



OUTER HOUSE, COURT OF SESSION

[2017] CSOH 121

A199/14

OPINION OF LORD MULHOLLAND

In the cause

GAVIN HAMILTON

Pursuer

against

THE SCOTTISH MINISTERS

Defenders

Pursuer: Barne; Clyde & Co (Scotland) LLP

Defender: Burnet; Anderson Strathern LLP

15 September 2017

Introduction

[1] This case concerns whether the pursuer has a natural right of drainage from his land, lying to the north of Lairs Farm, bounded to the east by the M74 Glasgow/Carlisle Trunk Road, over the adjoining lower lying property comprising the bounding section of the M74 and, if so, whether the M74 interferes with that right. The pursuer seeks a declarator to this effect. The defender refutes these claims.

[2] The pursuer is Gavin Hamilton. He is the proprietor of Lairs Farm, Blackwood. The defenders are the Scottish Ministers. The case came before me for Proof Before Answer. At the outset, it was agreed by parties that the Court would not consider the question of the

quantum of damages, but address only the issue of liability on the understanding that, if the defenders are held to be liable, they will enter into negotiations to solve the pursuer's drainage problem. At the Proof Before Answer, the pursuer led evidence in support of his case. The pursuer gave evidence and led evidence from Kenneth Phillips, who prepared a report on the drainage problem in 2009 which is 6/3 of the inventory of productions; Hamish McCall, a land agent who spoke to the pursuer's drainage problem and correspondence with the defender and South Lanarkshire Council; Susan Morton, a representative of South Lanarkshire Council who spoke to the works carried out by the council to investigate the problem and Gaye McKay, the pursuer's expert witness who produced an expert report which is 7/5 of the inventory of productions. The defender led evidence from David Devine, a representative from Roads Scotland and Jonathon Crawford, the defender's expert witness who produced an expert report which is 6/24 of the inventory of productions. A Joint Minute was submitted agreeing certain facts. Written submissions were submitted in addition to the oral submissions from counsel for the parties.

The Land which is the subject of this Litigation

[3] The pursuer is the heritable proprietor of land at Lairs Farm, Blackwood. The pursuer's title is recorded in the Land Register under Land Certificate title number LAN 93204. The land is located to the south west of the village of Blackwood in South Lanarkshire. At the north east part of the farm is a field ("the field" – field one) which is currently subject to flooding (also referred to as ponding). The field is bounded by the B7078 Carlisle road which crosses it from north to south. To the east of the field is a strip of land ("the strip") which is bounded to the east by the M74 Glasgow/Carlisle road. The strip is also currently subject to flooding and prior to the construction of the B7078 formed part of

the field. The field is bounded to the north by a disused railway line and Northfield Residencies, agricultural fields to the west and Lairs Farm to the south. Fields two and three of Lairs Farm are situated south of “the field” (field one) and are bounded to the east by the M74 Glasgow/Carlisle road.

The Pursuer’s Case

[4] The pursuer asserts a natural right of drainage over the defenders’ heritage, namely the section of the M74 to the east of the pursuer’s land. The natural right of drainage exists as a result of the pursuer’s land being higher than the defenders’ land and as a result the inferior tenement [the defenders’ heritage] is obliged to receive the water falling from the superior tenement land [the pursuer’s heritage]. This is the exercise of the natural right of servitude, is imprescriptible and *res merae facultatis* (schedule 3 to the Prescription and Limitation (Scotland) Act 1973). As a result of problems with the drainage to the north east of the pursuer’s field, the pursuer’s drainage system was reconnected to the old drainage system to the west and east of the B7078. As a result, water was making its way to the verge of the M74 land where it was being prevented, as a result of damage to the old drainage system, from passing to its natural drainage outfall (beneath a footbridge on the east side of the M74). This caused the water to fail to drain and back up, flooding the north-east corner of the pursuer’s field and strip. The old drainage system on the defenders’ land was acting as a barrier to the pursuer’s natural right of drainage and the defenders were accordingly liable to restore the old drainage system on their land to full working capacity.

Declarator Sought

[5] The pursuer seeks a declarator in the following terms:

“(i) the pursuer has a natural right of drainage from his land, lying to the north of Lairs Farm, bounded to the east by the M74 Glasgow/Carlisle Trunk Road (the "M74") and registered in the Land Register under Land Certificate title number LAN 93204, over the adjoining lower lying property comprising the bounding section of the M74; and (ii) the M74 interferes with said right.”

The Defenders' Case

[6] The defenders do not admit that the natural line of drainage follows the lie of the land and runs down through the north-east corner of the pursuer's field, along a pipeline terminating in a burn north of the village of Blackwood and east of the M74. As part of the construction of the M74 (widening of the A74 to become the M74) and the section of the B7078 which crosses the pursuer's field from north to south (in 1985/86), all existing roads drainage pertaining to the A74 in this location was infilled or removed and replaced with a new drainage system. As part of the construction of the section of the B7078 bisecting the pursuer's land, a new drainage system was constructed to deal with the pursuer's field and surface water run-off from the farmlands to the north. If properly maintained this field drainage system was adequate to remove surface water run-off and groundwater flow and prevent water accumulation in or flooding of the field. This drainage system was effective until 2009. South Lanarkshire Council are the roads authority responsible for the maintenance of the B7078. In accordance with that duty, South Lanarkshire Council carried out works to identify and alleviate flooding in the north-east corner of the field. The council's preferred option was to connect the land drainage to the road drainage system for the B7078. However, this could not be completed due to the presence of a gas main in the area. In consequence, the council connected an existing pipe, part of the field drainage system, to a pipe which ran underneath the B7078 without checking where the outfall for that pipe was located and whether the pipe was part of a working field drainage system. It

was an old defunct land drainage pipe for the pursuer's land prior to the construction of the M74 and section of the B7078 for this location. This pipe did not connect to the watercourse and outfall to the south. Had the council checked for outflow before connecting the field drainage it would have been apparent that it was not connected to a drainage network. Acting reasonably, the council would not have connected the drainage from the pursuer's field to it. Any failure of the drainage system for the pursuer's field was caused by one or more of the following factors:

- (a) lack of maintenance by the pursuer of his own private field drainage system;
- (b) lack of maintenance by the council of the adopted road drainage for the relevant section of the B7078;
- (c) impact damage to a discharge pipe of the B7078 drainage system caused by utility works;
- (d) impact to a discharge pipe caused by a new development, and/or
- (e) road widening works and formation of new footways on the B7078 carried out by or behalf of the council.

Any drainage pipeline found severed next to the M74 was not the cause of the ongoing drainage problems in the pursuer's field.

[7] In order for the pursuer to succeed in obtaining the declarator sought he needs to prove, on the balance of probabilities, that he has the natural right of drainage contended for and the M74 interferes with that right. I will deal with both questions in turn but before doing so, it is appropriate to set out the law governing the issues.

The Law

[8] The law in this area is that water outside a definite channel is permitted to drain with

the natural inclinations of the land. The rule is described by Erskine, Institute II,9.2. as follows:

“Where two contiguous fields belong to different proprietors, one of which stands upon higher grounds than the other, nature itself may be said to constitute a servitude on the inferior tenement, by which it is obliged to receive the water that falls from the superior. If the water which would otherwise fall from the higher grounds incessantly without hurting the inferior tenement should be collected into one body by the owner of the superior, in the natural use of his property, for draining his lands, or otherwise improving them, the owner of the inferior tenement is, without the positive institution of any servitude, bound to receive that body of water on his property though he should be damaged by it. But as this right may be overstretched in the use of it, without necessity, to the prejudice of the inferior ground, the question how far it may be extended in particular circumstances must be arbitrary”.

The inferior heritor is not entitled to cause the water to be thrown back on the land of the superior heritor, either by damming up a stream, or by impeding the natural drainage, see *Bell's Principles* (Guthrie edition) at paragraph 969. The superior heritor may clear his land of superfluous water, without regard to consequential effects on the inferior tenement, *ibid.*

The inferior must receive the superfluous water, even under the operations of draining, in all the variations of agricultural improvement, subject to equitable regulation by the Court if the superior owner should unduly press his right to the injury of the lower, see *Bell's Principles* at paragraph 968 and *Campbell v Bryson* ([1864] 3 M 254 per Lord Justice-Clerk (Inglis) at page 260. In this Inner House case Erskine's principle, as set out above, was approved by the Lord Justice Clerk at pages 259 and 260, Lord Cowan at page 261 and Lord Benholme at page 262. With regard to regulation by the court of the exercise of this right, Lord Justice Clerk (Inglis) noted at page 260 that,

“ if the inferior heritor complains that the superior heritor is unduly pressing his right, and making the servitude intolerable to him, he will have the right to come to the Court with his complaint, and the Court will be entitled to regulate the matter between the two upon equitable terms. That is the true meaning, I apprehend, of the qualification which Mr Erskine adjoins to the general statement of the doctrine; and to the doctrine with that qualification I unhesitatingly subscribe.”

Lord Neaves described the regulatory power of the court at page 263 as follows:

“The natural servitude of transmitting water and the servitude of way are subject to regulation, and can never be nimiously used or abused, and the party bearing the burden is entitled to have it regulated according to the circumstances.”

With regard to whether the natural servitude described by Erskine is extinguished by the superior heritor’s use of man-made drains, Lord Neaves dealt with this at page 263 as follows:

“Now, the question comes to be this - Is that confined only to the case when the upper tenement is in a state of nature? If that can be stated to be the law, it would be rather a lamentable doctrine - a very anti-social one indeed. That land must remain uncultivated, must remain unploughed, must remain in a state of nature, comparatively unproductive, otherwise you cannot get the water that falls upon it carried down upon the lower tenement; because I take it that there is scarcely any mode of cultivation that does not to a certain extent affect the descent of the natural water. A natural ditch will form itself. Is that never to be cleaned or cleared out? Must it be left to itself, to choke or silt up? Is nothing to be done to facilitate the drying of the land by means of that natural exit or outfall? I take it that proposition can never be maintained. And when once you allow that cultivation must be permitted, although it must have a tendency to send down more water than if the land were left uncultivated, is a proprietor to lag behind in the improvements of the day? Is he not to have a deeper drain, or to cover the drain when that may be of use to him, if he have a general right to have his water carried away, and does not exercise that in a manner nimious, and at variance with the usual course of cultivating his land? What he does must be for the purpose of cultivating his land. He is not to make a river for the purpose of making a river. He is not to make anything that has a sinister object. His object must be to cultivate his land; and if he keeps to that, and uses the ordinary means, it appears to me that the other party, subject to regulations where necessary, must bear the burden.”

See also Lord Cowan at page 261; Ferguson, *The Law of Water and Water Rights in Scotland* at page 295 and *Gibbons v Lenfestey and another* (1915) 84 LJPC 158 per Lord Dunedin at page 160.

The Evidence

[9] Having set out the law, I now turn to the evidence and my assessment of it. The pursuer, in evidence, confirmed that his father purchased Lairs Farm in 1994 and the pursuer's title to it was registered on 20 January 2000 (Land certificate Title number LAN93204 which is 6/1 of the inventory of productions). A section of the B7078 runs through his field (east of the field and west of the strip) which was constructed in 1985/86 along with the widening of the A74, which as a result attained motorway status (M74). This time frame is supported by a letter from First Scottish Searching Company to the pursuer's solicitors dated 1 May 2014, which is 6/20 of the inventory of productions, which confirms that the land necessary for the widening was compulsorily acquired on 4 January 1985. The defenders are heritable proprietors of the solum of the land on which the section of the M74 adjoining the strip is situated and the roads authority in which the said section of road is vested for the purposes of their functions as roads authority, including management and maintenance, in terms of the Roads (Scotland) Act 1984 (paragraph 2 of the Joint Minute of Agreement). The defenders are heritable proprietors of the solum of the land on which the section of the B7078 on the east side of the pursuer's field is situated. South Lanarkshire Council is the roads authority in which this section of road is vested for the purposes of their functions as roads authority, including management and maintenance in terms of the Roads (Scotland) Act 1984 (paragraph 3 of the Joint Minute of agreement). The drainage problem in the north east section of "the field" first manifested itself in Spring 2009.

Kenneth Phillips, a Principal Agricultural Consultant, was instructed to investigate the matter. He described an area of distinct wetness which extended for much of the length of the eastern boundary of the field and for some distance into the field. There were also other areas of wetness extending westwards along the hollows in the field. The pursuer in his

evidence described this section as a low lying area sloping towards the M74. He had not been aware of a drainage problem before. He has been familiar with the farm land since 1994 and therefore I am able to hold that the drainage arrangements covering the field and strip worked effectively for at least 15 years. No witness who was asked about the matter was able to identify a cause or trigger for the flooding. As a result, I am unable to make a finding as to cause, other than to record that some unknown factor must have caused the flooding. Since 2009 the pursuer has suffered from flooding in this area.

[10] A ten inch pressure gas main also runs through the pursuer's field (7/4 of the inventory of productions). It is situated about 20 feet from the field boundary. Following the discovery of the flooding the pursuer, in an attempt to identify the cause of the flooding, contacted Scottish Gas Network (SGN) to report the flooding. He believed that the gas pipeline was the cause of the problem. Sweeney Drainage Contractors were instructed by SGN to undertake enquiries on their behalf. Sweeney Drainage carried out this work in 2009. The assessment confirmed that areas of the field were lying in pools of water and when sections of the field drainage were excavated they were found to be full of silt. A survey identified two fire clay pipes at different levels (one higher and one lower) at the north east corner of the field, which were thought to be the drainage outlets from the field. The roadside verge was excavated to inspect two fire clay pipes which revealed that both pipes were blocked. Excavation was also carried out on the opposite side of the road, which found one pipe continuing towards the M74 (paragraph 3.4 of the report by Cadogans dated July 2016, which is 6/24 of the inventory of productions, authored by Gaye McKay and spoken to by her in evidence). Work was carried out by South Lanarkshire Council in the summer of 2009 to investigate the problems and implement a solution. This was consistent with their duties as roads authority for the B7078 (section 1 of the Roads (Scotland)

Act 1984), which includes the verge strip of land adjacent to the B road. The formal adoption plans were not in existence but a roads authority would usually adopt 2 metres either side of a carriageway. The field drainage was linked to the B7078 road drainage system. Investigations, which involved excavations of the verge, revealed two fire clay carrier pipes, one on top of the other. Pressure jetting and gully machines revealed that the pipes were blocked in the verge of the B7078 (evidence of Susan Morton, South Lanarkshire Council Network Team leader for Roads and Transportation). The council was only able to get a hose in for several metres before encountering an impassable obstacle. In order to restore the drainage to working order, work was commissioned by South Lanarkshire Council to install a new manhole (6/2 of the inventory of productions is the Works Order issued in October 2009). A new manhole was installed which is shown at figure 4.2 (photograph) of page 8 of the report by JMP Consultants Ltd, which is 7/5 of the inventory of productions. A picture of the old and new manholes is shown at figure 4.1 of this report (page 7). The manhole contains three pipes, namely the field outfall pipe, the outfall pipe to the east (which is the higher of the two carrier pipes to the B7078 drainage system) and the outfall pipe to the north (which is the lower of the two carrier pipes). The higher of the two carrier pipes was connected to the B7078 drainage system which involved replacing a section of crushed pipe. However, the lower of the two pipes (to the north) could not be connected directly into the B7078 drainage system for gravitational reasons. The council considered that the lower pipe could be provided with an outfall by running the pipe northwards, either to run directly into the burn or to connect it into the B road's drainage at a point where gravity supported the connection. However, a view was taken that this would require mechanical digging around the gas main which was deemed unsafe and therefore was not taken forward. Susan Morton in evidence (re-examination) stated that if it

was possible to connect the lower pipe to the road drainage system it would have been done. However, there was evidence that instead of being dug by a machine, this could have been dug by hand (which would have been more onerous but not so onerous that it could not be done) and the connection effected by this means. This was not done and the lower of the carrier pipes was not connected to the road drainage system or directly to an outfall.

[11] These works resulted in an improvement, but not a cure, as, albeit there was a lowering of the water in the north east corner of the field, water was still backing up in the field (see paragraph 3.2.1.4 and photograph 2 at page 6 of the report by Cadogans dated July 2016). A meeting (and excavation) was held on site with the pursuer, the Council, said Kenneth Phillips and Brian Sweeney of Sweeney Drainage Contractors on 21 October 2009. A letter dated 9 November 2009 from the pursuer to Amey, contractors for Transport Scotland (6/4 of the inventory of productions) sets out the outcome of the meeting. The letter records that last month the council made a road crossing of the B7078 to reconnect a nine inch drainage pipe, which was severed during construction approximately 20 years ago, leading from Lairs Farm, Blackwood. After reconnecting this pipe it was discovered that water was not flowing away. An area of ground was dug up next to the M74 boundary fence where the nine inch pipe passes under the M74 and during a meeting with Ian Downie of the Council, Ken Phillips (drainage expert) and Brian Sweeney (drainage contractor), it was concluded that the problem is now within the boundary of the M74 where the pipe is possibly severed. The letter ends with a request for Amey to take the matter forward. At around the same time (November 2009) said Kenneth Phillips of the Scottish Agricultural College produced his report commissioned by the pursuer. The report is 6/3 of the inventory of productions. Paragraph 1 (page 3) of the report sets out the remit which is to review the land drainage issues and establish if the drainage issues were the result of

deficiencies in the remedial drainage works carried out when a gas pipeline was installed or, if not, to establish their cause and possible remedial actions. In relation to field one (the field in which the water logged north east corner is situated), Mr Phillips opined at page 4, paragraph 5 as follows:

“It was clear from a visual estimate of levels that the construction of the motorway would have severed the outfall drain from this field. It was not possible to say if having been severed it had been connected into the motorways surface water drainage arrangements. It was however clear that without such a connection, the field lacked an outfall for its drainage water and that such a lack of outfall could explain the drainage issues observed within the field. It was concluded that the drainage issues within this field were most probably mainly or wholly as a result of disruption to the outfall pipe during road construction works.”

In respect of fields two and three, he recorded that there was an area of wetness within the fields extending north south along the fields. Some exploratory work on the drainage system had been undertaken and it appeared from this that the flow of drains from the higher part of these fields had been interrupted as a result of construction works on the gas main and that not all of the existing field drains had been tied in across the pipe track during the post construction phase. He concluded that the drainage problems within these fields were largely the result of unrepaired damage which occurred during the gas pipeline installation (page 4, last paragraph). He made a series of recommendations. In respect of field one, he made recommendations as follows (my numbering):

- (i) Confirm that the flow of the drain below the B7078 road is unimpeded.
- (ii) Undertake works to identify if the main drain from the field had been connected into the motorway drainage system.
- (ii) If no such connection had been made into the motorway drainage system determine if connection is possible failing this check levels then dig a deep

trench from the existing drain to the stream which flow east west approximately 100m to the north.

- (iv) Only once an adequate and clear outfall is available for the drainage water, carry out remedial drainage works within the fields. These works to include:
- (a) Exposing sections of the main drain to check that the blow-up that are seen have not resulted in disruption to the pipe system,
 - (b) Exposing sections of the main drain along the western edge of the field and opening some of the laterals to check that these are functioning and free of silt. It being possible that with the flow from the field being impeded, a build-up of silt within the lower section of the drain laterals may have occurred. If this has happened rodding or jetting will be required to clear them.

He made a further series of recommendations in respect of fields two and three which involved the construction of a new drain on the high side of the gas pipeline, connecting any drains flowing down from the higher parts of these fields into this high side drain, and connecting the high side drain into the stream at appropriate points, thereby providing an outfall (page 5 of the said report).

[12] A protracted period of correspondence followed which added to the frustration felt by the pursuer. The pursuer wrote to Transport Scotland, the roads authority for the M74, on 27 November 2009 advising that as the drainage water cannot pass under the M74 it is building up at the boundary fence, where it could cause flooding problems during prolonged rain. The problem was placed in the hands of Transport Scotland for their prompt attention (6/5 of the inventory of productions). On 9 March 2010 the pursuer wrote

to Transport Scotland following up on an unproductive telephone call (6/6 of the inventory of productions). The terms of the letter are as follows:

“Thank you for taking my telephone call yesterday, you asked me to write in for an update on the drainage problem because you could not tell me anything. As I stated numerous times to yourselves and Amey, the meeting we had with South Lanarks Roads, Scottish Gas, Drainage Contractor and Land Drainage Expert all say the problem drain is within the motorway boundary. You mentioned the field where the main leader drain runs from and under M74 is 'boggy'. This is because the field drainage main leader is not working. It is some considerable time since I raised this matter with yourselves and Amey - is there a funding problem? How long will it take to fix the problem? I leave this in your hands for your prompt attention.”

An investigation was then carried out by Transport Scotland which involved trial hole excavations at the verge filter drain to check for any connections into the trunk road drainage system and sondeing the recently installed road crossing below the B7078. The results of this work are set out in a letter from Amey to the pursuer dated 5 October 2011, which is 6/7 of the inventory of productions. The excavation found no evidence of connections into the verge filter drainage system. The pursuer in his evidence said that the excavation was in the wrong location (also paragraph 3.5.1.1 of the report by Cadogans dated July 2016). The sonde was traced across the B7078 to where (at a point 17 metres into the field area, approximately 18 metres from the boundary with the trunk road), due to a possible collapse or blockage, it would not go any further. Anticipated further works were detailed in the letter by Amey. In April 2012 a site inspection and excavation by Amey confirmed that there was a void in the drainage system on M74 land. The void was about a foot and a half in length. This is shown in a photograph which is 6/8 of the inventory of productions. This generated a letter from Hamish McCall of Lawrie and Symington, a company who deal with agricultural claims against utilities who had been instructed by the pursuer. The letter is dated 20 April 2012 and is 6/9 of the inventory of productions. It states

that the recent site investigations on the M74 verge at Lairs Farm showed very clearly that the motorway drains leading from Lairs Farm were terminated approximately 6 feet into the motorway verge. The drains had been terminated during the time of the construction of the hard shoulder of the M74, approximately 20 years ago, during which time the field drains had been silting due to the outfall being cut off, causing areas of Lairs farm to become waterlogged. Permission was requested to instruct a drainage contractor to re-drain the field or alternatively have a meeting to discuss the best way forward. As no response to this letter was forthcoming, three reminders dated 6 June and 10 July 2012 (x 2) were sent to Amey (6/10, 6/11 and 6/12 of the inventory of productions). Amey responded on 11 July 2012 by letter to Lawrie and Symington (6/13 of the inventory of productions). The letter accepted that there was a pipe which entered Transport Scotland land on the M74, however it was not proven which drainage system the pipe belonged to or that it connected to the drainage in the verge at any point or had been terminated during construction of the hard shoulders. Notice was given that Amey intended to carry out a CCTV survey of the verge drainage in order to identify any connections to the system. No evidence was produced that Amey carried out the CCTV survey. Mr McCall of Lawrie and Symington replied to this letter on 24 July 2017 (6/14 of the inventory of productions). The letter was as follows:

“...as you correctly state, the site investigation highlighted the drainage pipe from Lairs Farm was terminated within six feet of the boundary of the motorway verge. This drainage system used to cross under the motorway and the outfall was on the burn on the east side of the motorway, north of the village of Blackwood. All the drainage off of this section of Lairs Farm gathers in a cundy on the west of the B7078, goes under the road and crosses the rough ground of Lairs Farm and out into the motorway verge. We are quite happy to demonstrate this to you and we are quite sure that the local authority would only be too happy to endorse this as they built the cundy and renewed the drain under the B7078.”

On 12 November 2012, Amey responded by letter (6/15 of the inventory of productions) providing an update on progress. The letter confirmed that investigations had been completed and that work was underway with Transport Scotland to verify whether there was any documentation to confirm whether any private drainage system was given permission to connect into the trunk road system in this area. On 23 November 2012, a further letter was sent by Mr McCall of Lawrie and Symington to Amey (6/16 of the inventory of productions). The terms of this letter are as follows:

“We refer to your letter of 12th November 2012 and draw your attention to our letter, dated 24th July 2012 addressed to yourself, where you will see the private drainage system has always gone into the drainage system used to cross under the motorway to reach the outfall into the burn on the east side of the motorway, north of the village of Blackwood. This is the way this water has gone since the motorway was constructed. The problem occurred when the hard shoulder was added to the motorway and, your site investigation highlighted, the drainage pipes from Lairs Farm were terminated within six feet of the boundary of the motorway verge.

There is no documentation required for field drainage systems and all we wish is for the original system to be reinstated or an alternative route found that will allow our client's fields to drain as they did in the past. We have suggested before that we are pleased to meet with you on site to demonstrate the problem but ask that you treat this as a matter of urgency in view of the fact that our client's fields are suffering seriously.”

[13] In March 2016, Gaye McKay of Cadogans, consultant engineers, was instructed by the pursuer. She is a chartered environmental scientist with 19 years' experience in flood related matters. She has worked for regulatory authorities and the private sector and has extensive experience in flood risk management, catchment management and sustainable drainage. She has worked closely with the Scottish Government in the development of several national drainage guidance documents and was responsible for reporting to the Scottish Government on the findings of the responses to the public consultation on “The Future of Flood Risk Management in Scotland”. This resulted in recommendations for new

legislation to provide a sustainable approach to flood risk management. She authored the national guidance on Managing Surface Water and Urban Drainage in Scotland, on behalf of the Scottish Government. She has a master's degree in Wastewater and Environmental Management and has worked in the area of water and flood management for many years across the UK. She was an impressive witness whose evidence I accepted. She was measured, not prone to speculation, based her opinions and conclusions on verified facts and was clearly an expert in her field. She was the most impressive of the expert witnesses who gave evidence. She was instructed to prepare an expert witness report addressing the possible causes of flooding which had occurred at Lairs Farm. In order to discharge her remit a CCTV survey was carried out. The purpose of the CCTV survey was to identify any blockages in the pipe which conveys land drainage from Lairs Farm, beneath the M74 and which discharges to the east side of the M74, from an outfall within a disused railway bridge (paragraph 4.1.1.1 of her report which is 6/24 of the inventory of productions). The first survey took place on 31 March 2016. On the day of this survey the area had been subject to heavy rainfall and the pursuer's field had a significant accumulation of surface water and the manhole immediately downstream of the field (adjacent to the B7078) was close to surcharging. However, on this date the camera was unable to survey the required length of the pipe due to crushed rock debris. A second CCTV survey was carried out on 23 June 2016 which revealed that there was a gap in the 225mm diameter circular vitrified clay pipe which flowed in an easterly direction. The gap was located 0.6m from the start of the survey (a map at Appendix 2 to the report shows the location of the CCTV survey). This was consistent with the results of Amey's previous investigations in April 2012. The pipe was severed on the motorway verge, close to the Lairs Farm boundary. The pipe was intact on both sides of the void. The camera identified debris within the void at 0.8m from the start of

the survey. The survey was abandoned at 1.60m from the start, due to debris in the pipe, which had blocked 95% of the cross-sectional area. This debris appeared to consist of mud, clay and rubble. Photographs of the void and debris can be seen in Appendix 2 to the report. As a result of the investigations carried out, including the results of the CCTV survey, Gaye McKay opined that there was a significant gap in the pipework and an accumulation of debris, which had resulted in the pipe being unable to convey flows towards the abandoned railway embankment, on the east side of the M74. Land drainage from the Lairs Farm Field therefore no longer has a conveyance route to the downstream watercourse, resulting in an accumulation of water at low points in the field. The backing up of flows had led to insufficient flow velocities (often referred to as self-cleaning velocity) in the land drainage network to transport sediment. Therefore, silt has accumulated over time within the system, resulting in blockages and surcharging. Due to the remote location of the problem within the motorway verge, where access was limited, and the nature of the defect, it was likely to have resulted from works associated with the motorway.

[14] Having narrated the history of the drainage problem, I now turn to the issue of whether the pursuer has a natural right of drainage from his land over the adjoining property comprising the bounding section of the M74. On the evidence presented to me, I am satisfied that the pursuer has proved that he has a natural right of drainage. I have reached this decision for the following reasons. Firstly, alternative causes for the flooding (ponding) have been excluded. SEPA flood risk maps show that the pursuer's land does not lie on a floodplain and there is no risk of fluvial flooding (paragraph 3.6.1.1. of Cadogan's report and evidence of Gaye McKay). A review of SEPA flood maps also confirms that the area is not susceptible to groundwater flooding (paragraph 3.6.4.2 of Cadogan's report and evidence of Gaye McKay). There were no other known instances of sewer flooding in the

vicinity, from foul or surface water sources (paragraph 3.6.3 of Cadogan's report and evidence of Gaye McKay). Secondly, the topography of the ground is consistent with the natural right of drainage. The land drains under gravity towards the north east corner of the field and the strip (also confirmed at paragraph 2.4 of the expert report for the defender which is 7/5 of the inventory of productions). The pursuer, who had a detailed understanding of the topography of the area, gave evidence to this effect which I accepted. He explained that the outfall was the burn which was also the outfall for fields to the west of the M74. He explained that the burn flows in a northerly direction between these two areas of higher ground and in respect of the field the water passes beneath the M74 via a culvert. The outfall is shown in photograph 3 at paragraph 3.2.1.5 page 7 of Cadogan's report. The field drainage is a gravity fed system and the pursuer's evidence on the description of the drainage system for the field, strip and the outfall is supported by the evidence of the witness Gaye McKay. She confirmed that the pursuer's evidence on drainage flow was correct and the level in the north-east corner was 160.85m and the level at the outfall was lower (158m). These relative heights are consistent with a gravity based field drainage system and the relative locations of the pipe on the strip and the pipe at the outfall suggests that they were originally part of the same drainage system. There was no evidence of competing drainage systems. Thirdly, the dimensions and material of the field drain on the motorway verge, which was subject to the CCTV survey, is consistent with the dimensions and material of the pipe (fired clay) at the outfall flowing into the burn. Fourthly, the pursuer and the witness, Gaye McKay both spoke in evidence to water travelling from the manhole, installed by the council in 2009, in an easterly direction to the broken pipe, subject to the CCTV survey. This indicates that water from the field drainage system travelled by means of gravity to the field drain on the motorway verge. It could, of course, only reach

the broken pipe by means of gravity if the pursuer's field was higher than the M74 verge at the point of the void in the pipe. In fact, the pursuer and all the expert witnesses, with the exception of the witness, David Devine, accepted that the outfall for the pursuer's field drainage was the burn (shown at photograph 3 at paragraph 3.2.1.5 page 7 of Cadogan's report).

[15] David Devine is a chartered engineer who works for Transport Scotland. I have no doubt that Mr Devine is an expert in his field, however he was wrong in his evidence in a number of respects bearing on this issue. He suggested that the pipes in the different locations were a different shape (outfall pipe at the burn in particular) and therefore not part of the same drainage system. This was incorrect as was demonstrated to him in cross examination. He was also unaware there were two pipes emerging onto the B7078 at the north-east corner of the field and that it was the lower of these two pipes that could not be connected into the drainage system for the B7078 road. He was also unaware that the pipe had been located by Amey on the verge of the M74 in 2012 (6/8 of the inventory of productions). He had assumed that no such pipe had been found, as was the case in 2011, when Amey's investigations were undertaken in the wrong area. He did not have as detailed a knowledge as the other expert witnesses and he was in error in these important areas of his evidence. I therefore rejected his evidence on outfall and drainage system. I did, however, accept his evidence on one important point, namely that the council should have explored further whether the lower pipe could have been connected further north into the B7078 drainage system by hand digging around the gas main. To connect the lower pipe to the drainage system on the M74 verge without checking that it had an outfall would not provide a solution (as it had no outfall) and only increase the frustrations of the pursuer. The defenders during the Proof Before Answer attempted to lead evidence that the natural

path of drainage was not as asserted by the pursuer. It was being suggested that the disused railway line north of the pursuer's field had altered the natural line of drainage and created a barrier to the northward flow of the water. Objection was taken to this line of evidence as it was not covered by the pleadings. In particular condescendence three asserts the pursuer's case on the natural line of drainage. It is as follows:

"The natural line of drainage for superfluous surface and ground water from the Field follows the lie of the land and runs down through the Field's northeast corner. Said line of drainage runs along a pipeline and terminates in a burn north of the village of Blackwood. Said termination is east of the M74."

The defenders answered (three) – "not known and not admitted". No substantive case on this point was pled. I heard some evidence on the point under reservation. This evidence included the spot heights shown in the plans 7/1 and 7/2 of the inventory of productions, as spoken to by the witness Gaye McKay, which were supportive of the pursuer's case. The pleadings govern the cases pled. As there were no pleadings covering the substantive case sought to be led by the defenders of the altered natural line of drainage and barrier, this evidence was inadmissible. Even if it was admissible it would not have altered my decision. There was no evidence of substance, rather than speculation, that the two pipes integral to the pursuer's drainage system at the north of the pursuer's field ran contrary to the natural line of the flow of water from the field. There was no evidence as to when the railway was built or discontinued, the pre and post railway topography, and the drainage situation of the field before and after construction of the railway. The evidence and rationale supporting a natural right of drainage as contended for by the pursuer, as detailed above, was powerful, multi sourced, supported by the majority of expert and factual witnesses and the drainage system pertaining to the area. The fact that both the council and the defenders spent time and effort trying to investigate and sort the pursuer's drainage problem was illuminative.

Why would this have been done if no natural right of drainage existed? For the foregoing reasons, I am satisfied that the pursuer has the natural right of drainage as contended for.

[16] The defenders argue that *esto* there is a natural right of drainage it should be restricted to water from the strip. This is on the basis that the B7078 bisects the pursuer's field and strip and is a barrier both in terms of a being a physical barrier to the flow of ground and surface water and in terms of land ownership and the local roads authority's responsibility for drainage in and around it. I reject this argument. Firstly, the strip drains by means of gravity onto the M74 land and therefore there is a natural right of drainage. This was not the subject of dispute and the defenders *esto* position recognises this. Secondly, the field and strip are interlinked in their field drainage arrangements. Were it not for the void in the field drain on the M74 verge, water draining from the field (which is not connected to the B7078 drainage) would flow through field drainage on the strip and the M74 before reaching the outfall at the burn. The said void prevents the water reaching this destination. The pursuer and the witness, Gaye McKay, both gave evidence that water travelled from the lower pipe in the manhole in the field, installed by the council in 2009, in an easterly direction to the broken pipe. I accepted this evidence. It would in my opinion be artificial to seek to distinguish between the field and the strip, both owned by the pursuer, in respect of the natural right of drainage which the pursuer has and which he seeks to exercise in respect of the lower of the two drainage pipes in the manhole in the north east corner of his field which has been connected to the drainage system in the strip and M74. This does not mean that the council does not have a duty to seek to remedy the drainage problem from the pursuer's field. This the council did when connecting the higher pipe into the B7078 drainage system. They were unable to connect the lower pipe into this system with the use of a mechanical digger due to safety reasons. As a result, the lower drain was connected

into the drainage system which served the field and the strip and which when flowing towards the outfall at the burn goes through M74 land. The void in the drainage system is located on M74 land.

[17] Given that the pursuer has a natural right of servitude, has that right been interfered with? Firstly, a natural right of drainage is *res merae facultatis*. This is defined in *Trayner's Latin Maxims* (fourth edition) at page 554 as follows:

“A matter of mere power; a mere faculty. Such, for example, is the right which a proprietor has of building upon his own property, or which any one has of walking upon the sea shore, or sailing upon the sea, or on any navigable river. It is a right which may or may not be exercised at the pleasure of him who holds it; and such rights are never lost by their non exercise for any length of time, because it is of their essential character that they may be used or exercised at any time.”

(see also *Peart v Legge* 2008 SC 93 per Lord McFadyen at paragraph 25). As a result a *res merae facultatis* does not prescribe (schedule 3 to the Prescription and Limitation (Scotland) Act 1973). The right can be exercised as and when the proprietor of the superior land chooses to do so (*Anderson v Robertson* 1958 SC 367 per Lord Justice Clerk at pages 371 and 372 and *Rankine on Landownership*, (4th ed.) at page 426). Secondly, this is subject to the court's right to equitably regulate the matter where a proprietor of the superior land is unduly pressing his right and making the situation intolerable to him (Erskine Institute II, 9.2. and *Campbell v Bryson* [1864] 3 M 254 per Lord Justice-Clerk (Inglis) at p 260). Thirdly, no evidence was led as to when and how the drainage pipe on the M74 land came to be damaged creating the void (and the silting). The fact that the problem first manifested itself in 2009 does not mean that this was when the pipe was damaged creating the void. It is perfectly possible that the damage could have been occasioned earlier causing a gradual build-up of silt and debris which reached a point where flooding was caused in 2009. There was no evidence of an event in 2009 which could explain the flooding from that date and I

therefore have nothing which could support a date for the damage. As to cause, the witness Crawford in his report at page 12, paragraph 5.9, (7/5 of the inventory of productions) raises the possibility that the damage to the drain was caused by impact damage due to utility works, lack of maintenance by the pursuer, lack of maintenance by the council, impact damage caused by a new development, or road and footway widening works carried out by or behalf of the council. However, there was no evidence to support any of these potential causes and as the witness Crawford recognised in his report these can only be taken as conjecture. What can be taken from the evidence, however, is that the field drainage, including the section on the M74 verge, must have been in operation at the time of the widening of the A74 and the creation of the section of the B7078 running through the pursuer's land. It had been used to drain the field in the past and the restitution of this drainage system for the lower field drain is *res merae facultatis*. As the void which prevents this drainage system from operating effectively is located on the verge of the M74, the defenders are interfering with the pursuer's natural right of drainage. This is an inevitable finding from the location of the void.

[18] The final issue for me is to determine whether the pursuer is unduly pressing his right, and making the situation intolerable to the defenders. I did not gain the impression from the pursuer that he was being unreasonable in seeking to resolve the situation. He had protracted and lengthy dealings with the council and Transport Scotland to resolve the situation. This did not move quickly, which was not the pursuer's fault as he sought to have the matter resolved as quickly as possible, sending reminders, making phone calls and engaging the services of experts to try and move the matter forward. I could sense his frustration when he gave evidence, even though he came across to me as a reasonable, calm and measured man. The work done by the council to install a new manhole and connect the

higher pipe into the drainage system for the B7078 did reduce the flooding, but did not provide a cure. The council also tried to connect the lower pipe into the B7078 drainage system, but this could not be done using a mechanical digger as it was deemed unsafe given the presence of a gas main. It is not surprising therefore, that the council then connected the lower pipe into the drainage system which runs to the verge of the M74 and beyond to the outfall at the burn. This seems entirely reasonable in principle. However, this was done by the council without checking that this drainage system was fully functional. This should have been done but was not. The effect of this was to transfer the problem to another public body without providing the solution sought by the pursuer. The pursuer wishes a solution to his drainage problem. I am sure that he is not fixed on a particular solution. If it can be achieved by connecting the lower pipe into the B7078 road drainage system, this would be satisfactory to him. It is clear from the evidence that the possibility of such a connection was not fully explored. Hand digging around the gas main was a viable alternative to mechanical digging, which was deemed unsafe. As far as I am aware, on the evidence, this was not explored fully nor was it considered too onerous. This was the opinion of the witness Devine whose evidence on this point I accepted. It was clear on the evidence that the B7078 drainage system is effective. After all, the higher of the two drains when connected reduced the water logging in the north east of the pursuer's field. The pursuer's field drainage had been connected to the B7078 drainage system, without problem, for a period of time. It seems to me that, within reason, the connection of the lower (manhole) drain to the B7078 drainage system, by hand digging around the gas main should be explored. If that does not provide a solution then a connection into a fully functioning drainage system, including the section in the verge of the M74, would be reasonable and the pursuer would not be unduly pressing his right.

[19] For the foregoing reasons, I am persuaded that the declarators sought should be granted. I shall put the case out by order for consideration of the precise terms of the declarators, taking into account the requirement for a full exploration of the connection of the lower drainage pipe into the B7078 drainage system, and for consideration of further procedure. I shall reserve the question of expenses meantime.