Fitzpatrick and Others v Spencer

Ref. CH-2016-000289

High Court of Justice Business and Property Courts Chancery Division

13 October 2017

[2017] EWHC 2868 (Ch)

2017 WL 04581945

Before Mr Justice Morgan

13th October 2017, 10:28 TO 11:19

Representation

Mr G Healey appeared on behalf of the Claimants.

Mr P Petts appeared on behalf of the Defendants.

Judgment

Mr Justice Morgan:

1 There are two matters before me. The first is an appeal against an order made by his Honour Judge Gerald in the Central London County Court on 11th November 2016. The second is an application for an extension of time for appealing and for permission to appeal (with appeal to follow, if appropriate) against an order made by the same judge on 21st December 2016.

2 The principal matter is the appeal against the order of 11th November 2016. What the judge did on 11th November of 2016 was that he gave summary judgment for the defendants in relation to one part of the claim made by the claimants. In accordance with that summary judgment, the judge struck out parts of the particulars of claim. In the first appeal, the claimants submit that the judge should not have given summary judgment in that way but, instead, the relevant part of the claim, as originally pleaded, should go to trial, with the trial to take place following disclosure and witness statements and probably expert evidence.

3 The claim was issued on the 5th March 2015. The claimants served their particulars of claim on 2nd July 2015. The particulars of claim identify two sets of premises. It is said that one set of premises has acquired an easement of drainage by prescription over the other set of premises. I will refer to the premises as the "dominant tenement" and the "servient tenement", without prejudice to any dispute as to whether such an easement exists.

4 For the purposes of the argument on this appeal, it was assumed that an easement existed to some extent. I do not know if that would also be accepted at any trial of this claim.

5 The servient tenement is said to be 11 Westbourne Road, Islington, London, N7. That property is a large house, converted into flats. I was shown a photograph of the house, which suggests it was built in Victorian times. More recently, there have been further works done on the servient tenement but they are not relevant for present purposes.

6 The dominant tenement is an area to the rear of 11 Westbourne Road. It is possible that the dominant tenement includes some part of an area to the side of 11 Westbourne Road, which gives access to the area to the rear from Westbourne Road itself.

7 In his judgment given on 11th November 2016, the judge did not make any specific findings about the extent of any dominant tenement. Although I can see that there is likely to be an issue as to the extent of the dominant tenement if an easement of drainage were found to exist, that is not a matter which has been investigated at this hearing and I do not make any findings about it. I will proceed in this judgment on the basis that the dominant tenement is or includes land to the rear of 11 Westbourne Road.

8 At present, the dominant tenement is owned by the claimants and the servient tenement is owned by the defendants. For the purposes of the first appeal, I will proceed on the basis that the claimants will be able to show that, for a lengthy period of time, well in excess of 20 years before any relevant date, there has existed a drain pipe underneath the servient tenement and that water or effluent of some kind or other has flowed from the dominant tenement, through the pipe, under the servient tenement to the public sewer in Westbourne Road.

9 The particulars of claim plead the existence and extent of the easement claimed as follows. Paragraph 7 begins with the words: "At all material times prior to the claimant's acquisition of the" - and I interpose dominant tenement - "and certainly since 1985 at the latest", then certain matters are set out.

10 In paragraph 7(a) it is pleaded that a drain pipe existed as I have described.

11 Paragraph 7(b) is in these terms: "The claimants and their predecessors in title, the occupiers of the dominant tenement, have at all times and without interruption used the drainage pipe from the dominant tenement to the manhole" - I interpose that is in the servient tenement; continuing with the quotation - "to discharge sewage, foul waste and surface water into the drains serving the dominant tenement and from there to the public sewer."

12 Paragraph 7(c) pleads that the occupiers of the dominant tenement have enjoyed the right to use the drainage pipe for the purpose stated above, as of right, and openly, not by force and without the permission of the proprietors of the servient tenement.

13 Paragraph 8 pleads that the claimants have the right to use the drainage pipe in the manner set out in paragraph 7(b) of the pleading by virtue of a grant by deed made by all the necessary parties which has since been accidentally lost or destroyed or, alternatively, pursuant to section 2 of the Prescription Act 1832 .

14 The particulars of claim then plead that the claimants replaced a part of the pre-existing drain with a new pipe or a drain. The claimants did that in connection with their development of the dominant tenement. That development consisted of the demolition of some garages previously on that land, followed by the erection of two new houses.

15 It is then pleaded that the defendants removed the new pipe. The claimants say that the defendants' removal of the new pipe caused them loss and damage. The claim to recover loss and damage is pleaded in some detail, in paragraphs 21, 22 and 23 of the particulars of claim. I need not go into the detail of how the damages are said to have arisen.

16 On 14th October 2016, the matter came before Judge Gerald in the Central London County Court, when there was intended to be a case management conference. The case management conference did not proceed in the way intended but, instead, the judge adjourned the matter to the 28th October 2016. He directed that, on that occasion, the claimants were required to show cause as to why the matter should not be struck out as having no real prospect of success. His order goes on to refer to the claimants being required to file and serve a brief and succinct skeleton argument, and then he uses these words "and any concise evidence in support of the central aspects of the claim." He then permitted the defendants to file a brief and succinct skeleton argument in response.

17 The matter came back before Judge Gerald on the 28th October 2016 but the only order made on that occasion was to adjourn the hearing to the 11th November 2016, with a time estimate of half a day.

18 On 11th November 2016, Judge Gerald heard argument as to whether the claimants had a real prospect of success in relation to their claim for damages based upon an allegation of interference with the prescriptive easement, as pleaded by them in paragraph 7 of their particulars. Following argument, the judge gave judgment and made an order striking out part of

the claim.

19 The order made by the judge provided that paragraph 7(b) of the particulars of claim should be "amended" to read as follows, and the new paragraph 7(b) was to be in these terms: "The claimants and their predecessors in title, the occupiers of the dominant tenement, have, at all times and without interruption, used the drainage pipe from the dominant tenement to the manhole to discharge rainwater and surface waste water from cleaning the yard into the drain serving the freehold and, from there, to the public sewer."

20 The judge's order continued with an order striking out the claim to damages set out in paragraphs 21, 22 and 23 of the particulars of claim. The judge's order was to the effect that the claimants were to pay the defendants' costs of and occasioned by the hearings on 28th October 2016 and 11th November 2016, to be summarily assessed on the standard basis on a future specified date.

21 Pausing there, it can be seen that, apart from striking out in its entirety the claim to damages for interference with the easement which had been claimed, the judge had cut down the permissible ambit of the claim to an easement. Instead of a claim to an easement to discharge sewage, foul waste and surface water into the relevant drain, the claim was now restricted to an easement to discharge rainwater and surface waste water from cleaning the yard into the relevant drain.

22 Before going to the judge's reasons for his conclusion, it is helpful at this point to consider the material which the claimants have put forward to show that they have a real prospect of establishing their pleaded case at a trial.

23 It now appears to be common ground that there is indeed a drain under the servient tenement and that, for a lengthy period, a drain, or drains, on the dominant tenement have discharged into the drain under the servient tenement. As to the length of time that the drain has been there under the servient tenement, I can see that it is possible that the drain in question was constructed when number 11 was built in the Victorian era. It is also common ground that the diameter of the drain is 6 inches.

24 In the light of that common ground, it becomes important to know what use was made by the dominant tenement of the drain under the servient tenement. It would therefore be relevant to know what use has been made of the dominant tenement in that time and what, if anything, was discharged into the relevant drain. The particulars of claim do not plead any particulars of those matters. Paragraph 7(b) of the particulars of claim consists of a bare assertion as to the use made of the drain. However, the claimants relied, before the judge on 11th November 2016, on a statement from a Mr Carpenter. That statement is again relied upon in the argument before me. Mr Carpenter's statement is dated March 2016. It is short and, in view of the arguments which have been addressed to me, I will read it in its entirety.

25 "(1) Until 2008, I owned the property known as 11 Westbourne Road, London N7 8AR, which consisted of a ground floor, basement, two garages and three outbuildings at the rear of the building, for a period of 13 years. Prior to owning the property, I rented it for a period of 10 years, making a total of 23 years."

26 I break off at that point to indicate that, when Mr Carpenter refers to the ground floor and basement, he appears to be referring to a flat in number 11 rather than the entirety of number 11. I continue with paragraph 2 of the statement, in these terms:

27 "Before renting the property, I owned a building company, which converted both 9 and 11 Westbourne Road into flats. My company did not own the flats. I am therefore very familiar with the drainage system at the rear of number 11 Westbourne Road.

28 "(3) There was a manhole at the rear of number 11 which had two soil inlets, one for rainwater and the other inlet was from the upper end of the yard. These drains have always been in existence. I was told by Mr Horace Way that the buildings were historically used as horse stables, which would account for the fact that it was built with a 6 inch drain, to accommodate a greater volume of waste than the standard 4 inch drainage pipes which I believe have been installed for all of the neighbouring property.

29 29. "(4) The drains used to serve the yard and the garages at the rear of number 11. The

drains carried rainwater and waste water. I carried on my business in the yard and frequently used the water supply so that waste water flowed through the drains. I employed six persons and the site was used by six number of persons each day. I have marked the drains on the attached plan in red. In particular, we cleaned the yard for 30 to 45 minutes each day. We used water to clean our vehicles, which were four in number. We used water to clean one boat and one motor home that we kept at the premises, as well as make tea, wash and generally use water for miscellaneous purposes. I believe that the facts stated are true."

30 Attached to the statement is indeed a plan showing the presence of drains on the dominant tenement leading to the servient tenement. It is not necessary in this judgment to describe in any further detail what is shown on the plan.

31 Mr Carpenter's statement is brief but he seems to make the following points.

> (1) The drain under the servient tenement - and probably the drains in the dominant tenement - have been there "always", which suggests that the drainage dates back to the construction of the house on number 11.
>
> (2) The dominant tenement has been used in two different ways in the past.
>
> (3) The first way in which the dominant tenement was used was as horse stables, and presumably a yard.
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> (4) Mr Carpenter does not say when the use as horse stables started and ended. I can see that horse stables behind a house in Islington might have been appropriate when number 11 was built. I am less clear as to when that might have ceased to be the position.
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> (5) The second way in which the dominant tenement was used was as garages and a yard. This was the use made since 1985 and it is entirely possible that this use began before 1985 and that the use of stables ended long before 1985.
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> (6) There is a water supply to the dominant tenement. Amongst the types of effluent which passed into the drains was waste water from cleaning various vehicles and a boat. (I interpose that this use goes beyond the judge's formulation of waste water from cleaning the yard.)

32 It can be seen that the evidence from Mr Carpenter as to the use of the dominant tenement as garages is potentially useful evidence, although it is very briefly expressed. There is more room for argument as to the evidence as to the use of the dominant tenement as stables. If the dominant tenement really had been used as stables, it ought not to be unduly difficult to establish that fact and to provide much more detailed evidence about it.

33 There are some obvious questions which could be addressed by such evidence. When did that use begin and when did it end? What was the extent of the use? Were the horses kept in connection with the use of number 11 as a residence or was there a more extensive use of the yard and stables? Were there typically one or two horses or more than that?

34 I am not told whether the claimants have done any researches of this kind. It is now two and a half years since they brought these proceedings. It is one and a half years between the commencement of the proceedings and the judge's order which is now under appeal. I find it difficult to understand why the claimants have not done the further research which is appropriate

if they are serious about pursuing this claim.

35 Equally, I was not told that the defendants have done any researches of this kind. They have been facing a claim to a right to drain sewage into the drain since the matter was pleaded in July 2015. They certainly could have done something to investigate the historic use. I accept, however, that they only received Mr Carpenter's statement at the end of October 2016 and the relevant part of the claim was struck out on 11th November 2016.

36 For the sake of completeness, I ought to refer to the witness statement of Mr Fairburn of 26th October 2016. Mr Fairburn is the solicitor for the claimants and he exhibited the statement from Mr Carpenter. In case it matters, I refer to paragraph 8 of Mr Fairburn's statement. Mr Fairburn states three things. First, there is a water tap on the dominant tenement, secondly, there was a portable lavatory on a certain area of land for 3 years, used by up to twenty persons per day, and, thirdly, he produces photographs of the dominant tenement, taken in September 2011. He refers to the extent of the hard standing shown in the photographs and he makes the point that the hard standing must have had some drainage.

37 By itself, that further material does not add very much, if anything, to what Mr Carpenter had said. I do not, at the moment, see how the presence of a portable lavatory for a short period bears upon the ultimate decision in this case.

38 That then is the material about the historic use of the drain. It looks as if neither side has really investigated matters which call out for investigation. Both sides appear to have been content to continue this litigation and to postpone the time when they will get around to investigating whether the claim, or the defence of it, can be pursued with any prospect of success. That is not a sensible way to conduct litigation.

39 On the evidence to which I have referred, it seems to be accepted that the claimants have a real prospect of establishing a right, acquired by prescription, to discharge rainwater and surface waste water from cleaning the yard into the drain under the servient land. The claimants of course go further. They say they have a real prospect of establishing a right, as they have pleaded, acquired by prescription, to discharge sewage, foul waste and surface water into the drain under the servient tenement.

40 The parties are agreed as to some of the legal principles to be applied. Both sides referred to the way in which the matter is described in Gale on Easements, 20th edition, at paragraph 9-03. The paragraph in question specifically deals with the acquisition of rights of way by prescription but it is accepted that the general statements in that paragraph apply to other easements arguably acquired by prescription.

41 There appear to be three parts of the paragraph which may be material.

42 The first is as follows: "The general rule is that where a right of way is acquired by user, the extent of the right must be measured by the extent of the user."

43 The second passage is as follows: "Applying the general principle that every easement is a restriction on the rights of property of the party over whose lands it is exercised, the real question appears to be, on the particular facts of each case, whether proof has been given of a right coextensive with that amount of inconvenience sought to be imposed by the right claimed."

44 The third passage is: "It will therefore be for the court to infer the extent of the supposed grant from the actual amount of injury proved under all the circumstances attending it. If it appeared that the way had been used for all the purposes required by the claimant, there would be strong evidence of a general right while, on the other hand, proof that the party, having occasion for a particular use, had not made that use of the way in question would be almost conclusive evidence that he has not a right of way for this particular purpose."

45 Mr Petts, counsel for the defendants, supplemented that passage from Gale by citing *Dewan v Lewis, [2010] EWCA Civ 1382* , and, in particular, what was said by Lord Justice Carnwath at paragraph 24 of his judgment. He referred to one of the passages from the eighteenth edition of Gale on Easements at paragraph 9-03 and he added the following:

> "Such a right is a restriction on the rights of the owner of the servient tenement. The

> justification is that, by acquiescence over a long period, he has lost the right to object to it. By the same token, he should not be taken to have lost the right to object to a user more onerous than that which has in fact taken place."

46 Lord Justice Carnwath regarded the question as to the extent of the right which has come into existence as being a different question from questions as to excessive user of an established right; see paragraph 26 of his judgment.

47 In paragraph 37 of his judgment, Lord Justice Elias referred to this question and he appeared to regard the issue as to the extent of the right which has been acquired as raising similar considerations to the question as to whether there has been excessive user of an established right. I need not, I think, read out paragraph 37 of that judgment.

48 The current edition of Gale also refers to the recent decision of the Supreme Court in *Loose v Lynn Shellfish [2016] 2 WLR 1126* . In that case, Lord Neuberger, at paragraph 46, referred to the general rule as having been accurately set out in paragraph 9-03, this time of the nineteenth edition of Gale on Easements. What he approved was the following statement, which I've already read from the twentieth edition but I will repeat: "When a right of way is acquired by user, the extent of the right must be measured by the extent of the user."

49 I will not refer in more detail to the judgments in *Loose v Lynn Shellfish* , although they do contain matter which would be material if this case were to go to a trial. Paragraph 45 is relevant to this type of enquiry because it stresses the importance of the actual use of the right and it steers the court away from attempting to do a drafting exercise in relation to the notional or fictional grant of the easement. Lord Neuberger said something similar at paragraph 69 of his judgment.

50 Building on that degree of common ground between the parties, Mr Healey, for the claimants, then submitted that, on the evidence referred to above, the claimants could establish a right to discharge through the drain any effluent that was suitable for discharge into a public sewer. That way of putting the claim would include the case as pleaded, which referred to sewage, foul waste and surface water. Mr Healey submitted that the judge was wrong to confine the right to the discharge of rainwater and surface waste water from cleaning the yard. The claimants wish to assert the wider right because they want to say that they had a right to connect the drains from the two new houses to the drain under the servient tenement. I assume that the new houses will produce the usual effluent as they have toilets, baths and/or showers, kitchen sinks, hand basins and, I assume, dish washers and washing machines.

51 In support of his submission, Mr Healey submitted that it would be wrong to distinguish between different types of effluent. Any effluent suitable for discharge into a public sewer could be discharged into the drain without increasing the burden on the drain. After all, he pointed out, that drain was used to drain away all the usual effluent from the flats in number 11 itself. He submitted that the claimants ought to succeed in their claim, based on the evidence as to the use of the dominant tenement as garages since 1985 and whatever the position was as to the period when the dominant tenement was used as stables.

52 Mr Petts, for the defendants, supported the conclusion of the judge. In particular, he stressed that the only effluent which could be drained from the dominant tenement was surface water even if the water has spilled on the surface as a result of the use of a hose to wash down vehicles. Thus, on his submission, the right did not extend to sewage; nor, for that matter did it extend to water from a bath or a shower or a kitchen sink or anything else that was not surface water.

53 I need to mention at this point that, when the case was argued before the judge, counsel then appearing for the claimants - not Mr Healey - conceded by way of agreement with a suggestion from the judge himself that the right which would have been acquired by reason of the user between 1985 and 2008 would not have included a right to discharge sewage into the drain. Counsel conceded that because he accepted that, from 1985 to 2008, no sewage had been discharged into the drain. However, he relied on the position before 1985 - possibly long before 1985 - when the stables were there, when he said it could be inferred that some horse manure and horse urine would have been washed down into the drain. Thus, he submitted, the right acquired extended to faecal matter and no distinction should be drawn between animal and

human faeces. Mr Healey submitted that counsel's concession was wrong and that he should be allowed to withdraw it on this appeal.

54 Before considering the reasons given by the judge for his conclusions, I will indicate my own reaction to the limited evidence in this case and to the submissions which I have heard.

55 I will start with the limited evidence about the use when there were stables on the dominant tenement. This is truly exiguous evidence but, nevertheless, it exists and it has not so far been contradicted by the defendants. Based on this evidence, it is possible that a court could hold that, when the stables were there, the occupiers of the dominant tenement had discharged into the drains some faecal matter, being some manure and urine, which was washed into the drains when the stables and yard were washed down. I think it is unlikely that horse manure was shovelled into the drains in any quantity but I accept that water polluted with horse manure and urine may well have been discharged into the drains.

56 A possible problem with this evidence is that it does not say when this user took place. For how long were horses kept on the dominant tenement? What length was the gap between the horses being kept on the dominant tenement and 1985, which is the beginning of the period described by Mr Carpenter himself? The claimants certainly cannot show the discharge of faecal material into the drains for 20 years up to the commencement of this action - see section 4 of the Prescription Act 1832 - but they rely in the alternative to the 1832 Act on the principles of lost modern grant.

57 Then, in addition to the evidence of use by horses, there is the evidence of the drainage of surface water and also of washing down of vehicles by Mr Carpenter from 1985 to 2008.

58 As regards the evidence which might be available to be considered at the trial, Mr Healey submitted that there will be more evidence than is currently available and that the court should not dismiss the claim on a summary basis at this stage, thereby preventing the claimants from carrying out researches and marshalling the available evidence. As to that submission, this is not a case where the claimants are likely to obtain very much, if anything, worthwhile on disclosure by the defendants. It the claimants are to find further evidence, then they will have to do some research and obtain it. Put that way, I do consider it is likely that, if this case proceeds, the claimants will do the necessary research. Having tried a number of cases in which it was relevant to make findings as to the use of land over a period of many decades, it seems to me that evidence as to former use is eminently available. I repeat that I am surprised that the claimants do not seem to have taken these obvious steps already but apparently they have not.

59 Standing back, my reaction to this state of affairs is that this case should be allowed to proceed and not be disposed of summarily. There is a real prospect that the claimants will be able to show that there has been use of the drain for the discharge of different kinds of effluent, including faecal matter, over the years. If so, they have a real prospect of showing the acquisition of the right as pleaded by them. This being my own reaction to the evidence and the submissions, I need to consider the approach of the judge.

60 The judge was rightly critical of the fact that the claimants had done so little to marshal the evidence which they would need to establish their case. However, I consider that he was too dismissive of the evidence as to the use made by horses and the inferred consequences of that use. The judge ought to have accepted that this evidence could support a finding that effluent containing faecal matter had been discharged into the drains. If, which is not clear to me, the judge made a distinction in his judgment, as distinct from what was said in the course of argument, between animal and human faeces, I doubt if that distinction was justified.

61 Further, I think that the judge should have been influenced in the claimants' favour by the consideration that, if there was anything in the evidence about use by horses, that matter would be the subject of much more extensive evidence at a trial. Accordingly, I disagree with the judge's conclusion that the claimants have no real prospect of establishing the easement which they have pleaded.

62 I can see that, at the trial, there might be a real point as to how to determine the extent of the right which has been acquired. The test stated in Gale at paragraph 9-03 appears clear but there can be real difficulties in its application in a particular case. The task for the court is to determine the extent of the user in which the servient owner has already acquiesced and where to draw a line to enable the servient owner to object to a different use in which he has not acquiesced. The

problem comes in drawing the line. The problem comes in deciding whether the two matters involve different uses or simply two varieties of the same use.

63 In the case of rights of ways, there appears to be no difficulty in distinguishing between a right of way on foot, on horseback and with vehicles as three different types of use of a right of way. The position may be much more difficult with the types of effluent which may be discharged into a drain.

64 There is a lot to be said for an argument which distinguishes between effluent coming from a dominant tenement which contains faecal matter and effluent which does not. However, that argument may not be so strong in this case, where the drain under the servient tenement was presumably designed for the very purpose of discharging effluent containing faecal matter to the public sewer. Further, whatever can be said in support of the distinction in general terms, it is possible that that distinction will not be appropriate in this case if it is shown that the drain was used for the discharge of effluent containing faecal material during the time when the dominant tenement was used as stables.

65 As to Mr Petts' argument that the key distinction is between surface water and other water, I'm not persuaded that fits with the evidence of Mr Carpenter as to washing down vehicles, unless one treats surface water as including both water falling on the surface naturally and water artificially placed on the surface by the use of the hose. It is not obvious to me that one should distinguish between waste water from washing down a car and waste water from a domestic shower.

66 With those comments on how the relevant test might be applied at a trial, I will not at this stage further discuss the application of the test. I consider that it is only sensible to apply the test when the court has made its findings on the evidence before it as to the use made of the drain by the dominant tenement. As I have indicated, whether the concession made by counsel below was right or wrong, I take the view this case ought to proceed to trial for evidence to be given and findings of fact to be made.

67 Having reached that conclusion, I do not consider that it is necessary for me to consider whether to permit the claimants to withdraw that concession for the purpose of arguing this appeal. Accordingly, it is not necessary for me to consider whether the claimants need to amend their appellant's notice in that respect. I will not therefore consider whether they have put forward sufficient grounds for being allowed to amend their appellant's notice at a very late stage, just before the hearing of this appeal.

68 That is not the end of the matter because the judge had a second reason for his conclusion. It was submitted to him that, even if the claimants could show they had acquired the right which they pleaded, that right would not entitle them to discharge effluent, including faecal material, from two houses which had six or possibly eight WCs and six baths or showers. The judge correctly directed himself that a question of that kind was to be decided in accordance with the principles in *McAdams Homes Ltd v Robinson 2005 1 P&CR 30* . In that case Lord Justice Neuberger said the following:

> "(49) The issue before the judge was whether the drainage easement, impliedly granted in 1982, at a time when the dominant land was used as a bakery, could continue to be enjoyed following the redevelopment of the dominant land for the purpose of two residential houses.
>
> "(50) The authorities discussed above appear to me to indicate that that issue should have been determined by answering two questions. Those questions are (1) whether the development of the dominant land, ie the site, represented a 'radical change in the character' or a 'change in the identity' of the site … as opposed to a mere change or intensification of the use of the site … (2) whether the use of the site as redeveloped would result in a substantial increase or alteration in the burden on the servient land, ie the cottage.
>
> "(51) In my opinion the effect of the authorities in relation to the present case is that it would only be if the re-development of the site represented a radical change in its character and it would lead to a substantial increase in the burden that the dominant owner's right to enjoy the easement of passage of water through the pipe would be

suspended or lost."

69 Lord Justice Neuberger made further comment as to carrying out the exercise he had identified when he said at paragraph 66 that one had regard to the likely range of levels of flow for, in the first instance, a bakery and, in the second instance, the two houses. One looked at the likely range of levels of flow rather than actual levels, for reasons which he explained.

70 In this case the dominant tenement has been altered from stables to a yard with garages and then altered again to two houses and their curtilage. I assume that the houses have the usual requirements as to drainage and, in particular, as I have described, they have six to eight WCs and six baths or showers.

71 It is agreed that the most recent development of the dominant tenement in this case resulted in a radical change in its character. Everything then turns on the answer to the second question in the *McAdams* case, namely whether the use of the dominant tenement as developed would result in a substantial increase or alteration in the burden on the servient land.

72 The judge asked himself that question. At paragraph 27 of his judgment, he said this: "It also seems to me self-evident that that is a substantial increase or alteration in the burden on the servient land. It seems to me quite obvious that two separate dwellings, with those amounts of en suite facilities, will increase the burden of the use of the drain from that which had hitherto been used, especially if one bears in mind that, in addition to drainage of both foul and surface water from the dwellings, there would also be drainage of surface water from, not only the rest of the yard, which is not built over, but also the whole of the side access way, which, on the evidence before me, previously did not drain into the existing drainage system."

73 Having reflected on the matter, I am not able to agree with the judge. He did not, and this court does not, have the evidence at this stage which would enable one to answer the question, which is a question of fact and degree. I do not regard the answer as self-evident, as the judge regarded it. There must be evidence to enable the court to weigh the matters referred to in the *McAdams* case and to come to its decision. The matter ought not to be disposed of on a summary basis and without evidence.

74 So that it is not overlooked, I also point out that the judge may be right as to the extent of the dominant tenant and whether the land which would have drained into the drain following the development included land which was not part of the original dominant tenement. However, that is a different point from the main point considered in his paragraph 27. Land which is not part of the original dominant tenement does not have the benefit of the right of drainage acquired only for the benefit of the dominant tenement. It follows that I will allow the first appeal.

75 As I indicated at the beginning of this judgment, there is a second appeal before the court. I need say very little about the order which was the subject of that appeal, the judge's reasons for that order, nor the grounds of appeal. I also do not need to consider whether this is a proper case in which to give the claimants an extension of time for appealing. They were 2 days late with their appellant's notice.

76 The reason why I do not need to go into the underlying matter is that it is now agreed that the order which was made on 21st December 2016 was overtaken by events, namely a further order by the judge on the 10th of February 2017. All that remains to be considered is what should happen, the costs of that appeal. Mr Healey says that I should make no order on the appeal and make no order as to the costs of the appeal. Mr Petts says that the defendants should have their costs of the appeal, at any rate from the time when the appeal became otiose but yet was not withdrawn by the claimants.

77 I consider that, when it was clear to the claimants that the second appeal was otiose, they should not have continued it. They should have withdrawn it. At the very least, they should have proposed to the defendants that the appeal be withdrawn, with no order as to costs up to that point. If the defendants had not agreed to such an order, then the matter might have had to go on, but the claimants didn't make that proposal. Instead they allowed the appeal to continue. They did not inform the court that the appeal was otiose.

78 I, myself, was required to consider the second appeal on two occasions and I made orders in it on the 27th February 2017 and the 27th March 2017. I was not told that the appeal had

become otiose. Mr Healey referred me to an email dated 12th April 2017, in which the claimant's solicitors referred to the second appeal and appeared to be saying that, if the court allowed the first appeal, then they should get their costs of the second appeal. That was not the right approach. The second appeal was otiose from 10th February 2017, irrespective of whether the first appeal was allowed or was dismissed.

79 I consider that the right order to make in relation to the second appeal is to make no order on it, save that the claimant shall pay the defendant's costs of the second appeal in relation to the period from 24th February 2017; that is 14 days after the judge's order of 10th February 2017.