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Judgment: approved by the court for handing down (subject to editorial corrections)*	*Delivered:* **29/04/2024**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

CHANCERY DIVISION

_____

PATRICIA ANNE-MARIE LEEPER and PAUL WILLIAM FRANCIS LEEPER
Plaintiffs/Respondents

and

BRIAN JOSEPH MURPHY
Defendant/Appellant

_____

Mr T Ringland BL (instructed by T G Menary Solicitors) for the Applicant
Mr J Rafferty (instructed by Walker McDonald Solicitors) for the Respondent

_____

HUDDLESTON J

Introduction

[1] This is an appeal against an order made by His Honour Judge Lynch in response to an equity civil bill. The order under appeal was dated 8 March 2019 and under its terms ordered that Brian Joseph Murphy (the defendant) grant Paul William Francis Leeper and Patricia Anne Marie Leeper (the plaintiffs) and their successors in title and the owners and occupiers of lands comprised in Folios AR11029 and AR11782 Co Armagh ("the Property"), an easement to "enter that portion of the lands comprised in Folio 1292 Co Armagh (the 'adjoining field' (as comprised in that parent folio)) for the purpose of laying, maintaining, repairing, inspecting, cleansing and replacing the sewer system, the approximate position of which [was] shown by marked by a blue line [on the map appended to the Order] together with the full free right at all times to drain soil water and effluent through [the sewer system].' There was a consequent covenant on the part of the plaintiffs to cause as little damage as possible and to make any good damage which they had caused by the exercise of that right. The wording of the easement is in fairly standard terms.

[2] The Order itself was, when granted, the culmination of a longstanding dispute between the parties. Mrs Leeper is the sister of the defendant. Their father, Mr Murphy Snr, gifted the Property to the plaintiffs in and around 1989/1990 carving

it out from the adjoining field/the parent folio. A bungalow was built on the Property, ostensibly by Mr Murphy Snr and/or under his direction and was completed in or about 1992. It is common case that the Property was serviced by a septic tank (within the curtilage of the Property) together with a soakaway system which was installed in the adjoining field under the auspices of the original 1989 Discharge Consent. The fundamental problem – and the basis of this dispute - is that no formal easement was granted for that portion of the soakaway/drainage system which was physically located in the adjoining field nor was there any clarity whatsoever as to its physical extent. Following Mr Murphy Senior's death, a dispute arose between the parties which led to this prolonged litigation.

[3] After a number of earlier attempts to resolve the issues between them the parties reached a compromise agreement on 11 January 2019 (the '2019 Agreement'). This document which was executed by the parties recorded (and here I quote):

> "The following steps in full and final settlement:
>
> (i) installation of a treatment plant to the satisfaction of building control and Northern Ireland Environment Agency (NIEA) within four weeks for [sic] the date hereof;
>
> (ii) All remaining pipework from original soakaway to be disconnected;
>
> (iii) separate storm water system from (i) above to be installed if necessary to flow to field drain;
>
> (iv) (i)-(iii) costs to be borne by the plaintiffs without prejudice to further order of the court;
>
> (v) upon building control and NIEA approval for step (i), defendant to grant plaintiffs an easement and burden for sewer system within 14 days;
>
> (vi) all professional legal costs to be determined by the judge upon completion of steps (i)-(v)."

[4] Pursuant to that 2019 Agreement there were discussions with NIEA as a result of which the original septic tank was replaced by a water treatment plant again located within the Property. That installation still required a soakaway system within the adjoining field.

[5] It is the plaintiff's position that the obligations set out in the 2019 Agreement had been discharged prior to the County Court hearing on 8 March 2019. The defendant disagreed and refused to grant an easement essentially for two reasons.

[6] The first related to the question as to whether or not the outflow from the treatment plant extended beyond what was considered to be the original soakaway, ie the line marked blue on the map attached to the Agreement, to a watercourse at the foot of the hill, a watercourse which bounded the adjoining field.

[7] It is now suggested either that Mr Murphy Snr extended the pipework to that point but told the Leepers something different or, alternatively, that the defendant/appellant extended it potentially to facilitate drainage of the field itself but denies doing so. In any event, as I will set out below, it seems clear from the evidence before this court that the pipe, albeit perhaps made up of several sections of connecting pipe of differing age, does in fact travel from the boundary of the Property diagonally to connect with a pipe that goes along the entire length of the eastern boundary of the adjoining field and then discharges into the watercourse at the bottom of that field.

[8] The second issue between the parties was a question of whether the storm water from the Leepers' property travels through the treatment plant or, more importantly, whether it enters the same outflow pipe at another (later) point before onward travel to the discharge point – in breach of the regulatory consents in place and, so, the provisions of the 2019 Agreement.

[9] At the trial the experts for the parties accepted the view of the independent expert (Mr Elliott) that the pipe which is in place needs to be replaced as it is no longer functioning as required. The loss of function is attributed either to excavation works carried out in February 2020 which were undertaken to establish the true position of the pipe "on the ground" and/or secondly, considering the specification of the pipe, its age and deterioration coupled with the ingress of fibrous roots from the adjoining hedge it has, at this stage, been rendered unfit for its original purpose. Added to that, it would seem that when originally installed insufficient stone/backfill was used upon which to 'bed' the pipe and, in turn, maximise the chances of percolation of run off into the surrounding sub stratum from the holes designed for that purpose within the pipe. The photographic and expert reports would certainly seem to confirm all of those issues and I am inclined to the view that the pipe is simply past its useful life and needs to be replaced.

[10] As is detailed below, notwithstanding the 2019 Agreement and the March 2019 Order further issues (largely practical as opposed to the principle of the granting of an easement) in relation to the extent and the route of pipes came to light after a physical excavation and investigation of the whole pipe system that was carried out in February 2020.

[11] From this, it is the Leepers' case that "the key facts which form the background of the [Agreement] were clearly mistaken." It is now argued that the resultant common mistake and the basis upon which both parties executed the 2019 Agreement goes to the essence of the agreement and why it was made rendering it obsolete and

leaving the court to determine the remedy as between the Leepers and Murphy on the basis of the evidence now before it.

[12] The Leepers also argue that they "find it difficult to either understand or accept that Mr Murphy might now argue that the parties ought to be bound to an agreement made in January 2019 which neither makes nor evidences the substantive arguments which are now advanced as his primary challenge on appeal' – an appeal which largely focuses on the need for NIEA consent and/or that the installation 'as is' is not compliant with normally regulatory requirements and that the plaintiffs as a result are in breach of the 2019 Agreement. In essence what this means is that Mr Murphy argues that the 2019 Agreement is binding within its terms and that the LTJ was wrong to accept the Leeper's evidence on (a) the extent of the pipe & (b) its regulatory compliance – thus entitling him to be successful in this appeal.

[13] That leads me to the history of the NIEA's Consent(s). Upon becoming aware of the deficiencies in the original (1989) Consent, Mrs Leeper made an application to regularise the situation in 2013. A Discharge Consent was subsequently issued on 7 June 2013 (the '2013 Discharge Consent'). I do not recite the entirety of it, but the operative provisions (which detail the conditions to which it was subject) are as follows:

> "(i) Should it subsequently be revealed that the sewage treatment system has not been accurately described in the application, or that the ground is incapable of absorbing all of the effluent, **this consent shall be considered null and void;**
>
> (ii) The discharge shall **consist solely of sewage effluent** from the single domestic dwelling at 53 Carrick Road, Portadown, Co Armagh, BT62 1BR (ie the Property);
>
> (iii) The sewage effluent from the dwelling shall be discharged into a subservice irrigation system capable of providing adequate treatment and dispersal of the effluent **without causing surface ponding or discharge to any waterway." [emphasis added]**

[14] The map appended to the 2013 Discharge Consent (CN1102/13) illustrates an outfall along a blue line marked on a plan which concludes at a mid-point along the hedge leading to the eastern boundary of the adjoining field approximately halfway towards the watercourse. This is the same line as was then (subsequently) detailed on the map appended to the 2019 Agreement. Indeed, the Consent formed the basis upon which that agreement was constructed. It is argued for Mr Murphy that this at the time was wrong and/or misrepresented.

[15] Ancillary to the works to be undertaken pursuant to the 2019 Agreement, the NIEA confirmed by email dated 18 January 2019 that the existing septic tank could be upgraded to a treatment plant without the need to apply for a review of the original consent CN1102/13 provided that the treatment plant was installed "in the same location of the current septic tank … and that no additional changes are made to the system currently installed." The email continued, however, in the following terms "the change from a septic tank to a treatment plant does not allow the consent holder to discharge to a waterway. Any change to the discharge point will require a review application to be submitted along with the appropriate fee." That is an important point to which I shall return.

[16] Nonetheless, the works were completed on that basis and a building control certificate in respect of them issued on 19 February 2019. In the absence of the grant of an easement by Mr Murphy the matter proceeded to hearing before the County Court Judge in a fully contested hearing.

[17] The LTJ heard from Mr Brian Murphy, his appointed expert Michael McCorry, Consulting Engineer, the plaintiffs and their instructed expert Samuel (Uel) Weir. As indicated above the LTJ found in favour of the Leepers and granted the easement to accord with the blue line in the terms recited above. It is that decision that has been appealed.

[18] In the lead up to the hearing of this appeal it was, in essence, a lack of consensus between the existing experts that resulted in the appointment of Mr Kenneth Elliott by Order of McBride J as an independent expert. It was Mr Elliott who subsequently assessed the results of the excavation along the boundary fence of the adjacent field by which he was able to establish:

(a) that the soakaway pipe along its length was in poor condition;

(b) that it extended a "significant distance beyond the point where the blue line terminated'; and

(c) that it discharges into the watercourse at the foot of the adjoining field.

[19] The relevant photographs quite clearly demonstrate firstly, the fibrous invasion of the pipes, secondly, that clearly different sections of pipes were used along its length (most probably from different points in time because of the different pipes used) thirdly, that the pipe work extended the entire length of the adjoining field and fourthly, that it discharged into the watercourse which marked the boundary of the adjoining field. The report also highlights the deficiency in porous backfill to the pipe and comments on the adverse impact of that in terms of preventing percolation from the holes in the pipe into the surrounding substratum as a further negative on the effectiveness of the installation.

[20] Mr Elliott, in his report confirmed that "the uncovered soakaway pipe shows the soakaway pipe extending beyond point C (ie the limit of the blue line) a further 30 metres to the waterway (point D) and that the uncovered soakaway pipe between (points A-B) has weathered/aged to a different degree of the remainder of the soakaway pipe", concluding that in his opinion "this section of soakaway pipe (ie between points A-B) was probably laid at an earlier date and not at the same time as the remainder of the soakaway."

[21] It is Mr Murphy's position that the extended field drainage pipe is not just a breach of the 2013 Discharge Consent but, in effect, renders the consent to discharge "null and void" as a fundamental breach of the conditions set out in the 2013 Discharge Consent (see above at [13]) resulting in his assertion that the Leepers have not fulfilled clause 1 of the 2019 Agreement. He thus maintains that the County Court Order was granted on the basis of inaccurate information and that, as such, he is entitled to therefore have the County Court Order set aside – hence his appeal.

[22] As matters currently stand, the practical reality of the County Court Order is that it has provided for the grant of an easement to a mid-point on the eastern boundary of the adjoining land (ie the blue line) but is deficient in that it does not actually match the functional operation of the soakaway system that actually services the Property which I accept, based on the expert evidence, extends to the watercourse. The second issue is the now acknowledged co-mingling of run off from the Waste Water Treatment Plant and storm water – which it is alleged is a further breach of both the Agreement and the Discharge Consent.

[23] In an advancement of the arguments put to the LTJ Mr Murphy now says that this "unlawful discharge" and/or breach of the 2019 Agreement renders him liable to a claim for non-compliance with the biodiversity/environmental requirements of DAERA with a potential impact upon his basic payment scheme entitlement and, secondly, that he would face difficulties should he choose to sell the adjoining field where he is now on notice of the defect. For those reasons he says that the County Court Judge was wrong to conclude that the Leepers had fulfilled the terms of the Agreement.

[24] He suggests that a separate storm water system is in fact required.

[25] Given the pervading and detailed dispute I invited counsel to distil the issues between the parties to an agreed list of issues for the determination of this court. That list is as follows:

(i) What was the basis of the County Court decision in March 2019?;

(ii) What evidence, relevant to the issues between the parties, has come to light since the determination of these proceedings by the County Court judge in March 2019?;

(iii) Does the subsequent evidence have any impact upon:

(a) The Agreement reached between the parties in January 2019;

(b) The court's Order in March 2019.

(iv) What practical steps are required in respect of storm water and the product emanating from the treatment plant on the Leeper's property? How should this be reflected in a court order?

(v) Where should responsibility lie for costs of the works in question at (iv) above?

(vi) What order should the court make in respect of County Court costs?

(vii) What order should the court make in respect of high court costs?

[26] I thank counsel for their respective submissions on those points and propose dealing with them under the following sections of this judgment.

(i) The January 2019 Agreement

[27] Having heard the evidence of the parties and considering the expert evidence (to incorporate all of the experts' oral and written reports - collectively 'the expert evidence') I have concluded that common mistake vitiated the entirety of the 2019 Agreement leaving none of its terms actionable. The Leepers, in good faith, and in line with the information available to them at that time (ie prior to any excavation of the pipe) were of the view that the "blue line" marked on the plan attached to the Agreement showed the full extent of the easement that they required. I accept their evidence that that is what they had been led to believe. Mr Murphy's counsel suggested that the Leepers knew exactly the nature and extent of the drainage system, but I do not find that compelling for a number of reasons. The foremost is that none of the experts then instructed seem to have worked that out prior to the excavation in 2020, ie after the hearing. Beyond that it is unconvincing to suggest that given the history of this case that the Leepers at the stage that they entered into the 2019 Agreement would have sought any shortcut. For their own personal reasons they simply wanted a solution that would resolve the dispute and allow the Property to be saleable.

[28] At that point in time they also had confirmation from building control (a building control certificate was issued on 19 February 2019) that building regulations had been complied with. In terms of the NIEA consent, as matters subsequently transpired, they were in technical breach of the NIEA 2013 discharge consent, but that information did not come to light until after the 2019 hearing and only as a result of extensive further site investigations. The 2019 email from NIEA which I have quoted from extensively above provided a reasonable basis for the view which to that point they had taken. Their aim was to resolve all of the issues such as would allow a

straightforward sale of the Property should they wish to do so. Mr Michael McCorry, Architect, on behalf of the defendant/appellant when cross-examined, confirmed that he could not recall any issue over the extent and/or route of the pipe in January 2019 and, significantly, the appellant himself did not give evidence on the point nor, indeed, of any contrary position at the time when the 2019 Agreement was entered into. In my view, therefore, based on the evidence before me there was no dispute between the parties as to what was agreed and documented in the terms of the 2019 Agreement when the parties went to the County Court on foot of the Equity Civil Bill which, in turn, led to the March 2019 hearing but it seems clear to me that, as subsequently revealed, both parties were labouring under a common mistake which vitiates the terms of the 2019 Agreement.

(ii) The March 2019 hearing

[29] By the time that the Equity Civil Bill came for hearing Mr Murphy had refused to grant the easement - provision for which had been made in the 2019 Agreement. Essentially, this seems to have boiled down to two reasons:

(i) His assertion that storm water was piped into the water tank/waste water treatment plant or commingled with the run off from it;

(ii) The extent of the pipe and particularly whether or not it extended the full length of the adjoining field and discharged to the watercourse which marked its boundary.

[30] At the trial, the learned trial judge, having heard evidence from Mr Uel Weir, Mrs Leeper, Mr Michael McCorry and Mr Brian Murphy, determined that the easement should be granted. He did so after a fully contested hearing and when all parties had had the full opportunity of presenting their respective cases. Mr Ringland implied that the Leepers in some respects should have been more diligent and undertaken the excavation work before the events of 2019, but I have no evidence before me to suggest that Mr Murphy would have allowed such excavation work. Equally, I would have to say that Mr Murphy at all times could have undertaken that work himself had he chosen to do so and formulate that as part of the case he made to the LTJ. He did not do so. All that was raised on his behalf were the results of 'suds testing' carried out by Mr McCorry. The LTJ was, I assume, invited to make conclusions from that piece of evidence but, frankly, given what I have heard as regards the impenetrability of the current pipe work on account of the loss of function I can see why he may not have been persuaded by that evidence.

[31] I have concluded that the County Court order **when made** was correct *in accordance with its terms* and based on the evidence available to the LTJ at that time. By its nature the Order had to be limited to the circumstances then known and upon which the learned trial judge had heard evidence. It did not (and could not) have dealt with the issues that subsequently came to light after the fuller excavation was undertaken and which are now before this court. By necessity any court order can

only deal with the matters that are put in evidence before it and are known and exist at the time that the order is granted.

(iii) The evidence which has come to light since the County Court order

[32] The appellant lodged his notice of appeal on 28 March 2019 and subsequently served it on 16 April 2019. Following an earlier High Court hearing time was extended to permit his appeal to proceed.

[33] Excavation works in the adjoining field were carried out on 7 and 13 February 2020 and are comprehensively dealt with in the reports provided by Michael McCorry and commented upon extensively by each of the experts.

[34] A jurisdictional issue was raised by way of submissions on 10 February 2020 which led to an adjournment of the first listed hearing of this appeal on 11 February 2020. Further submissions were lodged on behalf of the appellant on 18 February 2020 to which the Leepers responded on 3 March 2020 with a rejoinder from the appellant on 13 March 2020. This resulted in a hearing before Humphreys J and a decision which is dated 16 June 2021.

[35] By order of McBride J on 19 November 2020 this court directed the instruction of a joint expert, Mr Elliott. Mr Elliott's evidence and the report which he produced (dated 14 January 2021) was of substantial help and assistance to the court in dealing with this appeal – not least because it brings together all of the factual basis upon which this court can now determine the matter.

(iv) Current and future position

[36] Based on the evidence – both that adduced at the trial through oral testimony and due consideration of all the expert evidence, including, as I have said, the jointly appointed expert, Mr Elliott, but without rehearsing the detail of each the court makes the following findings:

(i) There appears to be on the ground a single pipe that is no longer functioning as it appears to be beyond its useful life span. From the evidence this arises from a number of causes –

   (a) The original positioning of the pipe closer to the hedge that might be desirable with the consequent increase in the ingress of fibrous roots;

   (b) The insufficiency of adequate backfill thus preventing optimum percolation to the substratum;

   (c) The more recent excavation works themselves.

(ii) That pipe, contrary to the assumptions upon which the 2019 Agreement was entered into and the basis upon which the County Court order was made, physically extends from the boundary of the Property diagonally towards the boundary hedge and thence to the watercourse at the foot of the adjoining field. To that extent the appellant/defendant is correct in his assertion. These facts, however, only became apparent **after** the Agreement and the County Court order and could not, therefore, have been dealt with by either.

(iii) The pipe is comprised of several sections of different pipes/pipework which, based on an assessment of the evidence, on balance, appears to have been laid at different points in time. Although I questioned the experts on the point, no further clarification could be given as to how that might have occurred or, indeed, as to those differing periods or who might have been responsible. Nonetheless, on examination of the photographic evidence and having considered the expert evidence it is quite clear that that is the case. It is equally quite clear that the pipe itself has become completely infiltrated by fibrous roots (largely arising because of its proximity to the adjacent hedge) and is no longer functioning as an effective drainage system;

(iv) On a balance of probabilities, only two possibilities for the existence of the pipe commend itself to the court. Those are, in summary:

(a) That Mr Murphy Snr extended the pipe at some point but simply did not tell the plaintiffs. In her evidence Mrs Leeper did provide a degree of confirmation as to this when she recalled that her father may have extended the pipe work in 1994/5. As Mr Ringland in his closing submissions fairly acknowledged it was something that was of little moment at the time and unlikely to be worthy of too much attention;

(b) That the appellant extended the pipe at some point to facilitate additional drainage of the adjacent field (which it is acknowledged has a preponderance to flood) although I acknowledge that he denies that position in spite of his failure to provide evidence.

In any event, it is unnecessary for me, to determine which version of events is correct. I prefer to work from the basis of what has been established to exist rather than theorise on how the parties got here.

(v) Storm water emanating from the Property, contrary to the defendant/appellant's assertion does not, in fact, enter the plaintiff's water treatment plant, but however it does drain into pipework which removes it from the Property and, at some as yet undetermined point, connects to the main soakaway pipe. It is the case, therefore, that the product of both the water treatment plant and the storm water drainage system become mixed and are, currently, discharged into the watercourse at the foot of the adjoining field. Although Mr Elliott's evidence and his investigations are inconclusive, it is my

view that it is more likely than not that that is the situation on the ground. I accept that that has an inevitable knock-on effect in terms of regulatory compliance and the 2013 Discharge Consent.

[37] As to that, the current view of NIEA is that the storm water drainage and the run-off from the waste water treatment works should not be mixed. This leads to the inevitable conclusion that there should be two pipes and, therefore, an easement which provides for the laying, maintenance and repair of the two pipes.

[38] Taking both that and the condition and functional capability of the existing water pipe (or rather lack thereof) suggests that the whole installation needs to be removed and replaced. The expert evidence, particularly that of Mr Elliott, confirms that conclusion.

[39] I accept that the current requirements of the defendant/appellant (in terms of field crossings etc) lead one to the conclusion that any specification for a revision of the soakaway installation believed must be designed and implemented to take those additional features into account so as to prevent any impediment on the use of the adjoining field. Again, these features were not the focus of either the 2019 Agreement or the County Court order but are in line with Mr Elliott's report of the site as it now presents.

[40] From what I have said, it obviously follows that NIEA's consent will need to be sought and a revised discharge consent procured aligned to the redesign of the system which is depicted in this judgment. It seems to me that the existing consents ie the 1989 consent; the 2013 consent and the 2019 email exchanges – much like the 2019 Agreement and the County Court order – were given on an erroneous basis but consistent with the understandings which existed at that time. I do not, as Mr Ringland urges, find mala fides on the part of the plaintiffs. I have taken it from Mrs Leeper's evidence that she is accepting of the fact (and, indeed, she confirmed it to be the case in open court) that the plaintiffs have no issue in seeking to regularise the final position and, indeed, are anxious to do so.

[41] The countervailing concerns expressed by Mr Connor Murphy (Mr Murphy's son who did appear and give evidence) as regards the environmental position and the potential impact for the farming business operated by he/his father as regards DAERA are, I fully accept, legitimate concerns but (a) on the evidence available to me no issues have yet manifested themselves either in terms of a breach of regulation and/or denial of grant assistance; and (b) in any event the concerns (as expressed) will be addressed by the revision of the recommended sewage/soakaway system (once implemented). Specifically on this point, Mr McCorry, on behalf of the appellant, acknowledged in cross-examination the evidence to the court that the product now coming from the waste water treatment plant is 97/98% "clean" and confirmed everyone's understanding which is that the ultimate decision as to compliance with the Regulations in this regard rests with NIEA.

[42] Distilling that down, I find that there is broad unanimity between all of the expert witnesses that the defendant/appellant's land is generally vulnerable to drainage issues – irrespective of the specific issues which arise in this case as between the parties. From the expert evidence consideration of the soil composition, the topography of the site and the fact that it lies in an existing flood plain are more than ample evidence of that issue. In fact, through none of the cases before me, was there any evidence adduced that would lead me to conclude that at any stage had the Leepers actually created flood damage within the adjoining field other than that which would have occurred naturally. Indeed, one could argue that the abortive "S" like installation (disconnected as part of the 2019 Agreement) in some ways may have improved the drainage quality of that particular portion of the adjoining field. Taking all of these factors into account and addressing myself to the questions put, I have determined that the 2019 Agreement was clearly based on a common mistake - in a sense which the law recognises - meaning that the mistake goes to the essence of the Agreement. It is therefore void. It cannot bind the parties in any continuing sense nor can either party at this point be said to be in breach of its terms. It was an abortive attempt to resolve this dispute. I do not accept the defendant/appellant's arguments that the parties ought to be bound to an Agreement entered into in January 2019 which clearly was made on such an incorrect basis. That means that this court must (as it was invited to do) determine the remedy as between the parties. I do that based on the evidence before me and taking into account those facts (as listed above) which I have found on the basis of that evidence and the assertions made by both parties that they want this dispute to be brought to an end – all of which I take as genuine expression of intent on their respective parts as further evidenced by the questions upon which I have been asked to opine.

[43] As for the County Court Order under appeal it was and remained valid when issued on the facts then known to the LTJ based on the evidence before him. All appeals to this court are by way of a de novo hearing based on the evidence before this appellate court. As I have explained, that evidence is much more extensive than that which was before the County Court judge and so it is unsurprising that I come to a more nuanced view – but it is a view, I would say, that is consistent with the County Court Order insofar as it affirms the grant of an easement but merely clarifies its extent in alignment with the evidence now before me.

[44] As to the extent of that easement, I conclude that it was the intention that it be an easement which was compliant with the requirements of NIEA. Over the period since the original discharge consent in 1989, those requirements have, inevitably, changed. To give effect to the easement, now, I find, requires an easement which envisages (a) the "two pipe" constellation to which I have referred above; (b) that the easement extends from the Property to the watercourse which bounds the adjoining field; (c) is laid at a level and subject to a design and implementation which does not impede the defendant/appellant's use of the openings now created in the hedge which exist between the adjoining field and his neighbouring property and maximises the opportunities for percolation to the substratum; (d) is subject, at all times, to compliance with the requirements of NIEA.

[45] The parties have already sufficient information to formulate the requisite wording but if they fail to achieve consensus on the form of easement within two (2) months of the delivery of this judgment the court is happy to settle the terms of such an easement.

[46] As to the question of regulatory consent, as I have said, this not only has changed throughout the course of the history of the relationship between the two land holdings (ie from 1989 onwards) but also has metamorphosed because of the differing understanding of what was originally constructed. It is common case that the current consent in no way complies with the regulations as they presently stand. That point was clearly accepted by Mrs Leeper and, indeed, she confirmed that she had no difficulty in addressing that situation.

[47] In an attempt to resolve all the issues outstanding and pursuant to the powers set out in Order 40(1) of the Rules I direct that Mr Elliott ought to be appointed to undertake the following works:

(a) to design a specification for the "two pipe" discharge solution;

(b) to liaise with NIEA to ensure that NIEA's recommendations can be fulfilled;

(c) subject to that dialogue, Mr Elliott's recommendations and ultimate design are to form the basis of the works to be carried out;

(d) the works are to be supervised and approved by Mr Elliott at each stage;

(e) at the appropriate stage Mr Elliott is to apply on behalf of the plaintiffs for an NIEA consent in respect of the works,

(f) that a map of the "as built" construction be prepared, appended to the easement be executed by the parties and registered in Land Registry to give effect to these arrangements.

Costs

[48] That brings me to the question of costs. I address this in the following way:

(i) In terms of the practical costs of the works, the reality is that the pipe installation which currently exists has ceased to be functional, in part, because of its original location but, not least, because it is over 30 years since it was originally installed. Had a formal easement in standard terms been granted when the property was originally gifted to the Leepers, I conclude it would have incorporated a standard provision which would have allowed the Leepers access for the purposes of repairing maintaining and (if necessary) renewing the soakaway installation. Consistent with that and, because, according to the

evidence before me, only the Property benefits, I have concluded that the plaintiffs should be responsible for the practical costs of excavating and completing the works;

(ii) As Mr Elliott is a joint appointment and, in my view, is, under the terms of this judgment, largely to continue in that role, then I direct that his costs should be borne equally between the parties;

(iii) I have determined that the County Court order in respect of costs should not be interfered with. The County Court Order was granted based on the evidence before the LTJ. The reality is that this appeal is entirely predicated on evidence that came to light after that event. The county court judge reached his determination based on the evidence that was before him at that point. Both parties had advanced their best case, and he gave judgment on that basis and determined the question of costs on that basis. I see no reason to disturb that conclusion. In any event, I also agree fundamentally with the conclusion that he reached based on the evidence then available to him.

[49] As I said at the trial, this is a highly regrettable series of litigation which largely could have been avoided. Again, standing back from it the conclusion of this judgment is that the County Court Order is no longer relevant, but not because one side "won" or "lost" but rather that the decision of the lower court has been rendered obsolete. A County Court appeal is (and was in this case) a de novo hearing. Given that discretion lies with me on the question of costs I have determined that each party shall bear their own costs in relation to the appeal hearing and any interlocutory matters that were reserved to the trial. I do not disturb and make no ruling in respect of any earlier High Court costs orders.