

Neutral Citation No: [2022] NICH 16

Ref: McB11952

*Judgment: approved by the court for handing down
(subject to editorial corrections)**

ICOS No: 2016/33325

Delivered: 27/10/2022

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

Between:

KEVIN JUDGE

Plaintiff

and

MICHAEL WAUGH

Defendant

Mr Coyle BL (instructed by Donnelly Neary and Donnelly Solicitors) for the Plaintiff
Mr Brian W McCartney BL (instructed by Campbell and Haughey Solicitors) for the
Defendant

McBRIDE J

Introduction

[1] The plaintiff and defendant are neighbours. The defendant owns a field which adjoins the plaintiff's dwelling house and garden. The plaintiff alleges that as a result of the defendant's negligence and/or nuisance excessive water has been caused to seep from his field into the plaintiff's property causing damage to the garden, trees and hedge.

[2] The plaintiff is represented by Mr Coyle of counsel and the defendant is represented by Mr Brian W McCartney of counsel. I am grateful to both counsel for their helpful written and oral submissions.

[3] The court heard evidence from a number of expert witnesses together with evidence from a number of lay witnesses both on behalf of the plaintiff and defendant. Whilst there is much factual dispute in the evidence which I will address later the following factual matters were not in dispute or, in some cases, were agreed by the expert witnesses at a joint meeting:

- (a) The plaintiff purchased 32 Dungannon Road in 1999. The plaintiff's premises consist of a dwelling house and garden and the plaintiff resides at these premises.
- (b) The defendant owns the field which adjoins the plaintiff's premises. At present this field is used for agricultural purposes.
- (c) The plaintiff's property sits on the corner of the Selshion and Dungannon Roads. It fronts onto the Selshion Road. The Dungannon Road lies to the west of the property. The rear and east side of the property is bounded by the defendant's field.
- (d) Prior to 2009 part of the defendant's field consisted of an orchard. The orchard was removed by his predecessor in title as he wished to develop the lands for housing. Due to economic conditions he failed to develop the lands and the field was then sold to the defendant in and around 2013.
- (e) There was a hedge which separated the orchard from the rest of the field. In 2013 with the permission of DARD the defendant removed the hedge and created a single field.
- (f) To the north (rear of the plaintiff's property) the defendant's field is bounded by an outer hedge. A natural watercourse runs along the line of this outer hedge terminating in a gully on the Dungannon Road.
- (g) The plaintiff's septic tank is located within the defendant's field at the northside of his property. There is a herringbone soakaway which emanates northward from the septic tank.
- (h) The plaintiff has an easement to inspect the septic tank and soakaway. Although there is a dispute whether there is an easement to walk along a hard standing area located at the eastern boundary between the plaintiff and defendant's lands this did not form part of the pleadings and was not therefore part of the dispute which required determination by the court.
- (i) The underlying soil of both the plaintiff and defendant's land has poor drainage qualities.
- (j) Mr Pentland, an expert in geology and hydrology gave agreed evidence that rainfall flows down gradient as "overland flow" ie surface run-off and, in addition, it infiltrates top soil where it moves laterally down gradient through the top soil layer as "through flow." Through flow in top soil is intercepted by stone drains.

- (k) The topography of the area is such that the plaintiff's land is located immediately adjacent to the lowest part of the immediate catchment area. All natural drainage from the surrounding catchment area therefore collects immediately adjacent to his property. His land is essentially located at the bottom of a hill and lies below the defendant's land. Water naturally flows from the higher to the lower land.
- (l) On the eastern boundary between the plaintiff and defendant's property on the Selshion Road there is a ridge of soil which is 100 to 200 millimetres high. It was agreed that this acts as a barrier to surface run-off water. Although it was not originally agreed that water could seep through the top soil laterally into the plaintiff's property this was accepted by Mr Elliott during cross-examination and, therefore, it was agreed that water could seep through the top soil laterally into the plaintiff's property notwithstanding the existence of the ridge. It was agreed however, that the water would not flood over the ridge.
- (m) The experts after conducting a joint inspection which involved digging trenches agreed that there was a network of drainage shores where the orchard previously existed. They further agreed that there was a stone shore along the line of the former hedge.
- (n) The experts further agreed that the waterway to the north along the outer hedge was heavily vegetated and was therefore not functioning effectively. They agreed that this caused flows to back up and saturate the surrounding land and that this impacted on the septic tank soakaway and at inspection there was evidence of effluent oils on the surface of the land.
- (o) The field drainage system discharged onto the Selshion Road via two gullies.

The Plaintiff's Case

[4] The plaintiff's case is that the removal of the orchard and the disturbance of the prior existing drainage system by the defendant has caused excessive water to seep into the plaintiff's land thereby causing damage to his property. In particular, the plaintiff alleges that he has lost a number of trees as a result of flooding together with the hedge. In addition, he alleges that the garden is now a 'carpet of moss' and requires remediation. He further alleges that the operation of the septic tank has been adversely affected. Although it was alleged in the statement of claim that the seepage of water had adversely interfered with the plaintiff's use of his swimming pool this claim has now been abandoned. The plaintiff seeks injunctive relief to stop the ingress of excessive water and, in addition, claims damages for loss and damage sustained.

The Defendant's Case

[5] The defendant denied that he had adversely interfered with the existing drainage system and gave evidence that he had put in a new and efficient drainage system including stone shores and pipes. He further denied that the plaintiff had sustained any water damage to his garden or trees and relied on expert evidence to this effect. The defendant further denied that he owed any duty either in negligence or nuisance in respect of the natural flow of water from his land to the plaintiff's land and alleged that any excess water on the plaintiff's property was due to its location at the bottom of the hill; the fact that Mr Judge did not have a drainage system on his land and because of the increase in the amount of annual rainfall.

Issues in Dispute

[6] The key issues in dispute were:

- (i) Is the defendant responsible for the blockage of the northern watercourse which is adversely impacting on the plaintiff's septic tank and soakaway?
- (ii) Is there an increase in the water flowing onto the plaintiff's land?
- (iii) If so, what is the cause of the excessive water? Is it due to:
 - (a) removal of the orchard; and/or
 - (b) location of the plaintiff's land; and/or
 - (c) increased annual rainfall; and/or
 - (d) lack of drainage on the plaintiff's land; and/or
 - (e) an inefficient drainage system on the defendant's land?
- (iv) Did the defendant replace the existing drainage system with a system which is less efficient?
- (v) Is the defendant legally liable for damage arising from the natural flow of water?
- (vi) If the plaintiff has sustained damage and the defendant is liable, what is the extent of the damage sustained and what remediation is required?

The Evidence

[7] The plaintiff called Mr Ramsey, Chartered Civil Engineer, to give expert evidence in respect of drainage. In addition, he called a number of lay witnesses, namely Mr Aaron Judge, grandson of the plaintiff, Mr Denis Harbinson, Chartered Civil Engineer, Mr Declan Creaney, gardener, and Mr Stephen Murray, a landscape gardener.

[8] The plaintiff did not give evidence. The court was advised that he was unable to give evidence by reason of ill-health. This was disputed by the defendant and Mr Waugh gave evidence that he had seen the plaintiff out driving one week prior to the hearing. When cross-examined Aaron Judge accepted his grandfather was out of hospital and was on the road to recovery and was driving. No medical evidence in support of the plaintiff's inability to attend court was produced.

[9] In all the circumstances, I am satisfied that there is no good reason why the plaintiff did not attend court to give evidence. In due course the court will assess whether an adverse inference should be drawn from the plaintiff's failure to give evidence.

[10] The defendant gave evidence together with Mr Jim Robinson, gardener, and Mr Clive Richardson. In addition, he relied on the agreed expert evidence of Mr Pentland, Dr Blackstock, Arboriculturist, and Mr Elliott, Chartered Engineer with expertise in flood risks and drainage.

[11] The evidence in this case spanned a number of days. Given that I have set out what I consider to be the agreed facts and the issues in dispute, I do not intend to rehearse the entirety of the evidence of each witness. Rather, I intend to concentrate only on the evidence of the witnesses insofar as it is relevant to the issues in dispute.

Findings of Fact

Issues in Dispute

Issue 1 - Septic Tank

Is the defendant responsible for the blockage of the watercourse to the north of the plaintiff's property which it is agreed is adversely affecting the plaintiff's septic tank and soakaway?

[12] It was agreed that the plaintiff's septic tank and soakaway are located on the defendant's land. The plaintiff has an easement in relation to the soakaway and, therefore, the defendant is not entitled to interfere with this.

[13] The agreed evidence of the expert witnesses was that the watercourse is blocked by vegetation and this is causing it to back up and consequently, the land in which the soakaway is located, is now saturated. This means the effluent is unable to soak away and the effluent oils are now apparent on the grass which overlies the soakaway. Mr Waugh in his evidence accepted that he could not farm this area as it was flooded and there was effluent present.

[14] It is therefore apparent that the soakaway is not working and this is adversely impacting on the working of the septic tank.

[15] Mr Waugh gave evidence that he is not responsible for the blockage of the watercourse and stated that this arose due to the collection of leaves which gathered in the area of the pipe which he had no title to, namely the gully at the Dungannon Road.

[16] The agreed minutes of the experts stated:

“The watercourse north of Judge land heavily vegetated and not functioning effectively.”

In addition, Mr Elliott gave evidence that he was unable to inspect the north channel as it was overgrown.

[17] I am satisfied on the basis of the evidence of Mr Elliott and the agreed minute that vegetation was interfering with the watercourse and this obstruction occurred along the entire course of the channel and therefore took place on the lands belonging to Mr Waugh. I do not accept Mr Waugh’s evidence that the vegetation which adversely affected this drainage network occurred only at the gully on the Dungannon Road and was therefore outside his control. I am therefore satisfied on the evidence that he was responsible for the obstruction of this natural drainage system, which was caused by heavy vegetation growth.

[18] I am further satisfied that this obstruction adversely affected the soakaway and the operation of the septic tank. Although evidence was given that Mr Judge failed to have his tank emptied on an annual basis, I am satisfied that the real cause of the problem was the fact that the soakaway was not functioning properly.

The Law

[19] In Charlesworth and Percy on Negligence at para 14.68 15th Edition, Sweet & Maxwell, it states:

“Natural streams; silting up

While it was formerly held that the owner of the bed of a stream is not liable where the growth of weeds caused the stream to silt up so that flooding occurred, this no longer remains the position following *Leakey v Natural Trust*. In extending the duty explained in *Goldman v Hargrave*, Megaw LJ recognised the potential for injustice to a neighbour who might be affected by an overflow due to flooding:

‘if the risk is one which can readily be overcome or lessened, for example, by

reasonable steps from the landowner to keep the stream free from blockage by flotsam or silt carried down, he will be in breach of duty if he does nothing or does too little.”

[20] In the present case the defendant failed to take any steps to remove the vegetation which grew naturally in this natural watercourse. The existence of the vegetation was known or ought to have been known to the defendant. The removal of such vegetation I consider, could easily have been done without much expense on the defendant’s part. Accordingly, I find that he is in breach of the duty he owed.

[21] In terms of damage the court did not hear evidence about any loss of amenity or inconvenience caused to the plaintiff. A dwelling house, however, requires a functioning septic tank. Whilst there are a number of remedial actions which can be taken to remedy the defect, I consider the best option is to connect the septic tank to the mains. Evidence was given that Mr Judge had applied and was granted permission to connect to the mains. This was not done as he failed to pay the connection fee.

[22] In terms of damages, I consider Mr Judge is entitled to the costs of the application and the connection fee. In the absence of agreement regarding this the court will hear evidence and submissions so that it can assess the appropriate level of damages.

Issue 2 - Is there an increase in the water now flowing onto the plaintiff’s land?

[23] A number of witnesses for the plaintiff gave evidence that the land was previously dry and only became waterlogged after the orchard was removed, the hedge was removed and the defendant adversely interfered with the existing drainage system.

[24] Aaron Judge, grandson of the plaintiff, stated that when he was a boy in the early 2000s he visited his grandparents in the evenings after school and also during the summer holidays. He recalled playing football, golf and trampolining in the garden. He gave evidence that he was able to walk across the garden in his bare feet without getting his feet wet. After 2012 he said the garden became very wet and as a result the lawnmower clogged up with the wet grass. Under cross-examination he accepted that he would not have been out in the garden much in the evenings after school as it was dark and, therefore, accepted that when he was present in the garden it was more likely to have been during the summer months.

[25] Mr Creaney did some gardening for Mr Judge for many years. He gave evidence that he noticed the garden had become damper. He said that there was an increase in moss and an increase in water ponding. As a result of this he also experienced difficulties cutting the grass. Under cross-examination he accepted that

he did not generally cut the grass. Mr Chris Robinson who visited the site said that there was a carpet of moss in the garden.

[26] The court was also shown a number of recent photographs. These showed significant ponding in the plaintiff's property. Mr Ramsey also gave evidence that he had seen ponding when he was at the site. During cross-examination he accepted that during some of his site visits he had not seen ponding and accepted a photograph taken during a site visit in August 2019 showed limited ponding notwithstanding the fact there had been heavy rainfall in the days preceding this visit. Notwithstanding this he remained of the view that the garden did pond especially after heavy rain.

[27] The defendant also relied on the agreed evidence of Dr Blackstock to show that there was no significant flooding to the plaintiff's property. In his report he stated that he had visited the plaintiff's property and carried out an inspection on 4 August 2021. He reported that on inspection of the lawn there were no species evident which were particularly associated with waterlogged conditions. Further, although he found moss present, he opined that this was common in a variety of lawns in Northern Ireland. He concluded that there was no evidence to connect the failure or death of the trees and hedges on the plaintiff's property with "waterlogging" resulting from run-off from adjoining lands.

[28] On the basis of the evidence I find that the garden was not waterlogged. Nonetheless, I find, based on the evidence of the various witnesses as supported by the photographs, that the garden is damper than it used to be and that it ponds especially after heavy rainfall. In particular, the evidence was that the garden was now a carpet of moss and the grass was much wetter and harder to mow resulting in the engine of the lawnmower burning out. I, therefore, consider that there has been an increase in the amount of water egressing onto the plaintiff's land, although I do not find it is such as to cause it to be waterlogged. Indeed, this view is corroborated by the evidence of Aaron Judge who, under cross-examination, accepted that his grandfather's primary concern in speaking to his solicitor was about conveyancing issues related to the easement of the septic tank and a dispute over a strip of land at the front of his property and that he only mentioned the water problem in passing. I, therefore, find that the plaintiff himself did not consider the increase in water to be a major problem. The plaintiff did not give evidence. Although the plaintiff's case was the garden suffered flooding and ponding he did not give any evidence to this effect and I draw an adverse inference from this.

Issue 3 - What is the cause of the increased water egressing into the plaintiff's land?

[29] The plaintiff's case was that the cause of the increased water egress onto his land was an inefficient drainage system created by the defendant when he disturbed the existing system and replaced it with one which was not as effective. As a result,

surface water run-off and seepage increased into the plaintiff's garden and property causing it damage.

[30] In contrast the defence submitted that the drainage system he put in place was similar to the previous one and that it was efficient. He further submitted that the presence of the ridge between the field and the plaintiff's land would act as a barrier to stop flooding. The defendant further contended that any increase in the water flow onto the plaintiff's land was due to the removal of the orchard and the increase in annual rainfall together with the fact the defendant had no drainage system on his land and his land was located beneath the defendant's land. In all the circumstances, the defendant submitted that in law he was not liable for the natural flow of water from the higher to the lower ground.

[31] A number of issues therefore arise for determination, namely:

- (i) What was the previous drainage system?
- (ii) What is the present drainage system?
- (iii) Is the present drainage system efficient?
- (iv) What is the cause of excess water emanating onto the plaintiff's land and, in particular, is it due to location, removal of the orchard, increased rainfall, soil type, lack of drainage on the plaintiff's land or is it due to replacement of the existing drainage system with one which is less efficient?

(a) What was the previous drainage system?

[32] No one was in a position to give evidence about what the previous drainage system was save that Mr Ramsey relied on old maps which showed drainage lines along the northern boundary and drainage in the orchard part of the field. In addition, he stated that he believed there was a sheugh along the line of the hedge which the defendant removed in the field.

[33] No one challenged the existence of a drainage system along the northern boundary. There was also acceptance that there was a drainage system in the area which was previously the orchard. The defendant did challenge whether there was a sheugh along the line of the hedge which he removed.

[34] Mr Waugh and one of his witnesses stated that there is no sheugh along the line of the former hedge. Notwithstanding the dispute about whether there was a sheugh along the line of the hedge, I am satisfied that the contour lines show that there was a dip where the hedge was located. This indicates that this was a low point and, I am satisfied, that this would be an area where a sheugh would be placed as sheugh are frequently placed along hedge lines. I am satisfied, however, that this was replaced with stone shoring and this was similar to the previous sheugh system.

(b) What is the present drainage system?

[35] Both Mr Ramsey and Mr Elliott attended at the locus and carried out extensive inspection including digging trenches. On inspection they found that along the line of the former hedge stone shoring had been put in place. They did not find any pipes on inspection. They further found stone shores in the area where the orchard had been. Again, no pipes were found on inspection.

[36] Under cross-examination Mr Ramsey accepted that the drains he found in the orchard area of the field looked like “the original system of the orchard.” He said that they were very small stone shores.

[37] When questioned about whether they were looking for piping Mr Elliott stated that there was no intention to dig down that far as this would have destroyed the piping which was in existence. In contrast, Mr Ramsey indicated there was an intention to find the pipe and on inspection none were visible.

[38] I am satisfied that the purpose of the investigation was to ascertain whether there was a drainage system in place or not and I accept the evidence of Mr Elliott that if they had dug down deeper they would have destroyed any piping which was in existence.

[39] Mr Waugh gave evidence that he had engaged Turkingtons to carry out drainage work to the lands. He stated that works of drainage were carried out at the Selshion Road side of the property, namely where the orchard had formally been. He stated that drains and pipes were put in this location. He further stated that a stone shore and piping had also been installed along the line of the former hedge. He produced an invoice from Turkingtons which set out details of works done which included piping and this invoice was dated July 2013 and came to a total of over £8,000.

[40] I consider there were some limitations in respect of the evidence of Mr Waugh in relation to the works. He was not present at the site when the works were done and therefore, he relied upon the invoice. The invoice did not detail that these works were carried out at this site and it appears from the other invoices that Mr Waugh engaged Turkingtons to carry out other drainage work at another location at Moy Road. Therefore, it is difficult to tell from the invoices alone whether drainage work was done which included piping. Turkingtons were not called to prove what works they carried out at the site.

[41] To ascertain whether new drainage work and piping was inserted it is necessary to consider the evidence of the lay witnesses, the experts and also the invoices. I am satisfied on the basis of the evidence of the expert that stone shores were in existence at the area which was formerly the orchard and that these were like the original system of the orchard. Further, I am satisfied from the inspection

that was carried out that stone shoring was placed along the line of the former hedge. There is no independent evidence to confirm that piping was installed in either the area of the former orchard or along the former hedge line. I did, however, listen carefully to Mr Waugh's evidence in respect of this.

[42] On the basis of all the evidence I am satisfied that there was disturbance of the previous drainage system. Secondly, I am satisfied that stone shores were placed in the area formerly occupied by the orchard and, according to the evidence of Mr Ramsey, these looked like the original system of the orchard and, therefore, I am satisfied that they were similar to the shores that previously existed in this area. I am also satisfied that stone shores replaced the former sheugh along the former hedge line and this was similar to the drainage provided by the sheugh.

(c) Is the present drainage system efficient?

[43] Mr Elliott gave evidence that there was more than one drainage network serving the field. He calculated the catchment area of the field which flowed towards Mr Judge's property consisted of 0.78 hectares. The water from this catchment area he stated went into a separate gully on the Selshion Road namely the lower gully coloured orange. The discharge from the remainder of the field went into the upper gully on the Selshion Road. His evidence was that both drains were active. His evidence was that the drain for the catchment area of the field which flowed to Mr Judge's land went to the orange drain in the Selshion Road was efficient and not overflowing. In addition, he said that the ridge between Mr Judge's and Mr Waugh's land acted as a barrier so that water did not overflow on to the plaintiff's land.

[44] Under cross-examination he accepted that the ridge would stop run-off water but would not stop seepage through to Mr Judge's land. He further accepted that the drainage from the defendant's field into the upper gully was not efficient as demonstrated by videos which showed a vigorous flow of water out on to the Selshion Road and significant ponding in the field. He did, however, remain of the view that the gully which served the catchment area which flowed to Mr Judge's land was efficient and was not overflowing. He accepted however that there was ponding in the field around this gully point.

[45] Mr Ramsey's evidence was that the field drains were not adequate and this was demonstrated by the fact there was ponding in the field and the video evidence which showed the gullies overflowing onto the road.

[46] I am satisfied that the drainage system for the field which ran into the upper gully was not adequate as the videos clearly showed a very vigorous flow of water on to the road. Further, although Mr Elliott said the lower orange drain was not overflowing and was efficient I noticed significant ponding around this area and in the video I also saw a vigorous flow of water from this gully. I therefore consider that it also is not working efficiently. Consequently, I am satisfied that the drainage

system from the field is not efficient and, in particular, the part of the field which drains towards Mr Judge's land is not efficient. Consequently, excess water now travels from the defendant's land on to the plaintiff's land.

(d) What is the cause of excess water now emanating onto the plaintiff's land?

[47] The key issue is whether the excess water which now emanates onto the plaintiff's land arises because the defendant has put in a less efficient drainage system, as the plaintiff contends, or alternatively whether it is due to either individually or collectively the fact that the orchard has been removed, there has been an increase in annual rainfall, the soil has poor drainage qualities, the plaintiff's land is located at the bottom of a hill and below the defendant's land and there is a lack of drainage on the plaintiff's own land.

[48] The nature of the soil, the location of the plaintiff's property at the bottom of the catchment area and the lack of drainage on Mr Judge's land are all matters which have not changed since 1999 and, therefore, I find that these cannot account for the excess water which now emanates on to his land.

[49] The only other possible causes therefore which would cause excess water are either a less efficient drainage system or, in the alternative, an increase in water due to the removal of the orchard and/or an increase in annual rainfall.

[50] On the basis of my findings of fact set out earlier, I am satisfied that the new drainage systems are similar to the previously existing drainage systems. Mr Ramsey accepted that the drainage system in the area formerly occupied by the orchard was similar to the old orchard scheme. I am satisfied that the insertion of stone shoring along the line of the former hedge is equivalent to the former sheugh which I have found to have existed.

[51] It is, however, clear from my findings of fact that there is now an excess of water going into the plaintiff's land. Such an excess has to be explained in some other way if it is not due to a change in the layout of the drainage system.

[52] I consider that the evidence indicates that the cause of the excess water is due to the removal of the orchard and also an increase in rainfall.

[53] At the experts' meeting the experts agreed "orchard likely to have provided more absorption of water from field reducing roughness coefficient." Further, Mr Ramsey was instructed by Mr Judge that the problems with flooding and ground saturation only occurred after the orchard trees had been removed and the ground had been re-profiled. I am therefore satisfied that the removal of the orchard trees, which Mr Ramsey and Mr Elliott both indicated were "thirsty" and therefore drank up a large part of the water on land, had a significant impact in respect of the amount of water which now flowed from the land onto Mr Judge's land. As appears from the instructions given to Mr Ramsay Mr Judge instructed that the problem with

excess water was related to the removal of the orchard. He did not attend to give evidence and therefore I accept that it was his view that the removal of the orchard was linked to the increase in water on his premises. Secondly, I am satisfied that the increase in rainfall is a material consideration giving rise to the increase in excess water flowing to Mr Judge's land. Mr Elliott gave evidence about the increase in annual rainfall over the relevant period and in his view this was "a material consideration."

[54] I am therefore satisfied that the cause of the excess water on Mr Judge's property arises as a result of the removal of the orchard and also because of the increase in rainfall rather than as a result of Mr Waugh installing a less efficient drainage system on his land.

The relevant law

[55] The plaintiff's case is pleaded both in nuisance and negligence. According to John Murphy, *The Law of Nuisance* (Oxford) at para 1.05:

"private nuisance can nowadays be understood as any ongoing or recurrent activity or state of affairs that causes a substantial and unreasonable interference with a claimant's land or with his use or enjoyment of that land."

[56] There is however, widespread judicial and academic disagreement about where the boundaries of private nuisance lie and, in particular, the relationship between private nuisance negligence and the rule in *Rylands v Fletcher* especially in relation to "acts of nature."

[57] In *Sedleigh-Dentfield v O'Callaghan* [1940] AC 880 trespassers laid a pipe to carry away rainwater from the defendant's land. During a heavy rain storm the pipe was blocked by leaves and sticks and the water overflowed and damaged the plaintiff's property. The court held the defendants liable on the basis the defendants had "knowledge or presumed knowledge of the danger posed by an inadequate pipe (they failed to fit to the end of it) and they failed to take reasonable means to bring it to an end." Similarly, in *Goldman v Hargreaves* [1967] 1 AC 645 the defendants were held liable when they failed to properly extinguish a tree which had been set alight by lightning and the fire spread to neighbouring land. In both these cases the language used indicates that liability rested upon negligence.

[58] In *Leakey v National Trust* [1980] QB 485 CA, however, the Court of Appeal confirmed that the National Trust were liable when a natural hill on their land slipped by reason of natural forces causing damage to the defendant's continuous property. The court followed *Goldman* as to the existence of a duty and as to its scope on content and indicated that this case was decided as a case in private nuisance.

[59] As John Murphy notes at para 1.28 the law in this area is so confused that it is impossible to assert with certainty whether these cases are better seen as falling within the scope of private nuisance law or the law of negligence.

[60] The major difference between treating them as negligence cases rather than nuisance cases is in respect of the different standard of care. In nuisance cases Lord Wilford said in *Goldman* that the standard is “what it is reasonable to expect of (the occupier) in his individual circumstances.”

[61] For the purposes of the present case it is necessary to consider the standard of care which arises in respect of the change in user of the land from an orchard to agricultural use and secondly, in relation to allowing a watercourse to become obstructed by the growth of natural vegetation.

[62] There is a longstanding view that liability for nuisance should be determined by reference to the principle of “reasonable user.” In *Green v The Right Honourable Lord Somerleyton and others* [2003] EWCA Civ 198 the court applied the *Leakey* principles to a flooding claim and Lord Justice Jonathan Parker reached a number of conclusions in respect of liability in nuisance and stated at para [78]:

“In *Leakey*, this court held that an occupier of land owes a general duty of care to a neighbouring occupier in relation to a hazard occurring on his land, whether such hazard is natural or man-made (the “hazard” in *Leakey* being an unstable mound of earth which was present on the land not as a result of any human action or activity on the land). As to the nature and extent of such duty of care, Megaw LJ said (at *ibid.* p.524D-E):

‘... the nature and extent of the duty is explained in the judgment in *Goldman v Hargrave* [1967] 1 AC 645 at pp.663, 664. The duty is a duty to do that which is reasonable in all the circumstances.’”

[63] Within this legal framework it must be considered whether the defendant’s use of his land in changing them from an orchard to agricultural use was reasonable use and secondly, whether this change has caused damage to the neighbouring property and, if so, whether in all the circumstances the defendant has failed to do what is reasonable in all the circumstances.

[64] In the present case I consider that a change of use by the defendant from an orchard to agricultural use is an entirely reasonable use of land. There should be ‘give and take’ between neighbouring occupiers of land. Using the lands for pasture is a common and ordinary use of the lands and, indeed, Mr Coyle on behalf of the plaintiff, accepted that he was not seeking to impose liability on the basis that there

had been a change of use. I therefore find no liability arises from the change in use of the field.

[65] Mr Coyle further accepted that an occupier of land is not liable for the natural flow of water from higher to lower ground. The increase in the flow in the present case I have found also arose as a result of an increase in rainfall. I do not consider that any liability arises for an increase in water flowing due to an increase in annual rainfall.

[66] For these reasons, I do not consider any liability attaches to the defendant in respect of the increase in water flowing on to the plaintiff's land as I have found this arose from a change of use from the orchard to pasture and also because of an increase in natural annual rainfall.

[67] In these circumstances, it is not necessary for the court to consider whether damage was caused to the plaintiff's property as a result of the excess water as I have found no liability attaches to the defendant.

[68] I have set out above my view of the law in relation to the defendant's liability for obstructing the natural waterway and the adverse impact this had on the soakaway and the septic tank.

Conclusion

[69] I award damages to be agreed, or in default of agreement, as assessed in respect of the costs of applying and connecting to the mains.

[70] I will hear the parties in respect of costs.