to water coming through the wall from OS242 to 243”. In reply Mr Marks said that there was no guarantee because water could even go in the sub-soil underneath but the work would take the greater part of the water. He said that it is a solution to water coming through the wall.

The Tribunal unanimously find on the balance of probabilities that there has been a ditch between points A - B - C as shown on the site plan Appendix B to the Report.

On the 23<sup>rd</sup> of June 2003 the Tribunal in the presence of the parties inspected the site.

They found that there is what appears to be a fairly shallow hand excavated trench between points A and B which then stops. This was dug on behalf of the Respondent following an attempt by Mr Hughes of the NFU to mediate an agreement between the parties.

Mr Hughes's involvement had initially been to advise the Applicant, a member of the National Farmers Union, but when it was found that the Respondent was also a member Mr Hughes changed his role from that of adviser to the Applicant to that of some kind of mediator hoping to broker an agreement. It turned out that Mr Hughes despite his considerable knowledge of agriculture is not

in any way expert in matters of land drainage. In a letter to the Respondent dated 23<sup>rd</sup> August 2001 he stated that his director would confirm that he (Mr Hughes) is not a drainage engineer and did not have the necessary facilities or indeed time to supervise the construction of a ditch.

Mr Hughes's recommendations were incorporated in an agreement between the parties which he prepared and was signed by them in January 2001. When Mr Hughes wrote to the Respondent on the 2<sup>nd</sup> of November 2000 he drew attention to a culvert between enclosure 246 and enclosure 243. It appears that Mr Hughes recommended the re-opening of the culvert and this had resulted in water flowing through it from OS246 (the Respondent's land) into field 243 (the Applicant's land) and then back again into the Respondent's land 242 as a result of which it seems that water which had for some years been getting from 246 directly into 242 now got into 242 via Mr Parry's field 243. This culvert had been re-opened at the suggestion of Mr Hughes.

The Tribunal are satisfied that under conditions of heavy rainfall water will flow in the ditch from A to B and cannot flow further. When we inspected on the 23<sup>rd</sup> of June in dry conditions there was quite a length along the boundary between the Respondent's field 242 and the Applicant's field 243 which we could not inspect because of the dense growth on it. The members of the Tribunal found Mr Marks's conclusion that there had historically been a ditch A - B - C convincing and accept his evidence.

Merely because it is not possible to see a ditch after point B now does not mean that there has not previously been a ditch there and section 28 of the Act is designed to deal with a situation where there has been a ditch which requires "remedial work" as defined in the Act.

We find that this is the case here.

The Respondent Professor Coates provided a great deal of material in an effort to demonstrate that the pond which he had dug in the summer of 2000 was not leaking into the ditch.

It is outside the scope of the Tribunal's jurisdiction to find whether it is so leaking or not.

### Injury

We are unanimously satisfied that in conditions of prolonged and/or heavy rainfall water will flow into the ditch A to B and because it cannot proceed to point C it will on occasions flow through the stone wall into the Applicant's field number 243 and cause injury to it.

Decision

We think it fit to make an order requiring the Respondent, Professor Rodney Frederick William Coates, to carry out the remedial work specified in the Schedule following.

THE SCHEDULE

The bed of ditch to Mr Mark's report section A - B to be lowered to the design bed level shown on the plan attached. A 150 mm perforated drainage pipe to be laid on the bed and clean stone having no dimensions greater than 50 mm or less than 5 mm backfilled level with the base of the boundary wall.

The bed of ditch section B - C to be lowered to the design bed level given on the same plan.

Dated this 24<sup>th</sup> day of october 2003

(Signed) .....  
(Chairman)