



BURGES
SALMON

Environment and energy briefing from Burges Salmon
published in the April 2014
issue of *The In-House Lawyer*.

Legal responsibility for flooding

THE
IN-HOUSE
LAWYER

Legal responsibility for flooding



BY MICHAEL BARLOW
partner,
Burges Salmon LLP

THE WINTER OF 2013/2014 SET A NUMBER of records. It saw the largest storm surge in 60 years; the stormiest December on record; the wettest January in 250 years; the lowest depression since 1876; and the wettest winter on record. Everyone will be aware of the flood events suffered, particularly in Southern England.

As the waters now recede, there are a number of fundamental questions to be asked about how we, as a society, should deal with flooding and who should ultimately bear the costs. The government and the insurance industry are wrestling with the question of insurance and the development of Flood: Re, which will deal with the insurance of many (but not all properties). The Environment Agency are considering which flood prevention works should be prioritised for funding.

Among all of this are the legal principles behind a claim arising from flood damage. As those who have suffered damage consider their options these principles are bound to come into play.

BACKGROUND TO THE LAW

Throughout time, and as a natural phenomenon, the periodic flooding of land has occurred in some form. Some flows are regular, resulting in the promotion of watercourses in a defined channel, while other flows have been more erratic and damaging following extreme weather conditions. As more land development has taken place on the natural floodplains, the courts have decided that certain floods which affect property interests should be avoided or counteracted whenever feasible. This is an important concept which has underpinned the development of the law relating to flooding over the years, as discussed below.

RIPARIAN RIGHTS AND CLAIMS ARISING FROM ENCROACHMENT OF THE SEA

This article will also not deal with claims arising from riparian rights which is a discrete area in itself. Riparian rights arise where there is a natural watercourse or water catchment areas, such as ponds. The owners of the land on either side of those watercourses (riparian owners) have certain rights which can be enforced against other riparian owners and in certain circumstances, these rights are relevant to flooding.

Many of the principles outlined below can apply to the protection of land from the encroachment of the sea. However, such claims also involve other legal principles which are beyond the scope of this article.

THE HISTORIC DEVELOPMENT OF THE LAW RELATING TO FLOODING

The common law has developed from the principle that flooding is natural and, as such, no-one can be blamed for causing it. However, gradually the courts have come to recognise that in some cases it is often the neighbouring land use rather than nature that is the cause of the flooding. The effect of this has been to put increasing duties on parties to take action to avoid flooding in the relevant circumstances and the development of a considerable body of case law in relation to flooding.

Traditionally, floodwater was regarded as a common enemy and everyone had the right to try to defend their property against flooding. As a result, any action to prevent flooding was taken to be a reasonable use of land even if problems were caused on another person's land. It is of course obvious that if water is diverted from one person's land it will eventually find its way onto another's land. As a result, a delicate balance has had to be struck between legitimate activities ie preventing flooding on one's own land and illegitimate activities which would mean re-directing floodwater onto land under another's ownership. In the 19th century, there was a considerable amount of litigation dealing with the establishment of the boundaries of this balance. At that time, a much larger degree of selfishness was permitted on behalf of the landowner when attempting to protect their land from flooding. This is no longer necessarily the case although the case of *Arscott v The Coal Authority* [2004] more recently confirmed that the 'common enemy' principle still applied.

FLOODING CLAIMS IN THE LAW OF NUISANCE

Most flooding claims will be brought in the law of nuisance. The term nuisance as used in law is not precisely defined but comprises a variety of situations which are discussed below in greater detail. Briefly, however, nuisances may be considered to be one of three situations: either acts or omissions causing damage or inconvenience to the

public in the exercise of public rights; acts or omissions specifically designated by statute as nuisances; or, finally, acts or omissions connected with a user of land which cause damage or interference with another's use and enjoyment of their land or some right connected with that land. The general rules (such as those relating to standing, foreseeability of harm and causation) for bringing a claim in nuisance will therefore apply to flooding cases.

It is important to bear in mind that the law of nuisance has been developed on a case-by-case basis so it is perhaps dangerous to draw general conclusions from the cases which all turn on their own facts. However, authors such as Howarth¹ have considered that the nuisance cases related to flooding can be divided into three main areas, mainly:

- a) land drainage rights;
- b) the mining cases;
- c) the culverting cases.

The basis of these cases are explained below.

LAND DRAINAGE RIGHTS

It has long been established that the owner of property situated on a lower level than its neighbour cannot bring a claim against its higher neighbour for any flooding caused by the natural occurrence of water running onto the lower land. It is also well established that the lower owner has no right to receive water from the higher owner. This reflects the points made above that the natural incidence of water on land is a common enemy. Further, it has now been established in *Home Brewery Co v William Davies & Co (Leicester)* [1987] that the owner of lower land has no duty to receive water from the higher land. As such it can take action to prevent that water entering its own land.

Liability for flooding between neighbours will arise when the defendant's use of the land is considered to be a 'non natural use'. In *Hurdman v North Eastern Railway Co* [1878], the defendant had piled rubble against the claimant's wall. As a result rainwater percolated through to the claimant's house. The Court held that the rubble was 'artificial work' and that the rainwater would not have percolated 'but for' the rubble. On that basis the claim succeeded.

Liability can also arise if water has accumulated on land and the owner of that land deliberately disperses it onto neighbouring land. In *Whalley v Lancashire and Yorkshire Railway Co* [1884], rainwater had collected against the defendant's embankment to the extent that the embankment was endangered. The defendant cut trenches in the embankment to allow water through and caused flooding to the claimant's land. The Court held that the defendant had no right to protect its property from flooding by transferring the problem to the claimant.

The above cases all illustrate that liability will only arise from the drainage between adjacent land if the defendant takes action which is non-natural or deliberate and which causes water to flow onto the neighbour's land.

THE MINING CASES

Historically many of the cases relating to flooding in nuisance have been in the context of mining operations, for example where one mine worker has carried out works which have allowed water to enter into a lower mine. Most of these cases were decided in the 19th century when it was generally accepted that the exploitation of coal and other minerals were of vital importance for the development of key industries. Such concerns may well have had some influence over the judges at the time.

It is not clear whether similar cases would be decided following the general principles arising from the nuisance cases (particularly *Leakey v The National Trust* [1980] as discussed below). Some commentators consider that there is a special class of nuisance which relates specifically to mining cases. As such this article does not address these cases in detail.

THE CULVERTING CASES

A culvert is a conduit which is used to enclose water that would otherwise flow naturally. The culverting cases arise where culverting of a watercourse has taken place and it is alleged that the culvert has consequently caused flooding. The general rule is that anyone who interferes with the course of a stream is liable if the works which they carry out are not adequate to carry off the water that travels down the new works. This is the case even if any flooding is a result of extraordinary rainfall.

Case law also shows that it is not only necessary to ensure that any culvert is designed and constructed correctly but also that it is continuously maintained to ensure that it operates effectively. Furthermore, it is also possible to be held liable in nuisance even if one did not construct the culvert but simply owned land on which a culvert has been constructed. In that case it is necessary to consider whether the defendant has continued or adopted the nuisance.

The most important recent case concerning culverting is *Bybrook Barn Garden Centre v Kent County Council* [2001]. In this case the defendant highway authority maintained a culvert which had been in place for some years to take the natural flow of water from a ditch passing under a road. However, the subsequent development of a business park in the vicinity caused the amount of water to increase and the pipe became inadequate for the increased levels. The question which arose was whether there could be an actionable nuisance which was caused by factors outside the defendant's control. The Court of Appeal followed the case of *Leakey* (see below) and held the highway authority liable. It said that once the council was aware that the pipe was not adequate to support the amount of water, it was under a duty to do what was reasonable to prevent any flooding. This shows a broad-based policy decision consistent with a trend towards increasing the scope for landowners to be held liable for unreasonable land use.

The fundamental principles in relation to liability for culverts are established in *Greenock Corporation v Caledonian Railway Co* [1917]. The appellant constructed a paddling pool in the bed of a stream which altered the course of the stream. As a result of extraordinary rainfall the stream overflowed at the pool and flooded the property of the respondent. The Court held that the duty of anyone who interferes with the course of a stream is to ensure that any works which are substituted for the natural channel are adequate to carry off the water even if the water is the result of extraordinary rainfall.

NOTE

- 1)** Howarth, W, *Flood Defence Law* (Shaw and Sons Ltd, 2002).

The appellant also attempted to argue that the extraordinary rainfall was an Act of God. However, the Court explained that such rainfall could be expected in Scotland.

There is also a duty on those who are responsible for culverts to maintain them. In *Pemberton v Bright* [1960] the County Council had constructed a culvert under a road between the properties of the claimant and the defendant. The culvert had been constructed without a grid and from time to time an employee of the Council cleared the mouth of the culvert. After some heavy rainfall the claimant's land was flooded because the culvert became blocked with branches and other debris. The Court held that the Council and the owner of the land were both liable on the basis that they had continued the nuisance.

Liability for continuing nuisances is also illustrated in the case of *Sedleigh-Denfield v O'Callaghan* [1940]. In this case, a culvert had been constructed on the respondent's land by a third party. A grating was placed on top of the culvert which, during a heavy rainstorm became choked with leaves and flooded the appellant's land. The respondents were held liable even though they had not constructed the culvert but because they had adopted the nuisance.

The culverting cases are particularly important because many industrial sites have culverts which need to be maintained or even upgraded. This is true even if the culverts were constructed prior to a company's ownership of the site.

THE CURRENT DIRECTION OF FLOODING CASES IN NUISANCE

Leakey v The National Trust has indicated a fundamental shift in the cases relating to nuisance and places an increased duty on all landowners to take active steps to prevent damage to their neighbours.

The National Trust owned a conical hill adjacent to residential properties. Following the hot summer of 1976, one of the occupiers of the houses noticed that there was a large crack in the hill which looked likely to cause a land slip. She notified the National Trust who indicated that they had no liability to do anything about it as it was a naturally occurring problem. Consequently a land slip occurred. The Court of Appeal held that the

National Trust was liable on the basis that there was a duty on a landowner who knew or ought to have known of, in this case, a risk of encroachment onto another's land, to do what was reasonable in all the circumstances to prevent or minimise the risk of the known or foreseeable damage or injury to that other person. That principle has been applied and modified in many of the subsequent cases on nuisance and marks a fundamental shift away from the 19th century cases which place a much lesser duty on a landowner.

An illustration of the Court's application of the Leakey principles to flooding claims is *John Green v Lord Somerleyton* [2003]. The Court of Appeal held that the principles applied to naturally flowing water and that the defendant would be liable if flooding was caused by their failure to do what was reasonable in the circumstances. As such, the scope of the duty on every landowner is to consider:

- a) The extent of the risk – whether it is reasonably foreseeable that damage will be caused;
- b) The foreseeable extent of any damage;
- c) Whether it is practicable to prevent or minimise any damage;
- d) If it is practicable, the extent of the works required;
- e) The financial resources of the parties.

If, having weighed up the factors, it is reasonable to take steps to prevent damage by flooding, then the landowner should do so.

OTHER POTENTIAL CAUSES OF ACTION

The impact of the Human Rights Act 1998 has been explored without success for the claimants since it came into force (for example in *Arscott and Marcic v Thames Water Utilities Ltd* [2003]). However, it remains a possibility that this cause of action may have success in the future.

CLAIMS AGAINST PUBLIC AUTHORITIES

Those who have suffered from the flooding in Somerset have argued that a lack of dredging by the Environment Agency was a major contributory factor in the flooding. Although a detailed examination of a potential claim is beyond the scope of this

article, claims against public authorities are possible but often difficult. For a claim against a public authority, as landowner, the position should be as described above but the courts are generally reluctant to find a public authority liable in negligence in exercising its statutory powers or duties. However, that is not to say that no such case could be brought if the facts supported it.

PRACTICAL ISSUES

In development projects it is likely that the issue of potential flooding will be addressed at the planning stage and, if a cause of flooding is not picked up at this stage, it should be possible to argue that any such flooding was not reasonably foreseeable. However, on smaller projects it is important to consider whether any flooding could result (the considerations are well summarised in *John Green* and set out above). If not, those affected (or their insurance company) could well be seeking to recover their losses from any party who has caused the flooding.

By Michael Barlow, partner, Burges Salmon LLP.
E-mail: michael.barlow@burges-salmon.com.

Arscott & ors v The Coal Authority & anor
[2004] All ER 194

Bybrook Barn Garden Centre v Kent County Council
[2001] Env LR 543

Greenock Corporation v Caledonian Railway Co
[1917] AC 556

Home Brewery Co v William Davies & Co (Leicester)
[1987] QB 339

Hurdman v North Eastern Railway Co
[1878] 3 CPD 168

John Green v Lord Somerleyton
[2003] EWCA Civ 198

Leakey v The National Trust
[1980] 1 All ER 17

Marcic v Thames Water Utilities Ltd
[2003] UKHL 66

Pemberton v Bright
[1960] 1 All ER

Sedleigh-Denfield v O'Callaghan
[1940] AC 880

Whalley v Lancashire and Yorkshire Railway Co
(1884) 13 QBD 131