

Y TRIBIWNLYS TIR AMAETHYDDOL CYMRU

AGRICULTURAL LANDS TRIBUNAL WALES

REFERENCE: ALT 04/2020

APPLICATION: An Application under the Land Drainage Act 1991

TRIBUNAL: G Wilson (Deputy Chairman)
Mr J Smythe (Drainage Member)
Mr H Evans (Farmer Member)

APPLICANT: Mr D Smith Dolhaidd Isaf, Pentreccagal,
Newcastle Emlyn Carmarthenshire,
SA3 89H (not represented)

RESPONDENTS: Mr R & Mrs W Leftley, Pantbach, Felindre,
Llandysul, SA44 5XS(not represented)

PROPERTY: Land Adjacent to Penrallt Farm, Felindre,
Llandysul, Ceredigion. SA44 5XU

HEARING: Sitting remotely on 11 March 2022

ORDER

The application is dismissed. 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 and Procedural Background

2. In an application dated 27 March 2020 the Applicant asserted that his field was being injured because “*residual water has been diverted onto the land from an adjacent land. The diversion necessitated breaking through a dividing mound between the two lands. The mound was the boundary between the two lands*”. The Applicant required that “*the mound is repaired*”.
3. A written report was produced from a drainage expert appointed by the Welsh Ministers at the request of the Tribunal; Mr K Hill of RSK ADAS Ltd (the Drainage Report) The report is dated 22 October 2020. The report concluded:
 - 2.4 *There is no evidence to prove that the alignment and outfall of culvert (A) had previously followed a different location. There is, however, reported evidence supplied by the Respondents supporting their claim that the current culvert outfall and the hole in the boundary bank represent the original conditions.*
 - 2.5 *Unless further evidence is provided that indicates that the culvert outfall has been unlawfully amended, any improvements such as a new ditch or culvert would be the responsibility of the Applicant.*
4. The Applicant responded to the Drainage Report on 2 December 2020. The Applicant stated that he disputed the facts and matters contained in the Drainage Report setting out the following reasons “*bias towards the Respondents, incorrect facts contained in the report*”. The Applicant referenced earlier emails that he had sent to the Tribunal. This includes a document dated 23 November 2020 in which the Applicant sets out a detailed response to the report.
5. In a reply to the application dated 9 December 2020 the Respondent asserted “*the Applicant has put forward no new evidence that actually supports his claim of our creating a hole in the bank this year. We have put forward documentary, photographic and video evidence to prove that we did not create the hole in the bank this year, or at any other time.*”

6. On 11 December 2020 the Respondents responded to the Drainage Report and the Applicants comments upon that report. The Respondents maintained that they had not created a hole within the bank separating their land from the Property.
7. Pursuant to directions issues between September 2021 and March 2022, the parties submitted their evidence and explanations of case. The Tribunal produced a composite hearing bundle which was circulated to the parties and panel together with video evidence.
8. A site visit was conducted on 10 March 2022 and the hearing took place remotely on 11 March 2022.

The Property and Drainage features

9. The property is situated at Pantbach, Felindre, Llandysul, SA44 5XS (the Property).
10. The Drainage Report records that the Property is comprised of a field which totals approximately 3.5 ha; the Ordnance Survey grid reference of the Property is SN 34251 36466; the Property is situated approximately 175 m above Ordnance Datum; the catchment of the area and the Property fall and drain easterly towards the Nant Esgair, which is approximately 250 m to the east of the Property.
11. We were assisted by the site plan at Appendix 6 of the technical report titled "site plan" (being the plan numbered ALT 04/2020-drg01, dated 22 October 2020) ('the Site Plan') together with the levels plan at Appendix 7 of the technical report titled ("the Levels Plan") (being the plan numbered ALT 04/2020-drg02, dated 22 October 2020). As shown on these plans the Property slopes from west/northwest to east south/east.
12. The Applicant became the owner of the Property in early 2020.
13. The Property is a pasture field
14. The Respondents' land lies to the North of the Property, as shown on the Site Plan. The Respondents' land comprises a newly renovated building and garden area.

15. On the Northern boundary of the Property is an earth bank which separates the Property from the Respondents' Land. The bank forms the boundary between the two properties. There is a hole in this bank. This hole/cavity is the subject of the dispute with the Applicant claiming that the Respondents opened this hole in the bank to drain their land.
16. Downslope of the hole in the earth mound, on the Property, we observed at our site visit some evidence that water had created a small channel. The channel was not significant, it was very shallow, short in length and ended abruptly with the next feature being some distance away and was the start of the ditch upon Applicant's land as shown on the Site Plan.
17. Within the Respondents' land directly upslope of the disputed hole, is an open trench which connects the hole to a culvert outfall/pipe of 150mm.
18. To the east of the Property the public highway slopes steeply towards a low point adjacent to the Respondents' property. Within the vicinity of this low point there is located a road drain/gulley chamber. A field drain outfalls immediately above the gully from the field to the west of the highway.
19. A shallow brickwork surface water drainage channel has been constructed across the Respondents' patio to allow overflowing surface water from the road to escape. This surface water channel discharges onto the upper reaches of the Property upslope of disputed hole.
20. Ditches run alongside much of the boundary between the Applicant's and Respondents' land. These ditches converge on the Applicant's land as shown on the Site Plan.

The Site Visit

21. The Tribunal undertook a site visit on 10 March 2022. This took around 2 hours. We were guided by the parties as to the particular things which they wanted us to see, including those described above. Weather conditions were damp but mostly dry. The land inspected was damp under foot. At the time of the site inspection there was no flow of water from the hole in earth bank over the Property. This has both advantages and disadvantages. One advantage is that we could see the condition of the Property. One disadvantage is that it

interferes with assessment of the manner of the flow of water. Where this 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.

The Hearing

22. The hearing proceeded remotely by way of video platform. There were some connectivity issues prior to commencing hearing. This included the Applicant being unable to activate his camera. The Applicant confirmed that he was content to proceed by way of audio only. The hearing proceeded on this basis without incident.
23. We took care and time to ensure that all relevant documents were before the Tribunal. We informed the parties of the documents that were held on the Tribunal file which comprised the composite hearing bundle produced by the Tribunal (129 pages which includes but is not limited to the Applicants and Respondents' explanation of case, Applicants and Respondents' bundle of evidence to include photographic evidence, letters from Chris Turner and the Drainage Report) together with the video evidence submitted by the parties. Having done so the parties confirmed that all relevant documents were before the Tribunal. The parties confirmed that they had received and had the opportunity to review the documents.
24. We heard oral evidence from the Applicant, the Respondents, Mr Turner the builder who undertook the barn conversion upon the Respondents' property and Mr K Hill BSc, a Senior Soil and Water Engineer of RSK ADAS Ltd and the author of the Drainage Report. We also heard oral submissions from the parties. The oral evidence and submissions are fully set out in the record of proceedings and have been considered.
25. We have considered all the documentary evidence together with the explanations of case. However, we do not rehearse all the documentary evidence in detail but include in this decision and reasons such evidence as was relevant to our decision

The law

26. 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 above.

27. 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.

28. 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'.
29. Taking a step back, it seems to us that we need 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.
30. 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.
31. 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.

Evidence and Submissions

The Applicant's Evidence & Submissions

32. Prior to the hearing the Applicant was directed to submit a document explaining his case which included a statement of truth. The Applicant adopted this document as his evidence in chief. The Applicant has expanded on his explanation case in the correspondence and documents included within the hearing bundle and in his oral

evidence given at the hearing, all of which have been considered. The relevant evidence and submissions are summarised below:

- a. The rainwater from the road in front of the Respondents house, about 200 yards in length and the water from the fields opposite, drain into a culvert which in turn drains into an open drainage channel which sits alongside an earth mound that divides the Property and the Respondents' land . The Applicant asserts that the Respondents' surface water drain arrangements were inadequate to cope with rainwater during heavy rainfall. As a consequence, they re-routed all the down pipes and roofs alongside the exit of the culvert, at the open drainage channel, and then broke a hole in the earth mound to alleviate their drainage problems by passing the surface water over the Property. During heavy rainfall several thousand gallons pass through the hole in the earth bank onto the Property.
- b. The Property was marketed in 2014 and again in 2018. The Applicant purchased the property in early 2020. The Respondent inspected the field In December 2019 and also in January 2020. At this point all the vegetation had died back, the tree on the Respondents' land was about 15ft from the hole. The Applicant asserts that he walked the whole of eastern boundary checking every post for stability and all the pig wire. The Applicant asserts that had there been a hole in the earthen bank at this time, bearing in mind the size of the hole and that he intended to farm sheep at the property, he would have seen it. There was no hole in the earth bank until the beginning of 2020. The Applicant first discovered the hole in early March 2020, when he went to repair the eastern boundary. Upon becoming aware of the hole in the earth bank the Applicant filled the hole with concrete/post mix which was subsequently removed by the Respondent
- c. Road debris has started to accrue in the Applicant's field. There was no such debris when the Applicant purchased the property which the Applicant asserts is indicative that hole in the earth bank was created after he purchased the Property.
- d. The depth of topsoil adjacent to the hole is 200mm, which is compatible with the rest of the field. If the arrangement had been in place for a number of years, then the topsoil from the hole and would not be 8 inches deep as shown in the technical expert report. The Applicant asserts this is particularly so given that the flow of water has moved a significant amount of road surface and debris. The implication being that if the flow is sufficient to move the road surface it would have also removed a proportion of the topsoil.

- e. The amount of residual water passing through the hole plus the road debris and dead vegetation for a minimum of six years would have the effect of either creating a ditch or a build up “ *the first signs of which are happening*”. The flow of water from the hole is creating a ditch where previously there was none which is indicative that the hole has been recently formed. The Applicant relies on the Respondents letter dated 11/12/20 which states “There were 3 named storms in February of this year Clara 8th and 9th, Dennison 15th/16th and Jorge on Feb27th- March1st. The Respondent asserts that this would have resulted in several thousand gallons of water passing through the hole which into would have caused “immense and an untold damage”, especially after Jorge which lasted for nearly 4 days. The Respondent asserts that the absence of such damage is indicative that the hole was formed after these storms.
- f. The hole is crudely hacked through an earthen bank and is not “befitting of its purpose which is to serve highway drainage”. The construction of the hole is inconsistent with its claimed use as a highway drain.
- g. The patio constructed on the Respondents’ property and the drainage therefrom postdate the works undertaken by Chris Turner because Mr Turner would have had to have exposed the pipe to become aware of its position work round it. Accordingly, the Applicant asserts that Mr Turner is unable to give accurate evidence as to the surface water drainage from the Respondents’ land.
- h. Drawing number ALT04/2020-the DRG 01 shows the culvert terminating on the boundary when in fact it emerges from the Respondents patio at least 2 m from the earthen bank. In addition, the drawing shows three bends in the pipe but does not show rodding points which would have emphasised that the pipe is not straight. The Applicant asserts that, if the pipe had been installed prior to 2014 with the sole purposes of carrying highway drainage it would have been straight. The bends are indicative that construction of the current route of the pipe, to incorporate bends, was as a result of the conversion work.
- i. When grass crops were cut (hay or haylage) they would be stored behind the hedge of Brynglas as shown on the Site Plan. This was because it was the driest part of the field part of that area has now become sodden. In addition, the grass crop included the area right up to the hedge of the Brynglas Property.
- j. The quantity of water discharged through the hole, as shown in the photos would not simply soak away.

- k. Historic satellite images reveal no ditches in the Applicants field but large ditches in the Respondents field.
- l. The legal title of the Property does not provide for the discharge.
- m. The Drainage Report failed to document and consider key facts and features. For example , the drainage expert took a photograph of the pipe only rather than its surroundings which would have revealed pipes carrying the rainwater from the Respondents roof to the open drainage channel and in turn to the hole in the earthen bank. In addition, the drainage expert failed to dig test pits on the Respondents side of the boundary to establish if the discharge had previously followed a route on the Respondents' Land. The drainage report does not give an estimated age of the hole.
- n. At a site meeting held between the Applicant; the estate agent acting on behalf of the party who sold the Property to the Applicant and a Highways Officer from Carmarthen County Council, the Highways officer stated that the Council would have only piped across the road and no further especially as the site was completely overgrown, with derelict barns and outbuildings. In addition, the Highways officer informed the Applicant that the Council would never dig through the roots of an oak tree.
- o. The Applicant asserted (in earlier correspondence) that the earth bank, surrounding the piped hole, would become eroded and collapse within a year of November 2020. On 23 November 2020, the Applicant stated that he was content *"to wait for a period of time perhaps a year, in order to see the amount of deterioration in the earthen bank caused by the flow of water through, the amateur, hacked, not piped hole which has increased in size, since early this year."*
- p. The Applicant relies upon an email from Beverley Kemp which is considered below which the Applicant asserts indicates that Ms Kemp, the party who sold the property to the Applicant, first became aware of the hole when photographs were sent to her by the Applicant. The Applicant did not produce Beverley Kemp as a witness (see below).
- q. The Applicant's email dated 5 September 2021 at page 75 of the hearing bundle records that Carmarthen County Council confirmed that a soak away was installed upon Respondents' Land in November 2015 in relation to the conversion works and a building completion certificate was issued on this basis.
- r. The Applicant asserts that as a result of the continued discharge of water over the property marsh grass will grow on the Property which has now become sodden in the relevant area. The continued discharge will result in a build up of road waste

materials. The continued discharge will result in a ditch being created, which would, with the field falling away from the bank, be 30ft into the property.

33. The Applicant gave his evidence in an open and instinctive manner. The Applicant did his best to answer the questions that was put to him as fully as possible. The Applicant's oral evidence remained consistent with the written evidence and the statements that he had placed before the Tribunal. However, in contrast to the Respondents' evidence there is no significant corroborative evidence of the Applicant's assertion that the Respondents created a cavity in the earth boundary mound to drain a combination of highway drainage and their own surface water drainage onto his land. These elements of the Applicants evidence amount to little more than assertion. Indeed, the majority of the evidence (see below) clearly does not support these assertions. In addition, we noted a specific feature of the Applicant's evidence. There were a number of instances where the Applicant identified evidence that was either missing or that would not support and the Applicant's case. In such instances the Applicant alleged bias and that the Respondent was in some way being favoured. By way of example only, in relation to the technical report the Applicant in his letter to Ms Higson dated 23 November 2020 states "*I find the report submitted by ADS, compiled by Mr Hill and Mr Farr to be extremely biased in favour of the Respondents*". The Applicant goes on to state "*[the Respondents are both Field Officers at Aberystwyth University. Have they been employed there by ADAS, now or in the past? Are they or have they been in the past work colleagues of Mr Hill and/or Mr Farr? Are they friends of Mr Hill and Mr Farr?]*". The Applicant did not bring forward any evidence to support his assertion that the author of the technical report was in any way bias. In the document titled explanation of case dated 24 January 2020 the Applicant states "*from January 2021 through to September 2021 Carmarthenshire County Council has been deliberately uncooperative.....One wonders what procedure Carmarthenshire County Council would have carried had the reverse between myself and the Respondent been the case*". The Applicant did not bring forward any evidence to support his assertion that Carmarthenshire County Council would have anyway favoured the Respondents. In a letter to Carmarthenshire County Council the Applicant refers to a Mr Carl Atkins from the enforcement team the Applicant states "*Mr Atkins obviously found all the relevant information regarding W/20 5527, perhaps he will divulge you why he deliberately lied in his emails. Could it be at the request quest Mr*

leftley". No evidence has been brought forward to support the Applicant's assertion that the relevant enforcement was influenced by the Respondents. At the hearing the farming member panel identified that the Applicant had produced an email from the former owner of the Property, Ms Beverley Kemp. The farming member asked whether anything had come from the email exchanges with Ms Beverley Kemp. The Applicant indicated that he thought she "*did a U-turn*" and assumed that she is friends of the Respondents. She did not want to get involved. The Applicant did not put forward any evidence to support this assertion that Ms Beverley Kemp was a friend of the Respondents. We find that the examples set out above are indicative that the Applicant is, where it suits his purposes, willing to make assertions for which he puts forward no corroborative evidence and which on their face appear speculative. We find that this feature of the Applicant's evidence, particularly when combined with the lack of corroborative evidence for his assertions, undermines the credibility of the Applicants evidence and reduces the weight we place upon the Applicant's evidence.

The Respondents' Evidence & Submissions

34. The Respondents adopted their explanation of case as their evidence in chief. The Respondents expanded on their explanation of case in the correspondence and documents included within the hearing bundle and in their oral evidence given hearing all of which have been considered. The relevant evidence and submissions are summarised below:
- a. The Respondents have resided on the land to the north of the property since 2014. The building in which they reside was originally a barn but has been converted into a residential property. The Respondents undertook the conversion via a building contractor.
 - b. The Respondents rely upon video footage which the Respondents assert has an embedded date of the 13 October 2018. The Respondents assert that the video footage shows water flowing through the culvert into the open drainage channel and down the Applicant's field on 13 October 2018 which is prior to the date upon which the Applicant claims the hole in the earth bank was made.
 - c. The highways authority would not simply have piped the culvert to the edge of the road as the courtyard to the Respondents' land was level with the road at the time they purchased it.

- d. The ditches on the Respondents' property service a constant spring and are several metres away from the hole.
- e. The previous owners of the Property would have tolerated the discharge as it serviced other fields in their ownership which were uphill of the Property.
- f. It is accepted that the hole has increased in size. However, the Respondents asserts that this is due to the Applicant filling the hole with quick set cement and large stones in an attempt to block it. The Respondents assert that they removed this blockage as the Applicant had no right to carry out the works. The Respondents assert that the removal works caused the hole to become enlarged not the flow of water.
- g. Prior to the Applicant purchasing the Property work was carried out on the entrance of the Property to prevent road water escaping through the Property and down the field. The result is that the water flows down the road to the highway drain and culvert.
- h. The effect was to cause more water to run down the road which was subsequently discharged through the culvert and in turn through the hole increasing the flow. 2020 saw an unprecedented number of severe storms again increasing the flow. The Respondents now frequently ensure that the highway drain is kept clear whereas it was previously regularly blocked which again increases the flow. The implication being that with increased flow the drainage arrangements would have been noticeable to the Applicant whereas previously they were not.
- i. For four weeks in March 2020 the Applicant's sheep regularly escaped from his field and were rounded up by the Respondents and neighbours. An inspection of the boundary fence at the bottom of the Applicant's field revealed that the fences were in a bad state of repair and a section was lying flat where a tree had fallen on it. Accordingly, the Respondent asserts that the Applicant did not carry out such careful inspections of boundary features as he claims.
- j. Following his application, the Applicant now regularly strims corner of the field in the vicinity of the hole. Preventing regrowth of the brambles and nettles that had previously hidden the hole and baffled the flow of water. For many years the field was only cut once or twice a year. The top corner of the Property through which the hole discharges is under an oak tree grows. This area was not previously cut as the tractor could not access it. The implication being that the ground was previously rougher than its current condition such that the rate of water flow would be slowed and its affects mitigated

- k. Carmarthen County Council has verbally confirmed that it owns the drain culvert. However, to what point is a matter of conjecture as they have no records and is prior to 2006. The council have yet to provide any confirmation in writing.
- l. The drainage arrangement was in place in 2014 when the Respondents bought their land the arrangements were logical and pragmatic as they drained water from one field in the vendor's ownership to another field in the vendor's ownership which was subsequently purchased by the Applicant.
- m. The culvert did not appear on the Respondent sale documents as the outlet was very overgrown and they discovered it only once the winter rains had started.
- n. The Respondents builder, Chris Turner was aware of culvert, open drainage channel and hole as he had to work around the existing pipe when excavating the courtyard and when he dug trenches for the house drainage systems.
- o. The Respondents installed a pump house to provide domestic water supply utilising a spring and dug a pond and created vegetable beds along the southern boundary of their land. They would not have sited these things in the path of regularly flooding water.
- p. The Applicants rely upon still photographs taken from the video dated 13 October 2018 showing water flooding through a drainage channel and down the Property, taken during storm Callum.
- q. The photographs which show the Applicant filling the hole were taken on 17th of March 2020. Despite the Applicant claiming that there would be no damage to the Property the Applicant is standing in a small ditch caused by the February storms.
- r. The Respondents' attempt to keep the road drain clear and operational to prevent road flooding. Previously the drain generally blocked all winter preventing the culvert from working properly. The implication being that regular unblocking of the drain has increased the flow of water.
- s. Apart from a very small ditch at the top of the Applicants field no permanent damage has been caused to the field.
- t. The Respondents' patio was laid in 2018 in response to the Respondents' growing frustration at the gravel around the house being regularly washed away.
- u. When the Respondents bought their property there was a gate between their land and the Property. The Respondents assert that this could provide an explanation as to why the culvert does not take a straight line between the road drain because it has been constructed to discharge downhill of that gateway/pathway.

35. The Respondents gave their evidence in an open and instinctive manner. The Respondents did their best to answer the questions that was put to them as fully as possible. The Respondents' oral evidence remained consistent with the written evidence and the statements that they place before the Tribunal. The Respondents' evidence is corroborated by external sources such as the evidence of Chris Taylor who we found to be a credible witness (see below), the photographic evidence and video evidence (see below). Accordingly, we find the Respondents to be credible witnesses and we place weight upon their evidence.

Mr Turner's Evidence

36. The Applicant has produced a letter from a Mr Chris Turner a director of Centreline Construction Ltd. Mr Turner states within his letter that he was the builder who undertook the barn conversion for the Respondents. The work started in 2015. Mr Turner confirms he had to inspect and work around the drainage pipe/culvert running from the road through the Respondents' land in order to install the new sewage pipework. Mr Turner confirms that at this time the pipe discharged to a hole in the bank into the adjacent field. Mr Turner's evidence remained consistent under cross examination. Mr Turner confirmed that not only did he see the pipe but he saw the trench/open drainage channel to which the culvert drained and the cavity/hole within the earth mound during the construction works in 2015. Under cross examination Mr Turner's evidence remained consistent that he had encountered the culvert, open drainage channel and hole in 2015. We accept that Mr Turner had a commercial relationship with the Respondents as he is their former contractor. However, we find that Mr Turner gave his evidence in an open and instinctive manner. Mr Turner did his best to answer all questions put to him as fully as possible. As stated, his evidence remained consistent under cross examination with that set out within his written statement. Mr Turner was willing to make concessions even where he knew it may not fully support the Respondents' case. For example, Mr Turner conceded that whilst he had installed the drainage at the residential dwelling on the Respondents' land and that drainage was to soakaways, he had not installed the drainage at the workshop and accordingly could not comment in relation to that drainage. For these reasons we find that Mr Turner is a credible witness and we place weight upon his evidence.

Ms Beverley Kemp's email

37. The Applicant has produced an email from Ms Beverley Kemp. The email states *"thank you for the photos. Yes that is a big hole. I'm assuming it's taken from your side? I would need to really see it from the roadside and a bit further back to get a perspective as possible. If you can get those we will have a look and see if we think it's new..... My initial feeling as it wasn't there before....."*
38. As stated above the Applicant was asked whether any further contact and had made with Ms Kemp. The Applicant indicated that he had contacted her but she had been unwilling to support his application further. The Applicant implied that perhaps there had been some influence from the Respondents.
39. Ms Kemp did not attend the hearing to have her evidence tested under cross examination which significantly reduces the weight that we attach to her email. Even taken at its highest the email is equivocal, calling for further evidence before a final view is given. For these reasons we place little weight upon Ms Kemp's email as corroboration Applicants claim that the hole in the earth boundary mound did not exist before he purchased the land and was opened by the Respondents in the early part of 2020.

The Technical Expert Report and Mr Hill's Oral Evidence

40. The Tribunal has before it a copy of a report dated 22nd of October 2020 prepared by Mr K Hill BSc, a Senior Soil and Water Engineer of RSK ADAS UK Ltd a drainage expert appointed by the Welsh Ministers at the request of the Tribunal. The report concludes as follows:

7 COMMENTS AND CONCLUSIONS

7.1 No evidence is available that would prove that the alignment and outfall of culvert (A) had previously followed a different location. Conversely there is reported evidence from a contractor and video footage, both supplied by the Respondents, which support the Respondent's claim. That is to say, that the current route and outfall of culvert (A), and the hole in the boundary bank, represent the original conditions.

- 7.2 *The chamber on the northern side of the road is not newly installed, with a rusty grid and no road cutting works evident in the tarmac.*
- 7.3 *The videos provided by the Respondents (dated 2018 and 2019) show runoff down the highway entering culvert (A) and flowing over the surface of the Respondent's property before discharging onto the surface of the Applicant's field adjacent to the disputed hole in the boundary bank.*
- 7.4 *The flows shown in this footage would migrate down the Applicant's field towards the head of the existing ditch in the Applicant's field.*
- 7.5 *The excavation made adjacent to the hole in the boundary bank recorded topsoil depths of 200 mm above mineral subsoil. This would be similar to topsoil depths found within the rest of the field. Thus there does not appear to be a deeper layer of organic rich soil that would indicate the presence of a former ditch that had become filled with sediment. Therefore it appears unlikely that there has ever been a ditch across the Applicant's field leading away from this location.*
- 7.6 *At the point where the boundary bank hole discharges, the ground is rough and may have well been left under longer vegetation cover as stated by the Respondents. Therefore, during normal rainfall events drainage water may have been less visible and to some degree soaked into the loose well drained soils.*
- 7.7 *No detailed survey of the neighbouring property (Brynglas) was undertaken. However, it appears to rely on soakaways to dispose of surface water drainage. Therefore, this would appear to indicate that during normal storms a certain volume of water may soakaway without resulting in visible runoff down the field.*
- 7.8 *It is conceivable that during the Applicant's visits to site before he purchased the field that these were not during periods of the [sic] time when surface flows were occurring. The brambles in the Applicant's field and tree in the Respondent's land, both now removed, may also have made the hole in the bank inconspicuous.*

41. Under cross examination from the Applicant, Mr Hill confirmed that the pits that had been dug showed no disturbance in the topsoil; that he was a little surprised to see the channel had formed since he last inspected the property; there had been significant erosion on the road surface so it was surprising that there was not erosion on the field. Mr Hill confirmed that there had been no pits dug on the Respondent side of the earth mound. When asked to explain why this might be by the Tribunal, Mr Hill confirmed that there was no obvious place to dig such as depressions. Mr Hill stated that in absence of a starting point he would potentially have to dig up the entire field. Under cross examination from the Respondent, the Respondent noted that there had been little rainfall from February to September and asked Mr Hill whether the channel could have been obliterated over that period. Mr Hill confirmed the channels that form on the Applicant's property could start to erode particularly if a mower had been put over the channel. Mr Hill went on to say that rough ground would slow the flow of water and that there was less likelihood of a channel forming.

Photographic and Video Evidence

42. There has been produced the Tribunal video evidence. This includes a video file titled "video 20th Feb.Mov together with a video file titled "IMG_2969.MOV
43. The video file titled "video 20th Feb.Mov runs to 42 seconds and shows a significant amount of water being discharged from both the cavity/hole in the earth diving mound and the surface water discharge point upslope of the cavity in the dividing mound. The water from the hole initially travels through a short channel on the Property before spreading out across the Property.
44. The video file titled "IMG_2969.MOV runs to 5 seconds. The video file shows water draining into the open trench/drainage channel upon the Respondents property. The camera angle is then raised to look across the Property. The video shows thick brambles on the Property where the Property boundaries Respondents land. The flow of water cannot be seen in the footage through the brambles. Below there is a flow of water down the Property. The Respondent asserts that the video was filmed in 2018.
45. There has been produced to the Tribunal photographic evidence. This includes a photograph which the Respondents claim was taken in 2015 and shows a gate in a position upslope of the position that the open drainage channel and hole are situated. Stills from the video

that the Respondents claim was taken in 2018; a photograph of the courtyard dated 13 February 2014 which shows standing water and a significant amount of road debris deposited on the highway adjacent to the Respondents property; a photograph dated 17 March 2020 showing the Applicant and a second person engaged in works in the immediate vicinity of the hole within the earth mound. The photograph shows that the area of the Property immediately above and immediately below the hole, the ground is very damp and appears to show that the area in which the Applicant is standing is lower to that of the surrounding area. The Respondents assert that this suggests that a channel had already begun to form in March 2020. A photograph dated 29 July 2021 which shows that the corner of the property through which the hole drains had been mowed/strimmed and was not rough ground. In the photograph the area of the Property in the vicinity of the hole is covered in grass and there is no evidence of a significant channel within this photograph. Similarly, a photograph dated 30 August 2021 again which shows this corner of the field as fully grassed. The photograph also demonstrates that the lower end of the Property was cut for hay but the upper corner of Property particularly those areas which are overhung by trees including that in the vicinity of the hole had not been cut for hay.

Findings of Fact

Did the Respondents open hole in the earth boundary mound in 2020 so as to discharge water over the Property?

46. There is a single factual issue in dispute in this case. That is whether in early 2020, the Respondent opened a cavity within the earth dividing mound so that a culvert from the highway together with the surface water drainage from their property would drain through this hole onto the Applicant's property.
47. We have considered the evidence that supports the Applicant's case. The Applicant's evidence is that hole could not have been present prior to 2020 because prior to that he had conducted thorough boundary inspections which would have revealed the presence of the hole. For the reasons set out above the weight that we place upon the Applicant's evidence/assertion is reduced. In addition, as set out below, we accept the Respondents' evidence that at the time the Applicant purchased the Property and conducted the site inspections the area within the vicinity of the hole was overgrown such that the Applicant's inspection of the boundary features would have been

obstructed. This element of the Respondents' evidence is supported by the IMG_2969.MOV video footage (see below). In the circumstances, we find that the Applicant has failed to demonstrate that his boundary inspections conducted prior to and shortly following his agreed purchase of the Property would have revealed the presence of the hole in the boundary mound.

48. Other than the email from Ms Beverley Kemp the Applicant has brought forward no significant corroborative evidence to support his assertion that the Respondents opened the cavity within the earth mound. For the reasons set out above the weight that we give to Ms Beverley's Kemps email as corroboration of the Applicant's account is significantly reduced.
49. We accept that there are elements of the experts evidence which, on the face of it, appear to support the Applicant's account. In particular that there is a potential inconsistency that the flow of water down the road was such as to cause significant erosion whereas the flow of water from the cavity within the mound did not appear to have affected the topsoil levels. In addition, the expert expressed a little surprise that there appeared to be a cavity developing at the site inspection. However, we find that a plausible explanation has been given for this, which is that previously the areas in question have been overgrown such that they would have slowed the water due to a combination of baffling and absorption (see comments below in relation to soakaways) but the Applicant's actions in clearing and strimming the area directly downslope of the hole was such that such absorption and slowing of the waters was no longer as effective.
50. We have found the Respondents to be credible witnesses and we place weight upon their evidence that the culvert, open drainage channel and hole in the earth boundary was in situ when they bought the property in 2015.
51. We accept that Mr Turner he has had a commercial relationship with the Respondents but for the reasons set out above we nonetheless accept that he is a credible witness and place weight upon his evidence that he encountered the culvert, the open drainage channel /trench to which the culvert drained and the hole in the earth to which the open drainage channel /trench to which drained onto the Property in 2015.
52. We found the Respondents to be credible witnesses and we accept their evidence that the five second video which has been produced to

the Tribunal was filmed in 2018. We find that the video clearly demonstrates water discharging from culvert to an open drainage channel/trench on the Respondents land at the time of the video. The video clip also shows rough ground to include brambles in the area on the Property directly opposite the open drainage channel/ trench. We find that the video shows a flow of water below this rough ground on the Property. We find that the video clip supports the Respondents' assertion that the drainage arrangements as are in situ now were in existence prior to 2020, in 2018 at the time of the video. We find the video clip supports the Respondents' assertion that there was a rough ground directly opposite the open drainage channel/ trench and hole at the time the Applicant purchased the Property. On the basis of the experts evidence (see below) We find that this rough ground would have slowed the flow of water and would have obstructed the Applicant's view of any effect upon the land the property as a result of the flow of water in the position directly opposite the hole .

53. The findings and conclusions of the expert report fully support the Respondents assertion that the hole, open drainage channel/trench and culvert represent the original drainage arrangements of the Property and the Respondents land. However, we find that the expert's failure to dig trial pits upon the Respondents land is significant. The expert stated that there were no clearly identifiable areas upon which to dig. However, there is clearly an area between the existing discharge and the ditch upon the Respondents land below the pump station where pits could have been dug which may have been informative. Whilst this reduces the weight that we place upon the report we nonetheless accept the expertise of the author of and place some weight upon the report albeit reduced for the reasons given.
54. The Respondents assertion the property is capable of some degree of absorption of the run-off is corroborated by the evidence in the bundle which indicates that Brynglas and the Respondents land both adopted soakaway drainage systems and which is the expert highlights is indicative that soil is capable of the degree of absorption such that in times of low flows the drainage arrangements may be less evident.
55. We find that the Respondents evidence that the flow has increased and become more noticeable due to their works to ensure that the highway drainage is unblocked, so as to ensure that the highway does not come flooded, is plausible.

56. The Respondents evidence that the meteorological conditions in early 2020 combined with the unblocking of the highway drainage was such that the volume of water was significant and became noticeable to the Applicant whereas previously it had not, is both plausible and corroborated by the meteorological records which show a number of significant storms at this time.
57. Accordingly, on the evidence before us and for the reasons set out above, we find that the Applicant has failed to demonstrate, on the balance of probabilities, that the Respondents opened a cavity in the earth mound in 2020 so as to drain the culvert and surface water drainage from their land to the Property. On the evidence before us we find that the drainage arrangements including the highway drainage culvert, open drainage channel/trench on the Respondents property and the hole in the earth mound dividing Respondents land from the Property are the original drainage features.

Do the Drainage Arrangements cause Injury to the Property?

58. As set out above, the Applicant have previously stated that he wished to wait for a year so that the true effect of the drainage could be established. At the time the site visit we were in excess of the year from the date that the Applicant made this statement. We accept that at the site visit there was evidence that a small channel had developed on the Applicants property. However, the channel was not significant either in terms of length or depth. The Applicant's assertion that the drainage arrangements would create a ditch 30 feet from his boundary due to the fall of the land had not materialised. The Applicant had previously stated that due to the drainage arrangements that his Property would be affected by marsh grass. We were not directed to any evidence to suggest that the Property is affected by marsh grass in a way that it was not at the time of the Applicant's purchase of the Property. We find that the evidence indicates that the Property is only affected by a significant flow of water at times of extreme rainfall and that water runs off the Land. We have not been directed to any significant evidence that would suggest that as a result of the drainage arrangements the land could not be used for its intended purpose or that's its productivity would be materially affected.
59. The Respondents' evidence was that the channels that are from time to time produced by the drainage would refill and be recut. The expert confirmed that such a channel could be eroded or could be destroyed

by a mower passing over the top of it. The Respondents' evidence that the cavity would refill is to some degree supported by the photographs of the property taken in March 2020 which show that the area in the vicinity of the hole has been affected by water and the Applicant standing in an area close to the hole which appears to lower than the surrounding area and the July and August 2021 photographs, which show the area immediately downslope of the hole grassed with no evidence of a channel. Accordingly, on the evidence before us we find that any channel on the Property that is formed by the flow of water from the open hole in the earth mound is formed at times of significant water flow but does not persist in absence of such flow of water . We find that any such channel is not permanent and will refill or be lost during dry periods.

60. In addition, we find that the any channel that form from time to time have been caused by the removal of the rough ground in the vicinity of the hole. As the rough ground no longer slows the flow of water and allows it to absorb into the soil as such ground conditions would allow; as evidenced by the prevalence of soakaway drainage. In the alternative, if the removal of the rough ground is not the cause of formation of a channel, we find that the removal of the rough ground has nonetheless exacerbated the process by which channels from time to time form.
61. On the basis of our site visit, we find that the channels that from time to time from are in a position which is overhung by a tree which the Respondent asserts would not be utilised for the purposes of grass cutting as they cannot be accessed by a tractor. The Respondents' evidence is corroborated by a photograph included in the hearing bundle taken in the summer months of 2021 which shows that the field has been cut other than the area in the immediate vicinity of the tree which is the area from which the hole drains and the channels in the ground form from time to time.
62. Accordingly, we find that the drainage arrangements cannot be said to have caused injury to land the Applicants land. Even if we were to accept that the drainage arrangements cause injury (which we do not) we would find that the extent of any injury is insignificant and not material.
63. In addition, we find that given the presence of a ditch on the Property downslope of the hole that it is within the Applicants gift to fully divert

the water flow to the ditch and thereby mitigate any perceived adverse impact to the Property.

Application of the Law to our Findings.

64. 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 (emphasis added).

Condition of the ditch

65. The Applicant's claim is that the drainage features or ditches upon the Respondents' land are in condition to cause injury to the Property due to the Respondent breaking through an earth boundary mound and diverting water through the hole. We have found against this element of the Applicant's claim. It follows that we find the Applicant has failed to demonstrate that a ditch is in such a condition as to cause injury to the Property. Having made this finding is not necessary to go on to consider the other elements of Section 28(1) of the Land Drainage Act 1991 as the application cannot be successful. However, we do so in the interests of completeness.

Injury to the Property

66. We have found that the drainage arrangements, as they are currently, represent the original drainage arrangements. Accordingly, in the interests of completeness, we have considered whether these original drainage arrangements cause injury to the Property. For the reasons set out above we have found that the Applicant has failed to demonstrate that the drainage onto his land has caused any injury to the Property as per Section 28(1)(a)

Prevent the Improvement of the Drainage of any Land

67. The condition of the drainage arrangements cannot be said to prevent the improvement of drainage of the Property as we have found that it is in the Applicants gift to divert the flow of water to existing ditches upon the Property.

Tribunal's Discretion

68. Our jurisdiction is discretionary. Even if we were to accept that the effects of the drainage arrangements did cross the threshold so as to be considered injury (which we do not) those affects are nonetheless insignificant because they are temporary in nature and have not been demonstrated to adversely affect the intended use of the Property. In addition, we have found that the Applicant's actions have exacerbated the affects of the drainage arrangements by removing the rough ground that slowed the flow of water. Finally, we have found that it is in the Applicants gift to divert the flow of water into the existing ditches on the Property. Accordingly, even if we had found that the impact of the drainage upon the Property was such that it reached the injury threshold, we would nonetheless not exercise our discretion in favour of the Applicant and would not apply the remedies that he seeks.
69. For all these reasons the application is dismissed.

A handwritten signature in black ink, appearing to read 'G. Wilson', written in a cursive style.

Mr G Wilson
Tribunal Deputy Chairperson

Dated 25 April 2022