PROPERTY LAW ISSUES RELATING TO DRAINAGE

INTRODUCTION

1. Since the law of sewers and drains is ancient, I propose to begin, very briefly, with a little history. That one of the earliest public health statutes enacted was Henry VIII's Statute of Sewers in 1531 reflects the general importance of sewerage to public health. But the origins of the modern law lie in the systematic construction of a network of public sewers in the 19th century, then the responsibility of statutory undertakers. The modern law thus dates from the Public Health Act 1848, which was followed by a series of acts to consolidate and amend the law – essentially in response to and to keep pace with the rapid process of urbanisation and industrialisation throughout the 19th and 20th centuries. Until relatively recently, the relevant undertakers were local authorities, but the Water Act 1989 provided for the transfer of most of those statutory functions to privatised water and sewage undertakers.

2. The process of urbanisation and legislation was most recently consolidated in the Water Industry Act 1991. Although this has itself been substantially amended, it remains the principal source of the law of drainage today.

3. The tide of statute in this field has been swelled by the common law and, in particular, the established principle that an occupier of land's right to drain water onto his neighbour's is limited to water which has come naturally onto his land *but which has not been artificially concentrated, retained or diverted*.[1] In other words, it is limited to a right of 'natural drainage' onto lower land, which is "*an incident of ownership of the higher land*".[2]

4. However, the occupier of lower land is not obliged to receive water running off higher land; he may put up barriers or otherwise pin it back even though this may cause

[1] *Smith v Kenrick* (1849) 7 C.B. 515*; Rylands v Fletcher* (1868) L.R. 3 H.L 330 at 338-339, Per Lord Cairns L.C
[2] *Palmer v Bowman* [2000] 1 W.L.R. 842.

damage to the occupier of the higher land if what he does is reasonably necessary to protect his enjoyment of his own land.[3]

5. Moreover, an occupier of land has no right to discharge onto his neighbour's land water which he has artificially brought onto his land,[4] or water that has come naturally on to his land but which he has artificially, even if unintentionally, accumulated there.[5] Nor does he have any right by artificial erection on his land to cause water to flow on to his neighbour's land in a manner in which it would not, but for such erections, have done.[6]

6. It is to square this circle that the law of easements and the statutes relating to sewerage have evolved.

The Water Industry Act 1991

Definitions

7. The modern law uses a number of terms which it is important to define clearly at the outset of any discussion. These definitions are set out in section 219 of the 1991 Act.

   7.1. "Sewer" includes all sewers and drains which are used for the drainage of buildings and yards appurtenant to buildings.

   7.2. "Public Sewer" means a sewer for the time being vested in a sewerage undertaker.

   7.3. "Drain" means a drain used for the drainage of *one* building or any building or yards appurtenant to buildings *within the same curtilage*. There is quite a lot of case-law on the meaning of 'curtilage',[7] which will always be a question of fact in each case, but broadly includes a building and the land attached to it.

[3] *Home Brewery Co Ltd v William Davies & Co (Leicester) Ltd* [1987] 1 Q.B. 339 at 349-352
[4] *Baird v Williamson* (1863) 15 C.B. (n.s.) 317
[5] *Whalley v Lancashire & Yorkshire Railway* (1884) 13 Q.B.D. 131; considered in *Arscott v the Coal Authority* [2005] Env. L.R. 72
[6] *Hardman v North Eastern Railway (*1878) 3 C.P.D. 168; also considered in *Arscott* – see also *Home Brewery Co Ltd v William Davies & Co (Leicester) Ltd.*
[7] The courts have considered it 'ill-advised' to attempt to provide a comprehensive definition: see *Barwick v Kent CC* [1992] 24 HLR 341 at 346, per Sir David Croom-Johnson.

7.4. "Lateral Drain" means that part of a drain which runs from the curtilage of a building or yards within the same curtilage to the sewer with which the drain communicates or is to communicate.

8. So, take a house. Its gutters and plumbing discharge into a drain. That drain, when it crosses under the boundary with the neighbouring house, becomes a lateral drain – though it continues only to drain one building. That lateral drain joins the drain from the neighbouring house, from which point it serves more than one building and becomes a sewer.

The Nationalisation of Sewers and Drains: the 2011 Regulations

9. Predictably, the owners of private sewers and drains have not historically been overflowing with enthusiasm for their maintenance and improvement. The Government's response to the problem of flooding sewers, which came relatively late in the day, was to nationalise private sewers and lateral drains. The Water Industry (Schemes for Adoption of Private Sewers) Regulations 2011 ("the Regulations") vested in sewerage undertakers the ownership and the responsibility for maintenance of private sewers and private lateral drains. The 1991 Act has also been amended so that sewers and lateral drains constructed after 2011 and which communicate with a public sewer are automatically adopted by sewerage undertakers.[8]

10. Importantly, however, drains which are not lateral drains or sewers – that is to say, those parts of drains within the curtilage of a building – have not been vested in or adopted by sewerage undertakers and remain in private ownership, subject to ordinary property law principles. It is also possible that part of a plot of land is sold so that a new stretch of lateral drain comes into being under the retained land, which is not automatically adopted by the sewerage undertaker. As a general rule, however, all sewers – drains serving more than one building – will be public sewers.

The Right to Connect to a public sewer

[8] S.106B.

11. This vesting of sewers and lateral drains in sewage undertakers has had two important consequences. First, it has lifted the burden of *carrying out* maintenance from householders.[9] Secondly, and perhaps more importantly, it has limited the scope for disputes over rights to connect drains to sewers.

12. That is for this reason: section 106(1) of the 1991 Act confers "a right to communicate with public sewers". This encompasses a right to connect to and to discharge foul and surface water into a public sewer.

13. The right to communicate has been said to be "absolute".[10] A sewerage undertaker can only refuse to permit the communication "*if it appears to the undertaker that the mode of construction or condition of the drain or sewer does not satisfy the standards reasonably required by the undertaker, or… would be prejudicial to the undertaker's sewerage system*".[11] But an undertaker cannot refuse to permit the connection on the ground that the additional discharge into the system will overload it. The burden of dealing with the consequences of this additional discharge falls directly upon the undertaker, with the consequent expense being shared by those who pay the sewerage charges.

14. Thus, all that is technically required by the 1991 Act is the giving of 21 days' notice of the intention to connect.[12]

Land traversed by a public sewer

15. So, the effect of the 2011 Regulations, coupled with the absolute right to communicate conferred by section 106, is that any land with an existing sewer flowing beneath it can be developed, and the associated drains and sewers can be connected to that existing public sewer.

16. The situation is trickier, however, when the development land is not traversed by any public sewer, and it is here that traditional property rights come into play.

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[9] Though they may still have to pay for this through sewerage charges.
[10] *Barratt Homes Ltd v Dwr Cymru Cyfyngedic (Welsh Water)* [2009] UKSC 13*; Marcic v Thames Water Utilities Ltd* [2004] 2 AC 42.
[11] S.106(4).
[12] S.106(3).

No public sewer: the options

17. Broadly speaking, developers have four options.

    17.1. First, the land in question may have the benefit of an existing drain connecting to a lateral sewer. It *might* be possible, depending on the nature of the proposed development, to make use of that existing drain.

    17.2. Secondly, the land might have the benefit of a right to lay pipes under third party land to connect to an existing sewer or drain.

    17.3. Thirdly, if no such right already exists, a developer might be able to negotiate the formal grant of such a right with the neighbouring landowners.

    17.4. Fourthly, a developer can serve a requisition notice on a sewerage undertaker, requiring it to exercise its powers under the 1991 Act to enter onto third party land and lay the necessary drains and sewers itself, at the developer's cost.

Express easements: the principles

18. Express pipe easements come in various forms, and it is important to determine precisely the scope of any existing right in order to avoid committing an inadvertent trespass or nuisance. The construction of express grants can be notoriously contentious, especially where the deed of grant is decades old and servient landowners see an opportunity to extract a ransom. Broadly speaking, the relevant rights might involve the following:

    (1) A right to lay pipes across third party land.

    (2) A right to use pipes already in existence.

    (3) The right to maintain or repair a pipe.

19. The scope of the grant is particularly important where existing pipes are inadequate to cope with the additional demand placed on them by a new development, such that

a developer would need to enter onto the third party land and replace the existing pipe with a larger one.

20. Ordinary principles of contractual construction apply. Broadly speaking, the meaning of a grant is the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the execution of the document. The process is, of course, an objective one and the subjective intentions of the parties are irrelevant.[13]

21. Some previous decisions give a flavour of how this works in practice.

    21.1. A reservation of "*the passage of gas, water and other pipes and electric wires through the demised premises*" has been held not to authorise the laying of a new system of pipes.[14]

    21.2. However, a grant "*to lay and maintain drains, sewers, pipes and cables over under and along*" a strip of land which was to be kept as a roadway and "*the free and uninterrupted passage and running of water, soil, gas and electricity there through and the right to enter upon and open up the said land for the purposes of laying, maintaining and repairing the said drains*" has been held to be sufficient to permit the grantee to remove the pipe and put in a bigger or better one or one following a different line under the servient land.[15]

    21.3. A grant of "*a right to receive a supply of gas*" has been held on the facts and in light of the wording of the lease to entitle the dominant owner to install a bigger gas pipe in a different position from the one existing at the time of the grant, though the court recognised that a possible meaning might be a right to receive whatever gas could be obtained through the gas main existing at the time of the grant.[16]

[13] See *Gale on Easements* (20th Edn) at 9-21.
[14] *Taylor v British Legal Life Assurance Co Ltd* (1925) 94 L.J. Ch. 284.
[15] *Simmons v Midford* [1969] 2 Ch. 415, per Buckley J.
[16] *Coopind (UK) Ltd v Walton Commercial Group Ltd* [1989] 1 E.G.L.R. 241.

21.4. "*A right to run water, electricity and other services through any pipes, cables, wires or other channels… and the right to enter onto… the Retained Land… for the purpose of installing, repairing, maintaining, cleansing and inspecting the conduits*" was held not to extend to a right to install a conduit over a route different to those existing at the date of grant or a right to alter the position or size of existing water pipes – "installing" referred to the provision of other services where there was not at the date of the conveyance an existing conduit.[17]

21.5. A right to use and connect to service-conducting installations that were in, on or over the servient tenement was held to mean that the dominant owner could do whatever was necessary to connect the drains on the dominant land with drains on the servient land.[18]

Indirect connections to public sewers

22. Note that where a developer has a private law right to connect new drains and sewers to an existing private drain, it is still necessary to serve a notice under section 106 of the Water Act 1991. The general practice of sewerage undertakers is to distinguish between 'direct' connections to public sewers and 'indirect' connections via a private drain, and to require notices of intention to communicate to be served in both cases.

Implied Easements: principles

23. The absence of an express easement may not be fatal to a developer's right to connect to a sewer on third party land. Such a right may arise on a transfer of part under section 62 of the Law of Property Act 1925, or the rule in *Wheeldon v Burrows* on the basis that the right is "continuous and apparent".[19] Thus, where a plot is conveyed with an existing building connected to a drain, the right to the flow of water and soil through that drain under the servient land may pass even without express words.

[17] *Martin v Childs* [2002] EWCA Civ 283.
[18] *Dixon v Hodgson* [2007] 1 E.G.L.R. 7.
[19] See *Mcadams Homes Ltd v Robinson* [2004] EWCA Civ 214.

24. A right may also arise by necessary implication. In one case, where land intended to be used as a building plot for the erection of a house was conveyed, a right to lay and maintain utilities to serve the intended house was implied into the grant.[20]

25. Difficulties may arise with prescriptive claims based on a right being acquired after 20 years user on the basis that the user might not satisfy the "without secrecy" requirement, by virtue of being buried. Where the existence of the pipes was either known to the servient owner or where it is obvious that the dominant tenement requires a water supply or drainage and the course of a drain can readily be inferred, a prescriptive claim may succeed.[21]

Liability for excessive user

26. Excessive user of an easement gives rise to liability in trespass and, in the case of drainage easements, potentially also in nuisance. Developers should accordingly bear in mind the principles set out in 2004 by Lord Justice Neuberger in *Mcadams Homes Ltd v Robinson.*[22]

    (1) First, if a public sewerage system is in a defective condition so that sewage backs up, that cannot render unlawful an otherwise lawful use of the drain by a third party – unless that third party's own excessive user of the easement was causing or substantially contributing to, the backing up.[23] What amounts to excessive use of the right depends on the grant construed in the light of the circumstances surrounding its creation, including the capacity of an existing system and the size of the buildings on the dominant land at the date of grant.[24]

    (2) 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 an increase in the use of the easement, cannot of itself be objected to by the servient owner.[25]

[20] *Donovan v Rana* [2014] 2 EGLR 1.
[21] *Schwann v Cotton* [1916] 2 Ch. 459.
[22] [2004] EWCA Civ 214.
[23] [11].
[24] [27].
[25] [24].

(3) However, where after the acquisition of an easement the dominant owner has substantially intensified or altered the use of his property with the result that the liquid being discharged from the land is increased to such an extent that it causes the drain to overflow, the dominant owner will incur liability in nuisance.[26] Accordingly, the developer may need to consider whether the existing pipe can sustain its development, or whether it has any right to enter the land and lay a larger pipe.

(4) Where there is a change in the use of or the erection of new buildings upon the dominant land, without having any effect on the nature or extent of the use of the easement, the change will not affect the right of the dominant owner to use the easement.[27] Thus, in *Atwood v Bovis Homes Ltd*[28] Neuberger J decided at first instance that the construction of a housing development on agricultural land with a prescriptive right of drainage over neighbouring land would not destroy that right, since the dominant owner, through the medium of a water drainage scheme, was going to ensure that the quantum of water passing over the neighbouring land would remain wholly unaffected by the radical development.

27. The relevant questions are:

(1) Whether the development of the dominant land represents a "radical change in the *character*" or "a change in the *identity*" of the site as opposed to a mere change or intensification in 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.

28. Both of these requirements must be satisfied in order for liability to arise. When both requirements *are* satisfied, the dominant owner's right to enjoy the easement will be ended, or at least suspended so long as the radical change of character and substantial increase in burden are maintained. In other words, the servient owner can legitimately block the pipe.

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[26] [28].
[27] [29].
[28] [2001] Ch. 371.

29. Thus, particular care needs to be taken to determine whether or not the capacity of existing drains can cope with the extra load. For this reason, implied and express drainage easements under third party land involving existing pipes are only likely to be of practical use in small-scale developments, unless the easement encompasses a right to enter third party land to lay a larger pipe.

In default of agreement: the undertaker's powers

30. In the absence of any or any adequate private right to connect to a public sewer, the 1991 Act may come to the rescue. Under section 98, a developer can serve a "requisition notice", which imposes a duty on undertakers to comply with a sewer requisition. The essence of the duty, in subsection (1), is "*to provide a public sewer to be used for the drainage for domestic purposes of premises in a particular locality in its area*".

31. For the duty to be imposed, three conditions must be satisfied:

    (1) First, the notice must be served by someone entitled to serve it, including the owner of any premise in the locality concerned, an occupier of such premises, and the local authority within whose area the locality is in whole in part located.[29]

    (2) Secondly, the premises must be premises on which there are buildings, or will be buildings when proposals made by any person for the erection of any buildings are carried out.[30]

    (3) Thirdly, that "*such security as the undertaker may have reasonably required has been provided for the discharge of any obligations imposed by those undertakings*".[31] In other words, the server of the notice must cover any shortfall between the sewerage undertaker's income and the cost of providing the works.

32. Subsection (1A) also imposes a duty to provide a lateral drain to communicate with a public sewer.

[29] S.98(2)
[30] S.98(1)(b)
[31] S. 99

33. To comply with the duty in section 98, sewerage undertakers enjoy rights under section 158 and 159 to lay a sewer in under or over any street, and, in respect of other land, to lay a sewer above or below the land.

34. So, in the absence of a private law right, a developer can appeal to the sewerage undertaker's duty to provide sewerage and rely on its statutory powers to do so under the land of a third party, provided that it covers the cost of doing so.

Conclusions: Planning implications

35. In reality, the exercise of these rights is less straightforward. Lord Phillips in *Barratt Homes* identified a "*fundamental problem that can arise as a result of the fact(…) that no objection can be taken by a sewerage undertaker to connection with a public sewer on the ground of lack of capacity of the sewer*", and said that "*there is a case for deferring the right to connect to a public sewer in order to give a sewerage undertaker a reasonable opportunity to make sure that the public sewer will be able to accommodate the increased loading that the connection will bring. The only way of achieving such a deferral would appear to be through the planning process*." His Lordship went on to recognise that this was not a perfect solution, and echoed Lord Justice Carnwath's comments in the Court of Appeal that more thought was needed on the interaction between the planning and water regulation systems under the modern law to ensure that different interests are adequately protected.

36. It seems that, even though 500 years have elapsed since Henry VIII's Statute of Sewers was enacted, parliament and judges are still struggling to ensure that the national sewerage system is not swept away by the tides of economic growth. The result is that developers may have to work with undertakers to clear the inevitable blockages from the planning application system, as well as from sewers and drains.

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14th May 2018