

Neutral Citation Number: [2021] EWHC 16 (Ch)

IN THE COUNTY COURT AT MANCHESTER

BUSINESS AND PROPERTY COURT WORK

PROPERTY, TRUSTS AND PROBATE LIST (Ch)

Case No. F30MA461

Manchester Civil Justice Centre
1 Bridge Street West,
Manchester M60 9DJ
Date: 8 January 2021

Before :

His Honour Judge Cawson QC

Between :

BERNEL LIMITED

-and-

CANAL AND RIVER TRUST

Claimant

Defendant

Christopher Jacobs (instructed by **Burnetts**) for the **Claimant**
Greville Healey (instructed by **Ward Hadaway Solicitors**) for the **Defendant**

Hearing dates: 14-18 December 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII.

The date and time for hand-down is deemed to be 10.30 a.m. on Friday 8 January 2021

His Honour Judge Cawson QC

Introduction

1. The Claimant is a fund management company which has, since 19 December 2017, been the registered proprietor of land off Sugar Street, Rushton Spencer, Macclesfield, SK11 0SN (“**the Site**”) shown edged red on the plan forming the Appendix to this judgment (“**the Plan**”).
2. The Claimant had initially funded a developer that had acquired the Site from the freehold owner of Ivy House, Rushton Spencer for the purpose of developing the Site by the refurbishment of the existing Ivy House, and the construction of 9 new dwellings thereon. Upon the failure of this developer, the Claimant took a transfer of the Site, and is now in the course of carrying on the development of the Site itself.
3. The Defendant is a company limited by guarantee and registered as a charity for purposes including preserving, protecting, operating and managing inland waterways in England & Wales for public benefit. The Defendant is the freehold owner of land immediately to the south west of the site (“**the Feeder Land**”), which forms part of banks and course of the River Dane Feeder Canal (“**The Feeder**”). It is successor to the British Waterway Board.
4. This case concerns the status of a pipe (“**the Pipe**”) that runs through the Site to point “A” shown on the Plan (“**Point A**”), where it discharges onto the Feeder Land and thus into the Feeder.
5. It is the Claimant’s case that the Pipe is a culverted natural stream or watercourse into which it, as riparian owner, is entitled to discharge surface water and treated sewage effluent from the properties in the course of being developed upon the Site, through the Pipe and onto the Feeder Land, so as to discharge into the Feeder, alternatively that it has acquired rights by prescription under the doctrine of lost modern grant to discharge surface water and treated sewage effluent in this way. The Claimant thus seeks declaratory relief by reference to what is permitted by a permit granted by the Environment Agency on 18 September 2017 (“**the EA Permit**”), and planning approval for a scheme granted on 22 March 2018 (“**the Approved Scheme**”).
6. The Defendant disputes that the Pipe is a culverted natural stream watercourse, maintaining that the Pipe it is merely a sewer or drain bringing effluent from septic tanks further up Sugar Street, and water from field drains, rather than naturally flowing surface water. The Defendant thus denies that the Claimant has any rights as riparian owner, and further denies that the Claimant has acquired any rights to discharge surface water or treated sewage effluent by prescription.
7. The trial of the case took place between 14 and 18 December 2020, heard remotely by Microsoft Teams. I heard the lay and expert witnesses referred to below, and attended on a site visit on 17 December 2020 accompanied only by the Claimant’s Site Manager, who

remained commendably neutral in escorting me over the Site and, at my request, lifting a manhole cover in the car park of the School adjacent to the Site.

8. I have been assisted by the helpful written and oral submissions of Mr Christopher Jacobs on behalf of the Claimant, and Mr Greville Healey on behalf of the Defendant, for which I am grateful.

Witnesses

9. Before setting out in more detail the background to the dispute, it is appropriate that I comment on the witnesses that I heard. I should add that, given the nature of this case, I did not feel materially disadvantaged in determining the issues that I have been required to resolve by not hearing and seeing the witnesses in person.

Witnesses of fact

10. The Claimant called two witnesses of fact, namely:

- 10.1. Richard Broun (“**Mr Broun**”), a Chartered Civil Engineer employed by RBA Ltd, and Engineering Consultancy. Mr Broun has provided engineering advice to Purple Places Ltd, a company associated with the Claimant, since November 2016, and prior to that provided engineering advice to the previous developer of the Site. It was Mr Broun who devised the strategy behind the Approved Scheme involving the pumping, storage and treatment of surface water and sewage effluent generated from the Site using an attenuation facility so as to treat the sewage effluent and ensure that the discharge into the Pipe was such as to achieve a rate of flow at Point A no greater than the existing “*greenfield*” run-off rate.

- 10.2. Kay Berry (“**Ms Berry**”), a director of, and 50% shareholder in the Claimant.

11. So far as Mr Broun’s evidence is concerned, I am mindful that much of what he says is opinion evidence, and therefore strictly inadmissible as given by him as a witness of fact. Whilst I do not consider that he set out to deliberately mislead the Court, I did get the impression that his evidence was influenced by a tendency to be defensive of the advice that he had given in respect of the Approved Scheme and the position that he, himself adopted with regard to the Claimant being a riparian owner. I have therefore treated it with some caution.
12. I found the evidence of Ms Berry to be perfectly honest and truthful with regard to the Claimant’s involvement in the development of the Site. Her evidence reflected her frustrations at the refusal of the Defendant to accept the entitlement of the Claimant to discharge via the Pipe onto the Feeder Land when, as she saw it, the scheme that had been proposed had attenuation facilities that adequately protected the Defendant and the Feeder.

13. The Defendant called seven witnesses, namely:

- 13.1. Susan Higton, a Works Engineer with the Defendant's Infrastructure Services Team;
 - 13.2. Karen Jackson, a Senior Environmental Scientist with the Defendant's Heritage and Environment Team for the North West Region;
 - 13.3. Leslie Young, who had formerly lived at the Royal Oak public house adjoining the Site, and who now lives at 2 Marsh Cottages;
 - 13.4. Glenys Terry, the owner of Ivy House between 1989 and 2010;
 - 13.5. David Mould, a Principal Hydrologist with the Defendant;
 - 13.6. Mark Heath, a Water Engineer with the Defendant; and
 - 13.7. Philippa Walker, the Defendant's Utilities Team Leader for the Western Midlands Region.
14. Again, I am mindful of the fact that much of the evidence from the Defendant's employees was inadmissible opinion evidence. I found all of the Defendant's witnesses to be honest witnesses, doing their best to assist the Court. There were a few disagreements in respect of certain points of detail between certain of the Defendant's employees and Mr Broun in relation to what occurred, and what was observable during the course of visits to the Site, and inspections carried out. However, I do not consider that anything ultimately turns upon these differences for the purposes of the issues that I am required to resolve, and I do not intend to dwell on them.

Expert Evidence

15. As to expert evidence, I heard from:
- 15.1. Called by the Claimant, Mr. Peter Martyn Jones, BSc (Hons), CEng, CWEM, FICE, MCIWEM ("**Mr Jones**"), a Chartered Civil Engineer, and the Chairman and a Director of Waterco Ltd, a consultancy that specialises in the investigation, assessment and design of water, wastewater and floodwater projects. Mr Jones graduated from Manchester University in 1974. His early years were spent working for a Civil Engineering Contractor and subsequently for a Local Authority Drainage department. Since the 1980s, Mr Jones has worked for a number of consultancies, specialising in water and wastewater projects involving hydrology, hydraulic modelling, waterways, pipelines, pumping stations and flood risk assessments.
 - 15.2. Called by the Defendant, Revd. Dr. Robert Peter Cameron Brown BA, BSc, MSc, DIC, DMS, PhD, FCIWEM, FRMetS, C.WEM, CEnv ("**Dr Brown**"), a director of RPC Brown (Consulting Hydrologist) Ltd, an independent hydrological consultancy. Dr Brown has a BSc in Geology and Chemistry, an MSc in Engineering Hydrology, and is a Fellow of the Royal Meteorological Society, a member of the Society for the Environment, a Chartered Environmentalist and a

Chartered Water and Environment Manager. According to his curriculum vitae, his specialist field is hydrology and water resources, particularly in relation to natural river flows and understanding catchment response to rainfall, both in the field and computer modelling, Dr Brown having in excess of 30 years' experience thereof.

16. Mr Jones produced a report dated 4 June 2020, and Dr Brown produced a report dated 22 June 2020.
17. Mr Jones and Dr Brown also signed off on a Joint Expert Report on 20 November 2020 (**“the Joint Report”**). However, whilst giving evidence in chief Mr Jones indicated that he wished to revise certain of the wording in the agreed sections of the Joint Report. In particular:
 - 17.1. In paragraph 6 of the *“Agreed Points”* section he wished the words *“underground drain”* to be replaced by the word *“culvert”* in the sentence reading: *“Until recently, an underground drain used to lead from (A) up to the school car park (B)”*;
 - 17.2. In paragraph 1 of the *“Agreed Interpretation”* section he wished the word *“predominantly”* to be removed from the sentence: *“The catchment, as originally identified by Richard Broun, is some 14 hectares in extent but general rainfall predominantly soaks away into the ground beneath.”*
 - 17.3. In paragraph 1 of the *“Agreed Interpretation”* section he wished the word *“sometimes”* to be removed from the sentence: *“However, heavy rainfall sometimes generates “run-off”, especially after a prolonged duration when the catchment is saturated.”*
 - 17.4. In paragraph 2 of the *“Agreed Interpretation”* section he wished the words *“(there being no flow most of the time)”*, to be removed from the sentence: *“Bearing in mind the infrequency with which overland is thought to occur (there being no flow most of the time), and based on our interpretation of the above facts, the following is offered as our most plausible description of the historic (18th Century) situation.”*
 - 17.5. In paragraph 5 of the *“Agreed Interpretation”* section he wished the words *“major”* and *“and is therefore considered a later addition”*, to be removed from the sentence: *“The stone channel forms a major construction to flow heading towards the 12” pipe and is therefore considered a later addition.”*
18. For reasons that I will develop when addressing the detail of the opinion evidence, I found Dr Brown to be a more satisfactory and persuasive expert witness in respect of matters concerning the key issue on which expert evidence was called, namely matters relevant to the status of the Pipe, and whether it has historically comprised a natural watercourse for the flow of surface water. In short, and as developed in more detail below, a key aspect of the expert evidence was the nature of the catchment above the Site (**“the Catchment”**).

Dr Brown's approach was, in my judgment, assisted by his geological expertise, and I found the exercise that he conducted by reference to that expertise and a thorough investigation on site of the Catchment to provide a sounder basis for analysing the nature of the Catchment than a modelling exercise carried out for Mr Jones. Further, I was impressed by the fact that Dr Brown began his investigation and analysis on the premise that existence of the 12" diameter pipe passing below the Feeder referred to below suggested a natural watercourse, and then tested that against the evidence obtained from a detailed investigation of the course of the Pipe and the Catchment, leading him to the conclusion that the evidence did not support the existence of a natural watercourse. On the other hand, I gained the impression that Mr Jones saw it as his task to demonstrate that the Pipe was a natural watercourse, and, indeed, at one stage in his evidence Mr Jones specifically suggested that he considered the purpose of his brief to be to "*prove Richard Brown's work*".

The Key Background Facts

The Feeder

19. The Caldon Canal (part of the Trent and Mersey Canal) was opened in 1779. The Rudyard Reservoir, a mile or so south of Rushton Spencer, was constructed in 1799 to replace water losses in the Caldon Canal due to lock use, leaks and evaporation. The Feeder, itself, was constructed in 1809 in order to provide a supply of water from the River Dane, lying to the north of Rushton Spencer, to Rudyard Reservoir. The Feeder was deepened in 1823, and its banks were raised in 1904-05. A detailed survey, referred to in the Appendix to the Joint Report, was undertaken by the North Staffordshire Railway Company, the then owner of the Feeder and Rudyard Reservoir, in 1903-04, prior to the raising of the banks of the Feeder. This made no mention of any watercourse, culvert or pipe where water from the Pipe now discharges into the Feeder.
20. Flows into the Feeder are known, in the past, to have been reversed, thus allowing water to discharge upstream to the River Dane in order to reduce the level in Rudyard Reservoir. However, at some time prior to 2011, a landslip occurred which breached the Feeder, and prevented it from being used for its intended purpose of supplying water from the River Dane to Rudyard Reservoir, and the Feeder was intentionally blocked off to prevent water from reaching the breached section. It is accepted by Mr Jones that control of water levels in the Feeder is now difficult during times of heavy rainfall. A concrete weir wall, installed by the Environment Agency, prevents inflow into the Feeder from the River Dane, and the sluice gates near Rudyard Reservoir are shut preventing water draining out of the Feeder. Due to a lack of resources, the Defendant has no plans to carry out repair works to the breached section, at least in the foreseeable future.

The Course of the Pipe

21. It is common ground that, prior to a diversion of the Pipe during the course of the construction works on the Site, dye tests carried out in 2018 and 2019 had established a hydraulic connection between a manhole in the garden of Jasmine Cottage ("**the Jasmine**

Manhole”) show at point C on the Plan (“**Point C**”), through to the manhole in the school playground (“**the School Manhole**”) shown at point B on the Plan (“**Point B**”), and then through to Point A, where the Pipe discharges into the Feeder. As referred to in paragraph 17 above, the Experts were agreed in the Joint Report that an “*underground drain*” used to lead from point A to Point B, although Mr Jones now wishes to refer to this as a “*culvert*”.

22. The original course of the Pipe leading from Point A to point B, and then on to point C, is shown coloured blue on Plan A. As part of the construction works on the Site, the Pipe has, where it crosses the Site, been replaced with a new pipe, and has been diverted in the approximate course shown green coloured Plan A so as to join back into the original course of the Pipe at point D shown on the Plan (“**Point D**”). As to where the Pipe had been diverted to, it was at one point suggested on behalf of the Defendant that the diversion was to Point A rather than to Point D, Dr Brown having observed that there was no manhole, as one might have expected, at Point D. However, the new pipe emerging at Point A can be seen from the photograph at paragraph 4.3.1.21 of Dr Brown’s Report, and it is reasonably clear therefrom that the new pipe does, where it leads down to Point A, follow the course shown on Plan A. This accords with my own impression from my visit to the Site.
23. Whilst it is the Claimant’s case that the Pipe represented a culverted natural watercourse, various Ordnance Survey maps that have been produced dating back to 1876 do not show any watercourse between Points A and C or, indeed, in the Catchment above the same. Paragraph 15 of the “*Agreed Points*” in the Joint Report records an agreement that no historical mapping, from 1845 to the present day, marks the presence of a watercourse. However, during the course of his cross-examination, Mr Jones did seek to suggest that certain boundary lines shown on Ordnance Survey maps did, in fact, represent a watercourse, in particular along the edge of the garden to Ivy House leading to Point A, and on the Catchment. Given that the agreed position of the Pipe is set away from the boundary of Ivy House/the Site, he suggested that the boundary had moved over the years. However, despite these suggestions, as commented on further below, I am not persuaded that any relevant watercourse is shown on the Ordnance Survey maps that have been produced. Further, as I have already identified, there is nothing to indicate the course of a watercourse at Point A on the survey carried out in 1903-04 prior to the raising of the banks of the Feeder.
24. It was common ground between the Experts that there was an old (but post 1850) very substantial 12” diameter pipe at Point A (“**the 12” Pipe**”) that headed downwards, at a steep angle, to pass under the Feeder, which had been buried until recently. It was also common ground between the Experts that excavation had revealed a restrictive 5” wide, 2ft long, dressed stone channel in front of the pipe that formed a constriction to flow heading towards the 12” Pipe. Evidence suggested that the 12” Pipe had been blocked for some time.

25. The Claimant relies upon a photograph (page 585 of the Trial Bundle) dating back to 2006 showing the bank of Feeder at Point A taken from the opposite side of the Feeder. It was suggested on behalf of the Claimant that this showed water flowing into the Feeder from the Pipe at that point. There is certainly some evidence of darkness in the bank of the Feeder at that point suggesting some discharge, but it is impossible to detect, from the photograph at least, any flow of water. It was Mr Young's very firm evidence, which I accept, that he had never seen any water coming into the Feeder at that point until the Claimant began to develop the Site. This would be consistent with a photograph that Dr Brown referred to during the course of cross-examination (page 277 of the Trial Bundle) showing Point A from the Site side of the Feeder in 2018, i.e. prior to the relevant development works on the Site, showing a discharge at that point but not the flow of water that can now be observed with a distinct channel. In the course of his evidence, Dr Brown suggested, in my judgment correctly, that the absence from the photograph dating from 2006 of silting in the Feeder at Point A was a further point against the existence of a flow of water at that point at that time.
26. So far as the course of the Pipe from Point C to Point A is concerned, this does, as I have already touched upon, begin with the Jasmine Manhole in the garden of Jasmine Cottage. This, together with a dyke behind the same shown on the Plan, is a recent construction by the owner of Jasmine Cottage, constructed to mitigate against flooding caused when heavy rainfall on saturated land caused water to flow down the channel in the field behind Jasmine Cottage and into the garden of Jasmine Cottage, and on occasion Jasmine Cottage itself.
27. There are a number of pipes coming into the Jasmine Manhole, which is some 6 feet deep. One pipe comes in at a higher level and leads through the hedge to an area of flooding in the field behind, adjacent to a spring. At the bottom of the Jasmine Manhole, one 120mm diameter pipe comes in from the dyke, one pipe comes in from the septic tank in the garden of Jasmine Cottage, and there are two further green 150mm pipes coming into the same. Mr Brown has suggested that these two latter pipes bring surface flow from the Catchment so as to lead to a continuity of flow down to Point A. On the other hand, Dr Brown considers these pipes to be field drains draining the land behind, rather than bringing surface flow, given the slotted, corrugated nature of the pipes in question and the absence of evidence of surface flow on the Catchment. There is one yellow 120mm outflow pipe out of the Jasmine Manhole which forms the start of the Pipe.
28. The Pipe then runs behind the garage to Daisy Cottage, and through the garden of Alley House before passing under Sugar Street and under the School car park. There is a manhole, and also an open channel section within the garden of Alley House, adjacent to the garage to Daisy Cottage.
29. Having had the School Manhole lifted for me, I was struck on my Site view by the steady flow of water through the Pipe. I raised with Dr Brown during the course of his evidence as to where this flow of water was likely to have come from. His response was to the effect that during the course of one of his visits to the location there was a significant flow

through the Pipe under the School Manhole, but only a trickle through the channel section in the garden of Alley House suggesting to him that there was another source of supply to the School Manhole from a different direction. I accept his evidence in this respect.

30. In addition, I was struck on my visit by the significant flow of water at Point A, out of the new pipe and into the Feeder. During the course of his cross-examination, I raised with Dr Brown the question as to how, if there was a steady flow of water passing through the Pipe as it entered the Site adjacent to the School car park and the School Manhole, it might have been that there was not, historically and until the carrying out of works by the Claimant, an obvious outflow at Point A of the kind that I observed. The gist of his response was to the effect that there is no conclusive answer to this, but that the likelihood is that rodding and clearing out of the pipework, and the more recent construction of the new pipe has significantly improved the flow, and that prior thereto water may well have leaked into the land due to the condition or arrangement of the Pipe.
31. Such an explanation would be consistent with the fact that Hydrock Consultants Ltd (“**Hydrock**”) produced a drainage strategy report dated 11 April 2012 for the Claimant’s predecessor in title JFL Developments, which concluded that there were no watercourses in the vicinity of the Site, and described existing drainage in the vicinity of the Site without any mention of the Pipe.
32. However, in paragraph 5.2 of a subsequent addendum report dated 17 January 2013, Hydrock referred to the fact that partial flooding on the tarmac play area of the adjacent School in late 2012 had led to investigations being carried out by the local authority that determined that there was “*a 150/225mm diameter culverted watercourse passing into the site*”. This addendum report further reported that further jetting and dye testing had “*proved that this culvert runs through this site in a south-westerly direction where it is believed to run under the feeder channel and outflow in the open fields to the south of Macclesfield Road.*” The addendum report did not propose that the Pipe be used to discharge surface water and/or effluent from the Site, and if there had been any significant outflow at Point A, then one would have expected reference to have been made thereto rather than to the culvert running under the Feeder.

The Site

33. It is necessary to identify a number of relevant features concerning the Site as it existed prior to the carrying out of the development works that have been carried out to date.
34. Firstly, so far as surface flow is concerned, Mr Jones accepted that, so far as the south-westerly side of the Site is concerned, surface water would have largely percolated or soaked through the ground heading in a different direction than Point A, such that it would not normally have reached the Feeder (adjacent to that part of the site) unless there had been a “*heavy rain event*”. So far as the part of the Site nearer to Point A is concerned, Mr Jones accepted that the area draining towards Point A was probably significantly less than indicated on Plan 4 referred to in his Report, and that so far as surface water flowing towards Point A was concerned, he agreed that the water would not have got into the Pipe

so as to discharge at Point A, save “*perhaps*” for a small amount percolating through the ground and getting into any broken sections of the Pipe.

35. So far as the discharge of effluent is concerned, the two Marsh Cottages shown on the Plan, situated on the other side of the Feeder, have historically discharged effluent under the Feeder into filter beds situated on the Site where filtered effluent has then percolated through the ground back towards the Feeder. This has been done through formal agreements with the Defendant, or its predecessor, British Waterways Board, and thus cannot form the basis of any prescriptive claim. Issues were identified in the evidence as to the extent to which these filter beds have been maintained and repaired over the years, and thus as to the quality of the effluent discharged, but I do not consider that any significant issue turns thereupon.
36. Ivy House also had a septic tank, part at least of which remains in situ. Ms Terry’s evidence was to the effect that the septic tank, when operational, was of a kind that required to be, and was in fact emptied on a regular basis. She referred to having been told that the liquid residue was filtered out into the adjacent field so as to discharge under the clay lining of the Feeder and into the land on the other side thereof. It was also Ms Terry’s evidence, which I accept, that she had absolutely no knowledge as to the existence of the Pipe during her long ownership of Ivy House, notwithstanding having planted a number of trees in the bottom tip of the Site adjacent to Point A, and having installed an oil pipeline from behind the garage at Ivy House to the back of Ivy House itself. Again, I would observe that if there had been any obvious outflow at Point A prior to Ms Terry moving out of Ivy House in 2010, then Ms Terry is likely to have noticed it.
37. In paragraph 10 of his witness statement dated 1 November 2019, Mr Broun referred to septic tanks, including that of Ivy House, as discharging through filter beds into the Feeder. In paragraph seventeen of his Report, Mr Jones observed that Ivy House had a septic tank ... “*which drains into the ground immediately alongside the piped watercourse.*”
38. However, despite not specifically mentioning this in the body of his witness statement, Mr Broun produced as enclosure “RB 7” to his witness statement a plan prepared by RBA Engineering Consultancy dated 14 October 2019 that purports to show a pipe leading from the septic tank directly to the Pipe. This plan is referred to in paragraph 25 of his witness statement where he makes reference to, amongst other things, discharge from the septic tank serving Ivy House, without making specific reference to how that discharge was effected, and in particular without making mention of any direct connection to the Pipe. In the course of re-examination, Mr Broun explained that he had been informed about this pipe leading from the septic tank by a contractor, and that he asked the contractor to check, in response to which, so he says, the contractor confirmed the existence of the pipe. No details were, however, provided as to the name of the contractor, or the circumstances or context in which any conversations with the contractor took place.

39. Of course, the ability to check this matter one way or the other has now been taken away by the works that have been carried out on the Site, and the reconstruction of the Pipe along an altered course. The burden of proof is, ultimately, on the Claimant to prove the connection into the Pipe to the extent that it seeks to rely upon the same in support of its claim. In the light of the evidence taken as a whole, and in particular the failure of Mr Broun to expressly deal with this point in his witness statement, the vagueness of Mr Broun's evidence when re-examined on the point, and the other evidence pointing to a septic tank the effluent from which drained into the ground, I am simply unable to conclude, on the balance of probabilities, that the septic tank at Ivy House did ever connect into the Pipe. Further support for a pipe from the septic tank not having connected into the Pipe is, as I see it, provided by the evidence that suggests that the flow through the Pipe was at best extremely limited until the Claimant began to carry out its development works.

The Catchment

40. The parties' respective positions in respect of the Catchment behind Jasmine Cottage can be summarised as follows.
41. Mr Jones's expert evidence was to the effect that the existence of the 12" diameter pipe passing under the Feeder was consistent with a culverted watercourse following the course of the Pipe bringing significant flows of surface water off the Catchment, a proposition Dr Brown did not dissent from, and indeed lead to him initially considering that he was dealing with a natural watercourse.
42. Mr Jones considered that a catchment plan prepared by Mr Broun provided a reasonable representation of the natural catchment area for the discharge at Point A during a significant rainfall event. This catchment plan identified a catchment area of some 14 hectares behind Jasmine Cottage. Mr Jones reached this conclusion based upon a review of GIS mapping, hydrology and hydraulic modelling undertaken under his supervision, the results of which are included at Appendix B to his Report. This modelling exercise essentially involved a consideration of the interplay between topography, rainfall and permeability of the relevant land, using what Mr Jones described as the "*industry standard*". From these exercises Mr Jones concluded that: ... "*the subject watercourse is the natural route by which water flowed from a substantial catchment, similar in extent to that shown in blue on the Broun Catchment Plan in around 1800; and that it was subsequently culverted with pipes of the size reasonably appropriate to the flows occurring in the natural watercourse.*"
43. It is relevant to note that the above modelling exercise conducted on Mr Jones's behalf required a certain factor to be included in respect of permeability by reference to a square kilometre area. For this purpose, the relevant square kilometre was taken to be that that included the course of a stream known as Bella Brook lying to the North of the area in question. When cross-examined, Mr Jones maintained that this was a perfectly reasonable approach to adopt, and that, in any event, the existence of significant amounts of relatively

impermeable stony red marl in the ground pointed against most groundwater percolating through the ground.

44. Mr Jones did not, himself, walk the Catchment but rather relied upon looking at the same from Sugar Street, and also from the garden of Jasmine Cottage. Particular reliance is placed by Mr Jones upon a photograph (page 50 of the Trial Bundle) taken looking up the hill from behind the garden of Jasmine Cottage and showing a distinct contoured valley through which he maintains that surface flow occurs, leading to the Jasmine Manhole and the Pipe leading therefrom. This valley, and the flow of water through the same, is said to be evident on the plans produced through the modelling exercise referred to above.
45. As indicated above, Dr Brown started with the premise that the 12” pipe under the Feeder did lend support to there being a culverted watercourse taking water flow of the Catchment, but his evidence was to the effect that when he then set out to ascertain whether the other evidence supported the existence of such a culverted watercourse, the evidence pointed firmly to the opposite conclusion.
46. Dr Brown regards it as a major flaw in the modelling exercise relied upon by Mr Jones that the permeability factor was taken from an area including Bella Brook, the very existence of a brook pointing to a lack of permeability, and thus surface run-off through a brook. He points to his own expertise as a geologist, in contrast to Mr Jones’s lack of expertise in this discipline. His evidence was that he has walked the Catchment and examined it in considerable detail, and has been unable to find evidence of surface flows other than sometimes at times of very heavy rainfall when, after rainfall for a prolonged duration, the Catchment becomes saturated.
47. As a geologist, Dr Brown disputed that the existence of stony marl would necessarily lead to the ground being impermeable, and pointed out that the existence of surface springs pointed to general permeability, with springs occurring where water was forced to the surface by clay lenses so as to form groundwater that would then disappear back into the ground once beyond the clay lens.
48. So far as the lie of the land around Jasmine Cottage is concerned, Dr Brown referred in evidence to the spring in the field adjacent to the garden of Jasmine Cottage that had led to ponding, and from which a pipe led to the upper part of the Jasmine Manhole. Dr Brown’s view was that this did not indicate or represent surface flow in that, unimpeded by the dyke and other development below the spring, the water from the spring is likely to have sunk back down into the ground once beyond the clay lens that had given rise to the spring. So far as water collecting behind the dyke was concerned, from which a pipe led into the Jasmine Manhole as referred to above, Dr Brown again was of the opinion that this did not represent surface flow, but water caused to be accumulated by the dyke. So far as the two green pipes leading into the bottom of the Jasmine Manhole were concerned, as already referred to, Dr Brown’s opinion was that these were field drains bringing into the Jasmine Manhole not surface run-off, but water taken out of the ground by field drains.

49. This all led Dr Brown to the conclusion that, looking at the actual facts on the ground, as opposed to a theoretical modelling exercise, it could be seen that the water entry into the top of the Pipe at point C was not surface run-off from the Catchment, and that historically there would only have been surface run-off from the Catchment at times of very heavy rainfall, after prolonged rainfall that had saturated the Catchment and that, ordinarily, water from the Catchment would percolate through the ground rather than running off as surface run-off forming a natural watercourse, that might later have been culverted.

The Development of the Site

50. Ivy House comprised a garden and immediate curtilage including a garage, with what Ms Terry at one point described as a field beyond the same. Ms Terry sold, and moved out of Ivy House in 2010, and it would appear from the Hydrock's reports referred to above that, by 2012, if not earlier, JFL Developments was looking to develop the Site.
51. Surface water and foul drainage was clearly always an issue in relation to the development of the Site, there being no suitable foul sewer in the vicinity to accept sewage from the Site. The conclusion of Hydrock's addendum report dated 17 January 2013, as set out in paragraph 4.3 thereof, was that a foul and surface water drainage solution was achievable on the Site for the development of nine new dwellings without reliance on an outfall to the Feeder. The proposal considered by Hydrock appeared to involve all surface water and foul drainage being directed to the low-lying North West corner where it would then pass through a suitably designed and sized prefabricated treatment plant from which the treated flow would then be pumped up to the south-eastern part of the Site with an underlying sand strata to enable infiltration to ground.
52. Planning permission was granted on 15 April 2013, and subsequent reserved matters approvals confirmed that the Site had permission for the construction of nine dwellings and the refurbishment of Ivy House, subject to the satisfaction of certain conditions.
53. It is apparent that the surface water and foul drainage scheme proposed by Hydrock did not provide a satisfactory or achievable solution, hence Mr Broun being engaged by the then developer in November 2016 to find a solution and propose a drainage strategy for the development. In the event, as already explained, given the financial difficulties of the then existing developer, the development was subsequently taken over by the Claimant.
54. It was Mr Broun's evidence that he first visited the Site in November 2016, and that his proposed drainage strategy involved the discharge of both surface water and treated foul water effluent into the Pipe. This strategy, as I have already mentioned, involved the use of the Pipe in conjunction with an attenuation facility involving a pumping station, a treatment plant and water storage so that treated effluent, mixed with surface water, could be stored and released into the Pipe at a rate no greater than what Mr Broun determined to be the existing "greenfield" run-off rate.
55. Mr Broun's proposal for the disposal of foul water required an appropriate permit from the Environment Agency under the Environmental Permitting (England and Wales)

Regulations 2016 (“**EPR 2016**”) for the discharge of foul water effluent. Consequently, on 25 February 2017, Mr Broun submitted an application for such a permit.

56. In September 2017, and notwithstanding the Defendant’s objections to the granting of the permit, the Environment Agency granted the EA Permit to the Claimant. It is to be noted from condition 2.1.1 and schedule 1, table S1.1 to the EA Permit that it permitted the discharge of secondary treated sewage effluent via sand filter via “*Outlet 1*”. Outlet 1 was rather higher up the Pipe, at the approximate position shown as point E on Plan A (“**Point E**”). Mr Broun was challenged under cross examination for having represented on a number of occasions that the EA Permit related not simply to the discharge of treated sewage effluent, but also the discharge of surface run-off from the Site. Whilst it is true that the EA Permit only related simply to the discharge of treated sewage effluent, in that it only granted permission in respect of the latter, it is relevant to note that the scheme as so permitted involved the mixing of the treated sewage effluent with clean surface water from the Site in that the EA Permit specifically refers to the fact that: “*After passing through a sample chamber the tertiary treated effluent will be discharged into the sump of a pumping station which will also take the clean surface water from the site. The mixed effluent and surface waters will be pumped into the culvert controlled by a float switch.*” In the circumstances, one can perhaps understand why Mr Broun described matters as he did without intending to mislead.

57. The EA Permit was expressed as controlling: “... *a proposed discharge of a 9.45m³ per day of treated effluent from a package sewage treatment plant and sand filter serving three existing houses [i.e. including the Marsh Cottages] and nine new ones to be constructed. The discharge will be made into a culverted watercourse that crosses under the development site which in turn outfall is into the adjacent River Dane Feeder Canal which is owned and managed by [the Defendant]*”.

58. The EA Permit discussed the status of the culvert, stating that:

“During the determination we considered whether the culvert passing through the development site is a “surface water sewer” or a natural watercourse that has been “culverted” at some time in the past. Determining this was necessary for defining the exact location of the discharge point (Outlet 1) on the permit. Legally the discharge point is where the effluent enters into “inland freshwaters” as defined in [EPR 2016]. Examining the available evidence we concluded that the culvert is part of the “inland freshwaters” network. So the discharge point is where the treated effluent outfall enters into this.

This matter is significant for the applicant with regard to whether they need additional permissions from [the Defendant] (or other parties) for the discharge. However, in our view, this is a completely separate matter to the permitting of discharge because the grant of a permit will not impinge on the rights of any other party to exercise their own legal rights. The permit is to enforce environmental protection measures only.”

59. Commenting on the suitability of the Feeder for receiving effluents, the EA Permit said this:

“With regard to the relative sizes of the discharge and water body we don’t know the precise dimensions of the isolated section of the [Feeder] but we know from various sources that it is approximately 2 km long, several metres wide and (at the point of discharge) at least 1 m in depth. The receiving water body channel is therefore extremely large in relation to the 9.45m³ daily volume of the discharge. With regard to the quality of the canal water (in the absence of data) we have made the assumption that a watercourse that is intermittently either a “dry ditch” or a “stagnant pond” cannot be of high quality and cannot sustain a diverse aquatic ecosystem requiring a high level of protection. However, the discharge in this case will be treated to a higher quality than a standard package treatment plant can achieve.

The fact that the volume of the canal section is very large in relation to the daily discharge volume means that in periods when there is any level of water within it there will be a large capacity for dilution even though it will probably only disperse slowly. But we do not regard the potentially slow dispersion of the effluent to be a significant environmental risk.”

60. EPR 2016 specify that “inland freshwaters” has the meaning given in s. 104 of the Water Resources Act 1991. This latter section defines “controlled waters” as comprising waters of various classes including:

“inland freshwaters, that is to say, the waters of any relevant lake or pond or so much of any relevant river or watercourse as is above the fresh-water limit”.

61. These terms are in turn defined as follows:

““ fresh-water limit”, in relation to any river or watercourse, means the place for the time being shown as the fresh-water limit of that river or watercourse in the latest map deposited for that river or watercourse under section 192 below; [...]

““ Relevant river or watercourse” means (subject to subsection (4) below) any river or watercourse (including an underground river or watercourse and an artificial river or watercourse) which is neither a public sewer nor a sewer or drain which drains into a public sewer.” [Emphasis added].

62. The Claimant submits that the Environment Agency is the appropriate agency for the determination of the issue concerning the status of the Pipe and the environmental impact of the scheme devised by Mr Broun, and the Claimant seeks to criticise the Defendant for seeking to go behind the conclusions of the Environment Agency.
63. The Defendant, on the other hand, submits that the question as to whether the Pipe constitutes a natural watercourse is a matter to be determined by the Court on the evidence before it, and that any determination in respect of the matter by the Environment Agency can only have been upon the basis of the evidence before it. Thus the Environment Agency

did not have before it the detailed Expert Evidence that is before this Court. Further, and in any event, the Defendant submits that in granting the EA Permit the Environment Agency required to define the exact location of the discharge point for the purposes of the permit, which was where the effluent entered into “*inland freshwaters*” as defined in the EPR 2016. All that the Environment Agency was required to determine was whether the “*culvert passing through the development site*” was part of “*the inland freshwaters’ network*”, so as to define the point of discharge as “*Outlet 1*”. It is argued that it is apparent from the definition set out in paragraph 61 above that the conclusion by the Environment Agency is entirely neutral on the question of whether the culverted structure was a natural, or an artificial, watercourse.

64. I will return later to consider the effect of the Environment Agency’s determinations in respect of the Pipe in considering below whether we are presently concerned with a natural watercourse.
65. Following the obtaining of the EA Permit, on 22 March 2018 the local planning authority approved the Claimant’s scheme for the disposal of foul and surface water drainage , i.e. the Approved Scheme, which involved the use of the attenuation and treatment system that have been considered by the Environment Agency in granting the EA Permit, including the mechanisms to ensure that the discharge of surface water run-off from the Site, as mixed with the treated effluent, into the Pipe would be attenuated with a view to ensuring that the rate of flow did not exceed the estimated previous “*greenfield*” run-off rate.
66. In addition to opposing the application for the EA Permit, the Defendant also, unsuccessfully, opposed the application for planning consent. The Defendant’s position was maintained during the course of the evidence from the Defendant’s witnesses, who were somewhat critical of the approach taken by the Environment Agency, concerns being expressed by, for example, Karen Jackson, that the Environment Agency had conducted a mere desktop exercise without a full and proper inspection on the ground. Karen Jackson expressed a particular concern that even if the Approved Scheme, properly functioning, might not be a cause for environmental concern so far as the Feeder was concerned, the Environment Agency had no effective mechanism for policing the operation going forward, and that, in the circumstances there could be no sufficient assurance to the Defendant that the quality of the treated effluent from the Site, and the limited flowrate therefrom would be maintained going forward.
67. Notwithstanding the Defendant’s concerns and objections, and in particular the Defendant’s expressed position that the Pipe was not a natural watercourse that entitled the Claimant to enjoy the rights of the riparian owner, the Claimant has pressed on with the development of the Site, including the installation of a new pipe following the course that I have already described. A number of the houses have already been built on the Site, notwithstanding that the issues in respect of surface water and foul drainage have yet to be resolved.

68. It is against this background, that the Claimant commenced the present proceedings in November 2019.

Issues to be determined

69. On any view the Approved Scheme involves the artificial accumulation of surface run-off and treated effluent on the Site and the discharge of the same onto the Defendant's land. It is therefore trite that absent some specific right to discharge into the Feeder, the Claimant has no entitlement to do so.

70. In *Home Brewery Co. Ltd. v William Davis & Co. (Leicester) Ltd.* [1987] Q.B. 339, p 346, Piers Ashworth QC, sitting as a Deputy High Court Judge, explained the position as follows:

“There can be no doubt that an occupier of land has no right to discharge on to his neighbour's land water that he has artificially brought on to his land (see Baird v. Williamson (1863) 15 C.B. (N.S.) 317), or water that has come naturally on to his land but which he has artificially, even if unintentionally, accumulated there (see Whalley v. Lancashire and Yorkshire Railway Co. (1884) 13 Q.B.D. 131), or by artificial erections on his land to cause water to flow onto his neighbour's land in a manner in which it would not, but for such erections have done: see Hurdman v. North Eastern Railway Co. (1878) 3 C.P.D. 168.”

71. This passage is adopted as being the law in *Gale on Easements*, 21st ed., at para 6-24, and the relevant passage in *Gale* was, itself, cited with approval by Lewison LJ (with whom Floyd and Richards LJJ agreed) in *Vauxhall Motors Ltd (formerly General Motors UK Ltd) v Manchester Ship Canal Co Ltd* [2019] Ch 331 at [83], following which Lewison LJ said at [84]:

“In the case of water artificially accumulated on land a right to discharge it onto adjoining land is an easement which is acquired, if at all, by grant or prescription.”

72. The following principal issues therefore require to be determined:

72.1. Whether the Pipe followed the course of a natural watercourse so as to confer upon the Claimant the rights of a riparian owner – in this respect, it is common ground that if the Claimant is a riparian owner, then it would have been entitled to divert the Pipe in the way that it has as, and that this does not affect its rights;

72.2. Whether, if the Pipe is a natural watercourse, and the Claimant enjoys the rights of a riparian owner, it is entitled to discharge surface water and treated sewage effluent from the whole of the Site into the Pipe at Point D so that it can then be piped down and discharged from the new pipe onto the Feeder Land at Point A;

72.3. Whether or not the Pipe is a natural watercourse, whether the Claimant has acquired by prescription the right to discharge surface water and/or sewage effluent into (or under) the Feeder at Point A and, if so, whether any easement so acquired by prescription extends to permit the discharge of surface water and

treated sewage effluent onto the Feeder Land at Point A as provided for by the Approved Scheme;

- 72.4. Whether, if the Claimant is found to have acquired a right not to discharge into the Feeder Land at Point A so as to discharge into the Feeder, but rather a right to discharge under the Feeder through the 12” Pipe, because upwards of 20 years’ user could only be demonstrated for the latter, the Claimant is entitled to require the Defendant to maintain and repair the 12” Pipe so as to permit discharge through the same.
73. As to this latter question, should it arise contrary to the Defendant’s submissions, it is the Defendant’s position that this relates to an issue that was not canvassed in the Statements of Case, and is only been raised in the Claimant’s Skeleton Argument, and that it would not be appropriate for me to deal with it, at this stage at least.

Is the Pipe a Natural Watercourse?

74. The first basis upon which the Claimant claims to be entitled to discharge piped surface water and treated effluent into the Feeder is on the basis that the Pipe is a culverted natural watercourse, and that the Claimant, as a riparian owner, has such a right. It is necessary first therefore to consider whether, in fact, the Pipe is a culverted natural watercourse or something else.
75. Gale (supra) at para 6-02 adopts the description of a watercourse as contained in Angell on Watercourses, 3rd ed. (1840), namely:

“a watercourse consists of bed, banks and water, yet the water need not flow continually, and there are many watercourses which are sometimes dry. There is, however, a distinction to be taken in law between a regular flowing stream of water, which at certain seasons is dried up, and those occasional bursts of water which, in times of freshet or melting of ice and snow, descend from the hills and inundate the country. To maintain the right to a watercourse or brook, it must be made to appear that the water usually flows in a certain direction and by a regular channel, with banks or sides. It need not be shown to flow continually, as stated above, and it may at times be dry; but it must have a well-defined and substantial existence.”

76. Gale (supra) goes on at para 6-02, and referring to *Broadbent v Ramsbottom* (1856) 11 Exch 602 at p 615, to point out, amongst other things, that the moment the water of a spring runs into a definite channel, it constitutes a watercourse.
77. I was also referred to the definition of a “watercourse” as set out in Bates, Water and Drainage Law, at para 1.60-1.61:

“1.60 *A “watercourse” has been judicially defined in a number of cases, the most comprehensive definition being given in the Australian decision of Lyons v Winter where it was held that, “To constitute a watercourse such as creates riparian rights there must be a stream of water flowing in a defined channel or*

between something in the nature of banks. The stream may be very small and need not always run, nor need the bank speak clearly or sharply defined; but there must be a course, marked on the earth by visible signs, along which water flows.” It is particularly important that there is a “flow” of water. If it merely oozes or seeps through the ground, even in a specific direction, there will not be a watercourse in which rights could be claimed.”

“1.61 *A watercourse can start at a spring (“a natural source of water of a definite and well marked extent”) or it can be formed from the action of surface water comprising rain, melting snow etc. However, the source has to be reliable, even if it is temporarily dry for part of the year. If there is a dry channel in the earth that is filled with water during temporary flooding this will not be a watercourse in which rights can exist. In such cases the question as to whether the channel is a watercourse that is temporarily dry or is not a watercourse at all is a matter of fact for the judge.”*

78. In support of the proposition that the watercourse need not always run, and might be temporarily dry for part of the year, Bates (supra) refers to *Stollmeyer v Trinidad Lake Petroleum Co Ltd* [1918] AC 485, where at p 491, Lord Sumner observed that a river which naturally runs during a good part of the year does not cease to be a river merely because at times it is accustomed to become dry.
79. In support of the proposition that if there is a dry channel in the earth that is filled with water only during temporary flooding this will not be a watercourse in which rights can exist, Bates (supra) refers to *Pearce v Croydon RDC* [1910] AC 909. In this case, Walton J was concerned with a Bourne flow over permeable chalk, which he held was not a watercourse. At p 916 Walton J observed that: “... *It is important to keep in mind this fact, that when there is a Bourne flow it is a flood. It is floodwater with which, in consequence of the heavy rains in the higher ground, the chalk is completely saturated, and it flows out very much like stormwater amongst the hills in other places; it flows out, and flows according to the law of gravitation whenever that takes place ... It is only when the flow is so great that the surface is completely saturated that it flows for any great distance.*”
80. In the present case, it is not in dispute that if there was, historically, a natural watercourse running along the course or approximate course of the Pipe, then the fact that that this natural watercourse might, at some point, have been culverted will not prevent it now being treated as a watercourse.
81. I take from the authorities that I have referred to above the following broad propositions:
 - 81.1. The fact that there may be some periods of non-flow is not incompatible with there being a natural watercourse;
 - 81.2. On the other hand, a dry channel which is only filled during temporary flooding is not a watercourse giving rise to riparian rights;

- 81.3. The question as to whether any temporary flows as may have occurred along a particular course is a watercourse is a question of fact for the judge to decide.
82. Although the ultimate issue as to whether there is a watercourse is a question of fact for the judge, the expert evidence adduced in the circumstances of the present case is highly relevant, and admissible, for the purposes of identifying and explaining the facts that do go to this ultimate issue.
83. As touched upon in paragraph 18 above, I found Dr Brown to be a more satisfactory and persuasive expert witness regarding the status of the Pipe, and whether it comprised a natural watercourse. Having now dealt with the factual background in more detail, I can set out more fully my reasons for coming to this conclusion:
- 83.1. As referred to above, I gained the impression that Mr Jones's overall approach was to seek to support the view expressed by Mr Broun that one is concerned with a natural watercourse, rather than approaching the matter with an entirely open mind. On the other hand, as I have said, Dr Brown impressed me by the fact that his starting point was that the 12" Pipe tended to suggest that one was concerned with a watercourse, and that he identified his task as being too seek to then ascertain whether the evidence supported that conclusion.
- 83.2. As I have explained above, Mr Jones and Dr Brown adopted a very different approach to the task in hand. Mr Jones principally relied upon modelling exercises relating to the topography, rainfall and assumed permeability, whereas Dr Brown relied upon his own expertise in geology, and a close examination and investigation of the facts on the ground. In my judgment, the exercise conducted by Dr Brown provided a more reliable evidence base as to what was, in fact, occurring on the ground, and what might have occurred historically prior to any culverting of any watercourse or other human intervention. Whilst data inputted on behalf of Mr Jones might have provided an accurate analysis in respect of topography and rainfall, it was, in my judgment, plainly deficient in respect of the important issue of permeability in the Catchment, applying an input that related to terrain around the adjacent Bella Brooke which provided, in my view, too much scope for significant error. On the other hand, Dr Brown was able to observe, with his close inspection on the ground, the lie of the land, and in particular that the valley above Jasmine Cottage shown in the photograph on page 50 of the Trial Bundle was dry, and only prone to any form of surface flow when the ground was saturated, and after very heavy rainfall. Further, Dr Brown was able, applying his greater expertise in geology, to explain that the presence of stony marl would not necessarily lead to a lack of permeability, and that the existence of occasional springs indicated a pattern under which water generally percolated through the ground, occasionally springing to the surface in areas with clay lenses, only to then seep back into the ground..

- 83.3. A further criticism legitimately made of the modelling exercise that Mr Jones had carried out was that whilst he might have checked the results of the exercise, the modelling was done by others who are not specifically named.
- 83.4. I regard it unfortunate that Mr Jones considered it necessary to revise agreed parts of the Joint Report in the manner described in paragraph 17 above. Mr Jones did sign off on the Joint Report sometime prior to trial, no doubt after having discussed matters at considerable length with Dr Brown. Mr Jones suggested that the reason why he saw fit to change matters that he had agreed with Dr Brown in the way that he did was down to the evidence that he had heard during the course of the trial. However, Mr Jones was unable cogently to explain what evidence had specifically led him to change his mind, and I found his explanation far from satisfactory.
- 83.5. There was one particular part of Mr Jones's evidence that I found particularly unsatisfactory. At one point he was questioned as to why a part of the Site, on the other side from Ivy House, might have been marshy. The explanation that he gave was that there must have been a broken bit of the Pipe near the oil tank behind the garage at Ivy House, which had caused water to gush downhill behind the garage. I found this to be a frankly incredible explanation which did not tie in with the other facts on the ground, and appeared to me to be at best ill-considered speculation.
84. On behalf of the Defendant, Mr Healey invites me to reject Mr Jones's evidence in its entirety. I do not consider it necessary to go that far, and I do not consider that Mr Jones was actively seeking to mislead the Court in any way. However, given the matters that I have referred to, I consider that I must treat his evidence with some caution. On the other hand, I was, as I have already said, impressed by the evidence of Dr Brown. Although he was criticised by Mr Jacobs for giving overlong answers, I generally found his answers to be soundly thought through and highly credible. Where there are differences between the two experts, I generally prefer the evidence of Dr Brown.
85. On the basis of the evidence that I have heard, my conclusion is that it is more likely that there was, historically, no natural watercourse following the course of the Pipe, and that rather than being a culverted watercourse, the Pipe was originally laid to take soil waste from houses further up Sugar Street and/or field drainage from the Catchment above Jasmine Cottage.
86. As I have said, the Claimant places great reliance upon what it describes as the determination of the Environment Agency in the EA Report that the Pipe is a natural watercourse, Mr Jacobs going so far in his Skeleton Argument to suggest that the Environment Agency was the "*appropriate agency*" to determine this issue, and to criticise the Defendant for seeking to "*go behind*" its conclusions. Whilst I do consider that the Environment Agency's consideration of the issue must carry some weight, any determination by the Environment Agency can only have been based upon the evidence

that it considered and took into account. The Environment Agency did not have the benefit of the expert evidence adduced during the trial of this matter. Further, there is no real evidence of the Environment Agency carrying out any detailed site inspection of its own, rather than relying upon information provided by Mr Broun. I therefore consider that it is incumbent upon me to reach my own independent judgment upon the matter based upon the evidence adduced before me taken as a whole.

87. Further, I consider there to be force in the Defendant's point that the Environment Agency were not necessarily concerned to determine whether it was concerned with a natural as opposed to an artificial watercourse, applying the various definitions referred to in paragraphs 60 and 61 above, although I do note that the EA Permit does refer to the Environment Agency having "*considered whether the culvert passing through the development site is a "surface water sewer" or a natural watercourse that has been "culverted" at some time in the past*", without making any mention of the possibility of there having been an artificial watercourse.
88. The following factors, in particular, have led me to the conclusion that we are not presently concerned with a watercourse:
 - 88.1. The absence of any indication of a watercourse, either along the Pipe or on any relevant part of the Catchment, on any of the Ordinance Survey maps that have been produced dating back to the mid-19th-century. This is in contrast to other watercourses shown on those maps. It is correct that Mr Jones did, as I have mentioned, seek to suggest that certain field or other boundaries represented boundaries with watercourses running along the same, but I was not persuaded by that evidence for a number of reasons. Firstly, the Pipe does not run along the boundary between the Site and, for example, the adjoining Royal Oak public house. Mr Jones suggested that boundaries had moved, but I could see no persuasive evidence of this, particularly in respect of the boundary adjoining the Royal Oak public house. Further, these boundaries were broken in positions where one would not expect them to be broken if they also represented a watercourse, e.g., in particular, where Mr Jones suggested a boundary/watercourse was shown on Catchment land behind Jasmine Cottage. In addition, I note that the Joint Report had agreed that: "*No historical mapping from 1845 to present day, marks the presence of any watercourse*".
 - 88.2. The absence of any reference to a watercourse in the survey carried out in 1903/04 prior to the raising of the banks of the Feeder shortly thereafter.
 - 88.3. Despite Mr Jones's modelling exercises suggesting that surface flow would have run-off the Catchment to Point A, which such exercises he described as "*industry standard*", I have reached the view that the evidence of Dr Brown shows that it is more likely than not that there was and is no significant surface run-off or flow from the Catchment, save when the latter is particularly saturated, and after heavy rain when, but only when, water might flow down the valley behind Jasmine

Cottage towards Point C. In reaching this view, I take into account, in particular, the following:

- 88.3.1. Dr Brown's observations from walking over, and closely inspecting the Catchment, including in particular the conclusions that he reached in respect of permeability having regard to his geological expertise, and investigation of the local geology.
- 88.3.2. Dr Brown saw no evidence of surface flows, save when the ground is saturated after prolonged rainfall, and heavy rain. Rather, he observed a dry valley bed, and occasional springs, demonstrative in his view of water passing through the substratum, and being forced to the surface when encountering occasional clay lenses, only then to sink back into the ground. This is, as I see it, consistent with the oozing and seeping referred to in Bates (*supra*) at para 1.60.
- 88.3.3. There was a spring immediately adjacent to the garden of Jasmine Cottage with a pipe leading to the Jasmine Manhole. However, Dr Brown's evidence was that this spring would not have led to a defined flow of water away from the spring, but rather, prior to human intervention, the water seeping back into the ground beyond the relevant clay lens.
- 88.3.4. The evidence as to what was coming into the Jasmine Manhole. The evidence of Mr Jones was that this was, or at least included flow of water off the Catchment. However, as explained above, the evidence of Dr Brown was that the water coming into the Jasmine Manhole comprised water piped from the ponding near the spring behind the garden of Jasmine Cottage, water collected behind the dyke constructed in the garden of Jasmine Cottage, and the two green corrugated pipes that Dr Brown identified as being field drains draining from the land, and not from the surface. I prefer the evidence of Dr Brown in respect of what was getting into the Jasmine Manhole, and thus, through the yellow pipe therein, into the Pipe itself leading down to Point A.
- 88.3.5. Dr Brown's evidence that most of the flow in the Pipe where I observed it at Point B under the School Manhole came not from the Pipe leading from Jasmine Cottage and Alley House, and thus the Catchment, but from another direction. As I have already said, Dr Brown observed that whilst there was little flow through the open chamber in the garden of Alley House, there was significant flow at the same time through the pipe under the School Manhole, demonstrating that water was coming from another direction, that then led into the Pipe across the Site.
- 88.3.6. The conclusion that I have reached above that, prior to construction works been carried out on the Site, including the rodding out of the Pipe, the flow through the Pipe, where it crossed the Site, was very much less than

it became once those construction works had begun, there now being a significant channelled flow into the Feeder which was not evident in the photograph on page 277 of the Trial Bundle.

89. In reaching the conclusion that I have, I have taken into account the existence of the now blocked 12” Pipe running under the Feeder, and the 5”stone chamber found in the vicinity of Point A that I have referred to. Both experts are agreed that this does provide evidence of there having been a considerable flow through a pipe of such a significant dimension, consistent with their having been a significant watercourse running down to the Feeder at Point A. Further, I accept that no clear explanation has been provided as to why the 12” Pipe would have been put in under the feeder if not for a watercourse. However, I consider this evidence to be outweighed by the other matters that I have referred to.
90. Inevitably, in a case such as this, there will be loose ends that cannot fully be explained. However, in respect of the 12” Pipe I would note that:
 - 90.1. Dr Brown did, during the course of cross-examination, suggest that a 12” pipe may have been installed in order to drain significant quantities of water out of the aquifer below the Catchment in order to lower the water table, which I regard to be at least a credible explanation;
 - 90.2. The Pipe itself has a diameter significantly less than 12”;
 - 90.3. Further, both experts were agreed that the machined nature of the stonework used to construct the 12” Pipe suggested that the latter had been constructed no earlier than the mid-to-late nineteenth century, i.e. some considerable time after the construction of the Feeder itself. It is possible that the 12” Pipe replaced some earlier pipe under the Feeder, but equally it might be an entirely new, which would support there having been no existing natural watercourse.
91. In short, therefore, I consider there to be insufficient evidence of a “flow” of water off the Catchment along the course of the Pipe to lead to the conclusion that there was a natural watercourse that has been culverted. Rather, I consider it more likely that the Pipe represents a drain and/or sewer put in to drain water from field drains, and/or soak ways from septic tanks further up Sugar Street.
92. On this basis, it is my finding that the Claimant has failed to establish the natural watercourse that it contends for, or that it is entitled to enjoy the rights of a riparian owner.

If a watercourse, what rights does the Claimant enjoy as a riparian owner, and could the Defendant properly object to what is proposed?

93. On the basis of my finding above, it is strictly unnecessary for me to consider this issue, but in case I should be wrong in respect of my conclusions as to whether the Pipe represents a natural watercourse, I set out my conclusions as to the rights that the Claimant would have enjoyed had it been established to be a riparian owner, and whether this would

have enabled the Claimant to proceed with the Approved Scheme without any further consent from the Defendant.

94. The Claimant's case is that it would amount to a "reasonable drainage operation" to discharge into and through the Pipe pursuant to the Approved Scheme, and in accordance with the EA Permit, and that being the case, it is entitled to do what is proposed as riparian owner. The point is made that the flow would not be allowed to exceed 4.9m³ per day, which would not be in excess of the suggested current "greenfield" run-off rate, and the treated effluent to be discharged will be less contaminated than what is already being discharged at Point A.

95. The Claimant says that a distinction is to be drawn between riparian rights on the one hand, and easements on the other hand, as explained by Parker J in *Portsmouth Borough Waterworks Co v London Brighton and South Coast Railway Co.* (1909) 26 TLR 173:

"Where a riparian owner sells part of his estate, including land on the banks of a natural stream, it is not necessary to make any express provision as to the grant or reservation of the ordinary rights of a riparian proprietor. These rights are not easements to be granted or reserved as appurtenant to what is respectively sold or retained, but are parts of the fee simple and inheritance of the land sold or retained."

96. In support of its case that the relevant applicable test is one of "reasonable drainage operation", the Claimant relies on *John Young and Company Appellants; v The Bankier Distillery Company and Others Respondents* [1893] AC 691. This case concerned the discharge of water pumped up from a mine, which affected the quality of water flowing to a distillery down-stream, the complaint being not in respect of quantity, but that the "foreign water" introduced by the mine was of a character and quality different from that of the natural stream, which prejudicial the effective operation of the distillery. The House of Lords upheld the interdict granted in favour of the distillery by the Court of Session.

97. Reliance is placed by the Claimant upon the following passages from the speeches in the House of Lords in that case, namely:

97.1. Lord Watson at p 697 (emphasis added):

"The law of Scotland upon this point is the same with that of England. In Blair v. Hunter, Finlay & Co. Lord Gifford said: "Although there is a natural servitude on lower heritors to receive the natural or surface water from higher grounds, the flow must not be increased by artificial means, although reasonable drainage operations are permissible."

It is to be noted that this passage followed a passage in which Lord Watson had said, talking about the position of the riparian owner downstream:

"But he is under no obligation to receive foreign water brought to the surface of his neighbours property by artificial means; and I can see no distinction in principle between water raised from a mine below the level of the surface via

the property, which is the case here, and water artificially conveyed from a distance stream.”

97.2. Lord MacNaghten, at p 698, said this (emphasis added):

“The law relating to the rights of riparian proprietors is well settled. A riparian proprietor is entitled to have the water of the stream, on the banks of which his property lies, flow down as it has been accustomed to flow down to his property, subject to the ordinary use of the flowing water by upper proprietors, and to such further use, if any, on their part in connection with their property as may be reasonable under the circumstances. Every riparian proprietor is thus entitled to the water of his stream, in its natural flow, without sensible diminution or increase and without sensible alteration in its character or quality. Any invasion of this right causing actual damage or calculated to found a claim which may ripen into an adverse right entitles the party injured to the intervention of the Court.”

98. The Defendant suggests that a distinction is to be drawn where water, or other discharge that the upper riparian owner might otherwise be entitled to discharge was “fired” from some other part of its property that had not previously enjoyed the benefit of riparian rights. There is some support for this proposition in the second of the quotes above from the speech of Lord Watson. Further, Mr Healey referred me to the following passage from the judgment of Lewison LJ in *Manchester Ship Canal Co. Ltd v Vauxhall Motors Ltd* (supra), where at para [88] he said:

“The rights which Mr Naylor enjoyed were those natural rights which attached to his land. By constructing the factory and its associated hardstanding Vauxhall themselves interfered with the natural drainage of rainfall. In particular by greatly increasing the impermeable surface of the land they diverted rainfall from penetrating the ground and caused it to run into the ravine. That change was outside the scope of his natural rights ... If and to the extent that Mr Naylor had acquired a right by prescription to drain his ornamental ponds, or water drained through a system of field ditches, the limited nature of the prescriptive right did not extend to the subsequently erected factory and hardstanding.”

See also Gale (supra) at para 1-162, referring to this passage.

99. On balance, I have concluded that if I had found that the Claimant was entitled to enjoy rights as riparian owner, then those rights would have extended to discharging into the Pipe pursuant to the Approved Scheme in accordance with the EA Permit. In the circumstances, it would, as I see it, not have been open to the Defendant to object unless and until discharge occurred significantly in excess of, or of a quality significantly below that intended to be achieved by the Approved Scheme and permitted by the EA Permit.

100. I accept that there is some support in the above authorities for the proposition that it is not open to the upper riparian owner to artificially channel surface run-off and treated waste

in the Pipe in the way proposed. However, I remind myself of the distinction between riparian rights and easements identified in paragraph 95 above, and I consider that the appropriate test is, ultimately, that identified in the passage from the speech of Lord McNaughton referred to in paragraph 97.2 above, where he said: “*Every riparian proprietor is thus entitled to the water of his stream, in its natural flow, without sensible diminution or increase and without sensible alteration in its character or quality. Any invasion of this right causing actual damage or calculated to found a claim which may ripen into an adverse right entitles the party injured to the intervention of the Court.*”

101. Based thereupon, I consider that the key focus of enquiry requires to be upon the effect of what is actually discharged into the watercourse on the downstream recipient of what is discharged.
102. Having regard to the fact that the Pipe already receives discharge from septic tanks from further up Sugar Street, and that the flow rate is proposed to be limited as referred to above, I do not consider that the quality of what the Defendant would receive as downstream riparian owner could be significantly diminished, or that the natural flow would be significantly increased so as to materially alter the character or quality of what was received. It is true that more would ultimately be discharged from the Site given that run-off would be channelled through the Pipe, together with treated effluent, from the nine further properties being constructed across the whole Site, but there is not, in my judgment, any real evidence above generalised concerns on the part of a number of the Defendant’s witnesses that this would cause the Defendant any real difficulty so far as, for example, flooding in the Feeder is concerned, at least so long as the flow is limited as proposed.
103. However, as I have found, the Claimant is not entitled to the rights of a riparian owner, and so this latter finding is, to that extent, academic.

Does the Claimant have a prescriptive right to do what is proposed?

The parties’ respective cases

104. The Claimant claims by prescription a right by way of easement to discharge through the Pipe and onto the Feeder Land, and thus into (or under) the Feeder based on in excess of 20 years user under the doctrine of lost modern grant.
105. I note by way of preliminary observation that there are four essential characteristics of an easement, namely:
 - 105.1. There must be a dominant and a servient tenement;
 - 105.2. The easement must *accommodate* the dominant tenement;
 - 105.3. The dominant and servient owners must be different persons; and
 - 105.4. A right over land cannot amount to an easement, unless it is capable of forming the subject matter of a grant.

See *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2019] AC 533, per Lord Briggs at para [35] referring to *Re Ellenborough Park* [1956] Ch 131.

106. It is the Claimant's case that it has acquired by prescription a right to discharge surface water from the whole of the Site into (or under) the Feeder at Point A, and also to discharge treated effluent from the whole of the Site into (or under) the Feeder at Point A. The easement said to have been acquired by prescription is, of course, based on past use, but it is alleged by the Claimant that the user proposed by the Approved Scheme and permitted by the EA Permit falls within the scope of the easement so acquired.
107. Reliance is placed by the Claimant upon *McAdams Homes Ltd v Robinson* [2004] 3 EGLR 93 at para [50], per Neuberger LJ, as authority for the proposition that where the dominant land is used for a particular purpose at the time an easement is created, an increase, even if substantial, in the intensity of that use, resulting in a concomitant increase in the use of the easement, cannot of itself be objected to by the servient owner, and that the servient owner would only be entitled to object if:
 - 107.1. The development of the dominant land represented a "*radical change in the character*" or a "*change in the identity*" of the dominant land as opposed to a mere change or intensification of the use thereof; and
 - 107.2. The use of the dominant land as redeveloped would result in a substantial increase or alteration in the burden on the servient land.
108. It is said that the Approved Scheme, if carried into effect in accordance with the EA Permit would not provide the Defendant with grounds to object on the above basis.
109. In order to succeed with its claim based upon prescription, the Claimant does, as I see it, need to overcome a number of hurdles, in particular:
 - 109.1. The Claimant needs to prove upwards of 20 years user in accordance with the rights that it now claims;
 - 109.2. If an easement is established on this basis, then it is necessary for the Claimant to show that the easement *so established* accommodated the whole of the Site so as to constitute the whole of the Site as the dominant tenement;
 - 109.3. The Claimant would then need to show that the user as proposed pursuant to the Approved Scheme, in accordance with the EA Permit, is not, when compared with any easement acquired by prescription, excessive applying the considerations referred to in paragraph 107 above.
110. For reasons that I will expand upon below, it can be seen that I consider that even if an easement by prescription is established, it is necessary to consider whether what is proposed in giving effect to the Approved Scheme is excessive in two possible respects, namely excessive as respects the extent of the dominant tenant, and excessive as to use, these being two distinct concepts.

111. I consider each of the above requirements upon the Claimant in turn.

Upwards of 20 years user?

112. It is necessary to bear in mind that one can only prescribe for a right that is not permitted in any event. As *Home Brewery Co. Ltd. v William Davis & Co. (Leicester) Ltd* (supra) demonstrates, there is a distinction between natural percolation, for which no right is required, and the channelling or diversion of water onto the land of another, for which a right is required. Consequently, it is necessary to distinguish between the natural percolation which has occurred from the Site onto the Feeder Land, and artificial discharge through the Pipe, for which a right would have had to have been acquired by prescription. Consequently, the user that requires to be shown in order to establish any right acquired by prescription based on upwards of 20 years user has, as I see it, to be user involving the discharge of surface water and/or effluent onto the Feeder Land through the Pipe discharging at Point A.

113. The Claimant's first difficulty, as I see it, is that there is no evidence of any significant amounts of surface water from the Site having, historically, drained off the Site and through the Pipe. As I have already mentioned, this was accepted by Mr Jones in the course of his evidence, Mr Jones accepting that prior to the commencement of the development works on the Site, surface water would have percolated through the ground, with occasional run-off directly into the Feeder Land along the boundary at times when the Site was saturated, and there was heavy rainfall. Mr Jones suggested that there may have been some limited entry of surface water into broken parts of the Pipe, but not sufficient in my judgment to found a prescriptive right to the discharge of surface water from the Site through the Pipe at that point A having regard, amongst other things, to what I have found to have been the limited flow in any event through the Pipe prior to the commencement of development works.

114. Further, and particularly given my findings in respect of the Ivy House septic tank, and that it did not connect into the Pipe, but that it was more likely to have discharged effluent through the ground, there is, as I see it, no evidence that foul water *from the Site* has been discharged onto the Feeder Land through the Pipe.

115. On the basis of this lack of evidence as to user, I am unable to find that the Claimant has, based on upwards of 20 years user, acquired any prescriptive right to drain surface water, or effluent of any kind collected on the Site, through the Pipe, so as to be discharged onto the Defendant's land at Point A.

The extent of any dominant tenant

116. Even if a prescriptive right based on 20 years user through the discharge of surface water run-off or foul channelled through the Pipe to Point A established, then, as referred to above, the issue then arises as to the extent of the dominant tenement relating to the easement so acquired.

117. In *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* (supra), Lord Briggs commented at paras [38]-[43] as follows on the requirement that the easement accommodate the dominant tenement:

“38. In the present case, the Court of Appeal [2017] Ch 516, para 56 described this requirement as follows:

“In our view, the requirement that an easement must be a ‘right of utility and benefit’ is the crucial requirement. The essence of an easement is to give the dominant tenement a benefit or utility as such. Thus, an easement properly so called will improve the general utility of the dominant tenement. It may benefit the trade carried on upon the dominant tenement or the utility of living there.”

39. Save only for easements of support (which may be said to benefit the land itself), easements generally serve or accommodate the use and enjoyment of the dominant tenement by human beings. Thus, a right of way makes the dominant tenement more accessible. Service easements enable the occupiers of the dominant tenement to receive water, gas and electricity. A drainage easement enables rainwater and sewage to be removed from land, in circumstances where its use would otherwise be inhibited by flooding.

40. The following general points may be noted. First, it is not enough that the right is merely appurtenant or annexed to the dominant tenement, if the enjoyment of it has nothing to do with the normal use of it. Nor is it sufficient that the right in question adds to the value of the dominant tenement. Thus for example, a right granted to the owners and occupiers of a house in Kennington to have free access to the Oval cricket ground on test match days might be annexed to the ownership of that house, and add significantly to its value. But it would have nothing to do with the normal use of the property as a home.

41. Secondly, the “normal use” of the dominant tenement may be a residential use or a business use. Further, since easements are often granted to facilitate a development of the dominant tenement, the relevant use may be not merely an actual use, but a contemplated use: see for example *Moncrieff v Jamieson* [2007] 1 WLR 2620, paras 132–133, per Lord Neuberger of Abbotsbury.

42. Thirdly, it is not an objection to qualification as an easement that the right consists of or involves the use of some chattel on the servient tenement. Examples include a pump (*Pomfret v Ricroft* (1668) 1 Saund 321), a lock and a sluice gate (*Simpson v Godmanchester Corpn* [1897] AC 696), and even a lavatory (*Miller v Emcer Products Ltd* [1956] Ch 304).

43. Fourthly, although accommodation is in one sense a legal concept, the question whether a particular grant of rights accommodates a dominant tenement is primarily a question of fact: see per Evershed MR in *In re Ellenborough Park* [1956] Ch 131, 173.”

118. Having regard to the requirement for the easement to accommodate the dominant tenement, it is necessary to identify the extent of the dominant tenement in the present case, that the easement claimed by the Claimant would have accommodated.
119. In the case of an easement granted by way of an express grant, the extent of the dominant tenement will be a question of construction of the relevant deed, extrinsic evidence being admissible to establish the identity of the dominant tenement – see *Johnstone v Holdway* [1963] 1 QB 601. As Upjohn LJ said in the latter case at p 612: “*In our judgment, it is a question of the construction of the deed creating a right of way as to what is the dominant tenement for the benefit of which the right of way is granted and to which the right of way is appurtenant. In construing the deed the court is entitled to have evidence of all material facts at the time of the execution of the deed.*”
120. The doctrine of lost modern grant depends upon the fiction of a grant that has been lost - see *Tehidy Minerals Ltd v Norman* [1971] 2 QB 528 , 552. As HHJ Paul Matthews pointed out in *Bate v Affinity Water Ltd* [2019] EWHC 3425 (Ch) at para [98], the doctrine of lost modern grant also requires that any claimed prescriptive easement have all the characteristics of an easement by express grant, including the need for a dominant tenant. HHJ Matthews went on at para [98] to say this:
- “But in my judgment there is a difference between express and prescriptive easements as to how that tenement is ascertained. In the case of the express easement it is a matter of the construction of the deed, and thus of the intentions of the parties. In the case of the prescriptive easement, there is no need to take the fiction of the grant that has been lost any further than necessary. The dominant tenement can be ascertained by looking to see whether any and if so which land of the party claiming the easement has been accommodated by its exercise during the relevant period.”*
121. On this basis it is necessary to consider and determine what land of the Claimant has been accommodated by the easement claimed during the period of user upon which the prescriptive claim is based.
122. Putting the Claimant’s case at its very highest, and if contrary to my findings above upwards of 20 years user for the purposes of surface water and foul drainage can be established, it is, in my judgment, plain that the easement did not accommodate the Site as a whole, but, at best, accommodated the immediate curtilage of Ivy House, and its septic tank, and surface water in the immediate vicinity of the Pipe, but no more.
123. The Claimant submits that there is a wider test as to what land might have been accommodated by the easement by reference to a reasonableness test, and that it is appropriate to include the whole of the Site within the dominant tenement because it formed part of the garden of Ivy House. However, Ivy House did, as can be seen from the various plans, have a distinct immediate curtilage and garden, as distinct from the rest of the Site which was more of the field. But, more importantly, the approach suggested by the Claimant does not seem to me to accord with the authorities referred to above which require a closer focus upon what particular part of the land of the party claiming the

easement did actually accommodate the easement. This closer focus does, in my judgment, require the dominant tenement to be limited in the way that I found.

124. In the circumstances, any dominant tenement having been limited to the extent that I found, even if the Claimant were able to establish an easement by prescription, I do not consider that it would extend to permit the drainage of surface water off any part of the Site not forming part of the dominant tenement.

Excessive User?

125. It would only be if I were wrong as to the lack of evidence sufficient to support the acquiring of an easement by prescription, and the extent of the dominant tenement relating to any easement so acquired, that one would get to the question as to whether the user proposed by the Claimant would be impermissibly excessive. However, I do consider the point in case I should be wrong as to the above, recognising that, in the light of my finding, this is a somewhat artificial exercise given that it presupposes past user that I have found not to have been enjoyed.

126. The two key questions are, as I have already identified, whether:

126.1. The development of the dominant land represented a “*radical change in the character*” or a “*change in the identity*” of the dominant land as opposed to a mere change or intensification of the use thereof; and

126.2. The use of the dominant land as redeveloped would result in a substantial increase or alteration in the burden on the servient land.

127. In my judgment, what is proposed does involve a radical change in the character and identity of the dominant land, on the assumption, contrary to my finding, that the dominant land includes the whole of the Site in the Claimant’s ownership. Prior to the commencement of the development, one had a relatively modest property, Ivy House, with a garden, sitting on a comparatively large open plot of land in a comparatively rural setting. What is proposed does, in my view, go beyond mere intensification of the past user, but involves a radical change in the nature of the Site from what I have described to a development including a further nine properties forming an estate development, and covering the whole of the Site. This does, to my mind, on any reasonable objective view, involve a radical change in the character and identity of the Site, cf *Giles v County Building Contractors (Hertford) Ltd* (1971) P&CR 978, a case concerning more intensified development of an already developed site.

128. The more difficult question is, in my view, as whether the use of the Site as redeveloped as proposed by the Approved Scheme could properly be said to result in a substantial increase or alteration in the burden on the servient land of the Defendant. If the Claimant had been able to establish an easement of drainage by prescription in respect of which the whole of the Site was the dominant tenement, with an existing “*greenfield*” run-off rate as used by Mr Broun for the purposes of the application for the EA Permit, and planning consent, then my finding would have been that the proposed user anticipated by the

Approved Scheme, as permitted by the EA Permit, would not have mounted to an excessive user. I take into account that the effluent discharged would have been treated, and that it was proposed that the flow limited to the existing “greenfield” run-off rate, albeit that, because there will be a greater surface run-off area that requires to be artificially drained off, and nine more houses from which sewage will require to be discharged, ultimately more will have to be disposed into the Feeder. However, despite the fact that the Feeder is now blocked and that there is no flow along the same, the evidence does not, in my view, demonstrate that there would be a substantial increase or alteration in the burden on the servient land, i.e. the Feeder Land/Feeder itself, in respect of either the quality or quantity of the discharge from the Pipe.

129. In addition to the evidence as to risks of flooding, I have taken into account concerns expressed in the evidence given on behalf of the Defendant of a difficulty, going forward, in policing discharge from the Site, and that in *McAdam Homes v Robinson* (supra) at para [66], Neuberger LJ expressed the view that in considering the question of intensity of use, the Court was entitled to take into account potential intensities of use in the future. However, it does seem to me that I am entitled to proceed on the basis of what is proposed and intended by the Approved Scheme, as permitted by the EA Permit, and that if, in the future, there is a departure from what is permitted, then it would be open to the Defendant to take its own steps to police the situation by bringing nuisance proceedings of its own.

Conclusion in respect of prescriptive rights

130. For the reasons set out above, I do not consider that the Claimant has, on the evidence, established that it is entitled to a prescriptive right to drain surface water or treated effluent onto the Feeder Land at Point A, whether to discharge into or under the Feeder. In any event, I do not consider that the dominant tenant in respect of any easement so acquired would have extended to the whole of the Site so as to permit the discharge of surface water and treated effluent proposed to be discharged by the Approved Scheme, and the EA Permit. Had I reached a different view in respect of these matters, then I would have been minded to find that the user proposed would not be excessive.

Issue as to the repair of the 12” Pipe under the Feeder

131. This is not an issue that was raised by the Claimant ahead of the trial of this action, but was raised in Mr Jacobs’s Skeleton Argument. The issue is, as I understand it, that if any right acquired by prescription is to discharge through the 12” Pipe running under the Feeder, rather than to discharge into the Feeder itself on the basis that the Pipe did not discharge into the Feeder for upwards of 20 years, then, the Defendant is under an obligation to repair the 12” Pipe.

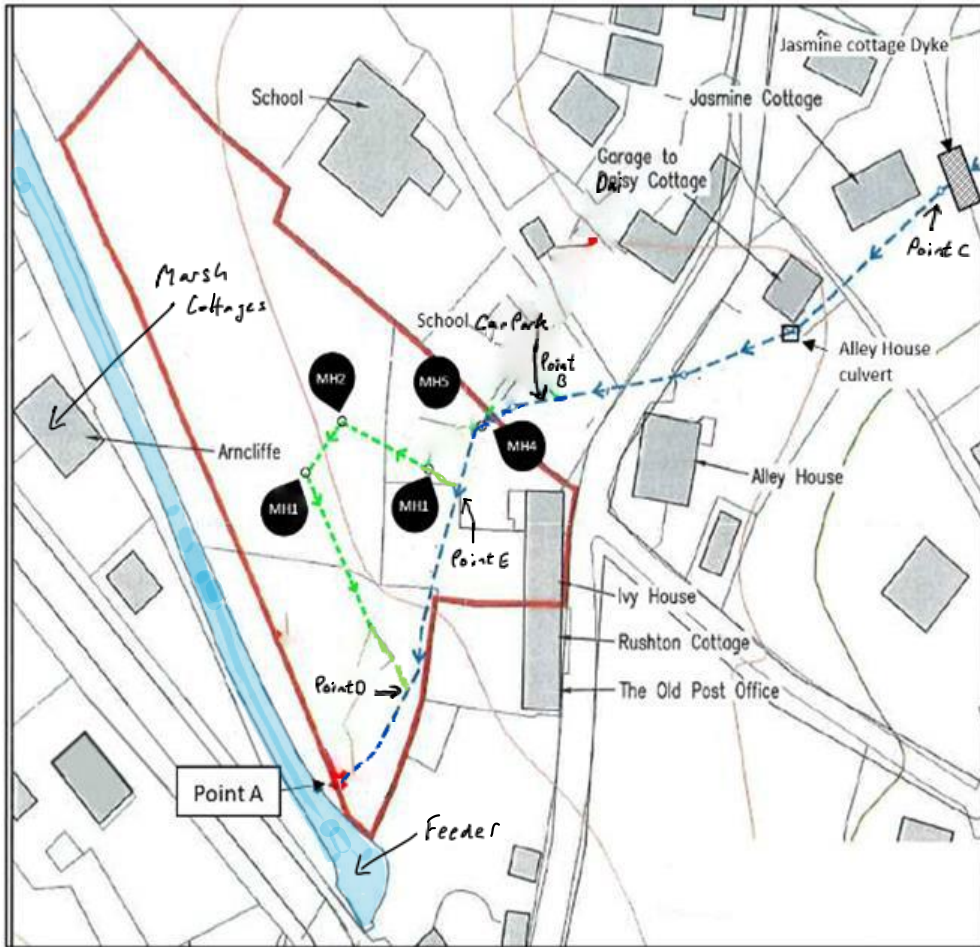
132. In the light of my finding that no such easement has been acquired by prescription, the point is necessarily academic. Whilst I might ordinarily have been prepared to decide the point in case I should be wrong as to my finding in respect of the acquisition of an easement by prescription, I agree with Mr Healey that it would not be appropriate for me to do so bearing in mind how late in the day the point was taken, and that I have only

heard very limited argument on the issues raised by this point, which does raise a number of quite difficult points of law in respect of the respective obligations of dominant and servient owners.

Overall Conclusion

133. In view of the fact that I have found that the Claimant is neither a riparian owner with the benefit of riparian rights, nor entitled to an easement acquired by prescription to drain surface water and treated effluent from the Site through the Pipe and onto the Feeder Land at Point A, it must follow that the Claimant is not entitled to the declaratory relief that it seeks by its Particulars of Claim.
134. I should add that I have reached the decision that I have with a significant degree of regret bearing in mind the difficulty that the Claimant finds itself in having taken over the development of the Site, and having come up with the Approved Scheme as permitted by the Environment Agency. However, I have been compelled by the evidence to find that the Claimant is not a riparian owner, and that it has not acquired by prescription drainage rights that it contends for. I would hope that some accommodation between the Claimant and the Defendant is possible going forward.

**APPENDIX
PLAN REFERRED TO**



KEY

- Site Boundary
- - - - - Approximate route of original Pipe
- - - - - Approximate route of new pipe laid by Claimant