

**IN THE DISTRICT COURT
AT WHANGAREI**

**CIV-2015-088-000250
[2016] NZDC 19894**

BETWEEN CAROL BRIANNE BYLES
Appellant

AND NORTHLAND REGIONAL COUNCIL
Respondent

Hearing: 4 July 2016

Appearances: Ms Prendegast for Appellant
Mr Mathias for Respondent

Submissions: 13 September 2016

Judgment: 21 November 2016

**RESERVED JUDGMENT OF JUDGE L I HINTON
[In the matter of an appeal under s 62 of the Land Drainage Act 1908]**

[1] This appeal by Mrs Byles as appellant concerns a notice issued by the respondent Northland Regional Council instructing Mrs Byles to remove an obstruction from a watercourse running through her property.

[2] The alleged obstruction is a culvert at a crossing on a stream. The culvert has been there since 1949 and the crossing provides Mrs Byles with vehicle access to part of her farm. Mrs Byles' farm property was acquired by her and her late husband in February 1999. The small watercourse running through the farm originates in a spring upstream.

[3] The Council's position is that the culvert is an obstruction that is causing damage to upstream properties due to flooding and it is reasonable for the Council to require that it be removed. The Council relies on powers conferred under s 62 of the Land Drainage Act 1908 (the Act).

[4] The Council issued its instruction notice by letter dated 14 May 2015 instructing the removal of the obstruction, namely the causeway culvert, from the stream by 19 June 2015.

[5] The Council issued that instruction as “a local authority” under the Act, the source of the Council’s authority in relation to the undertaking of public works being the Soil Conservation and Rivers Control Act 1941. As a local authority the Council has the powers under s 62 to issue a notice requiring the occupier of land to clear obstructions from a watercourse or drain.

[6] The notice issued by the Council was preceded by a letter of request to the Byles dated 7 April 2015 titled “REMOVAL OF OBSTRUCTION FROM DRAIN” which included the following:

As discussed with you previously, the obstruction due to the causeway culvert crossing in the stream where it flows though (*sic*) your land on the bed of the unnamed tributary at and around map coordinate 1707550 E – 6041200 N (Datum 2000, NZTM projection), at the property located at 70 Watrous Downs, Maungatapere, being LOT 7 DP 188035, is having an effect on upstream landholders.

Under the Land Drainage Act 1908, it is your duty to maintain the stream free of obstructions. Pursuant to Section 62(1) of that Act I request you to remove the obstruction from the stream, namely removal of the causeway culvert crossing from the stream, as to enable the free flow of water in the stream before 11 May 2015. The removal shall be done to ensure that the stream cross sectional profile within the footprint of the causeway, and immediately upstream and downstream of the causeway, is not constricted by the causeway.

[7] The removal of the causeway culvert was not effected by the stated date of 11 May 2015 and the Council subsequently gave notice to the Byles under the Council’s letter of instruction dated 14 May 2015 titled “REMOVAL OF OBSTRUCTION FROM STREAM” which included the following:

Under the Land Drainage Act 1908, it is your duty to maintain the stream free of obstructions. Pursuant to Section 62(1) of that Act I instruct you to remove the obstruction from the stream, namely the causeway culvert crossing, as to enable a free flow of water in the stream by 19 June 2015.

Should this work not be completed satisfactorily by 19 June 2015, the Council will have a contractor enter onto your property under Section 62(2 & 3) of the Land Drainage Act and complete the work. The Council will recover the costs of such work from you.

[8] So the action required by the Council, according to those letters, was the removal of the causeway culvert crossing from the stream running through the Byles' property, so as to enable a free flow of water.

[9] The Council issued those letters because of concerns that upstream owners were suffering flooding in storm conditions. A precursor item from the Council (by letter to the Byles and upstream owners) in December 2014 referred to the "Watrous Down drainage issue involving the culvert crossing on the Byles' property ... and flooding of the land upstream ... of the culvert crossing during high intensity rainfall events". Mrs Byles said in her evidence:

The situation I now find myself in started in April 2011 when the neighbours upstream complained of flooding following Cyclone Wilma in January 2011.

[10] At the conclusion of the hearing of this matter on 4 July 2016 I advised the parties that in my view the culvert presented a relevant obstruction impeding the flow of water which ideally should be removed and improved having regard to s 62 of the Act. The question for me was, however, on what terms ideally should that removal of the culvert be effected. My view was that (bearing in mind the Court had a discretion) if the Court simply made an order for removal without more, that might not in the circumstances (to put it broadly) be fair to Mrs Byles.

[11] So that I then proposed the parties consider terms on which removal/replacement of the culvert could be effected. I anticipated, given the evidence and my indication, and evident acceptance of my proposal by the parties, that agreement would have been possible.

[12] No agreement was reached. The parties simply filed closing submissions. I subsequently convened a teleconference recently with the parties to confirm their position.

[13] This decision I now give is consistent with the view I have already indicated.

Section 62 of the Act

[14] Section 62 of the Act provides as follows:

62 Local authority may order removal of obstruction from watercourse or drain

(1) Where there is any watercourse or drain within or beyond the district of a local authority, and its obstruction, in the opinion of the local authority, is likely to cause damage to any property in such district, the local authority may order the occupier (or, if there is no occupier, the owner) of any land on the banks of such watercourse or drain within the district or within 1.5 kilometres beyond the boundary of the district to remove from such watercourse or drain, and from the banks of such watercourse or drain to a distance not exceeding 3 metres from the nearest margin of the watercourse or drain, all obstructions of any kind calculated to impede the free flow of water in such watercourse or drain.

(1A) For all the purposes of this section—

- (a) obstructions includes earth, stone, timber, and material of all kinds, and trees, plants, weeds, and growths of all kinds:
- (b) the occupier or owner of land adjoining a road shall be deemed to be the occupier or owner of land on the banks of any watercourse or drain running upon such road where such road fronts the land of such occupier or owner, unless such watercourse or drain has been artificially constructed by the local authority for the purpose only of draining the surface of such road:
- (c) remove, in relation to any obstruction consisting of trees, plants, weeds, or growths, includes, if the local authority so specifies, burning, poisoning, cutting, or treating, whether with or without the removal of the burnt, poisoned, cut, or treated portions.

(2) Every occupier or owner who fails to commence the work specified in the order within 14 days from the receipt thereof and to continue that work with all reasonable expedition or, where the local authority specifies a time within which the work must be completed, who fails to complete the work within the time specified in the order is liable to a fine not exceeding 1 pound for every day during which such order is not obeyed, and a further sum equal to the cost incurred by the local authority in removing any such obstruction; and the said cost shall be a charge on the land, and may be recovered as rates are recovered under any Act for the time being in

force in the district: provided that any such occupier or owner may appeal to a District Court Judge against such order within 10 days after the service thereof, and such District Court Judge shall have jurisdiction to determine whether such order shall have effect, having regard to all the circumstances of the case, and pending the determination of such appeal the order shall be suspended.

...

[15] An order for the removal of an obstruction under s 62(1) may be given by the Council where the following preconditions are met:

- (a) There is a watercourse or drain;
- (b) The watercourse or drain adjoins the owner's or occupier's land;
- (c) There is an obstruction in that watercourse or drain;
- (d) The obstruction is calculated to impede the free flow of water in the watercourse or drain; and
- (e) In the opinion of the Council that obstruction is likely to cause damage to any property (in the district of the Council).

[16] Under s 62(2) on an appeal to this Court, the Judge has jurisdiction "to determine whether such order shall have effect, having regard to all the circumstances of the case ...".

[17] As noted recently in *Titford v Northland Regional Council*, it is incumbent on the local authority to prove (on the balance of probabilities) at the hearing of any appeal that all preconditions to the issuing of an order under s 62 were met at the time the order was made¹.

[18] Here, there is a small stream running through Mrs Byles' property. The potential issues arising are broadly whether the culvert is an obstruction, whether it

¹ DC Kaitaia CIV-2009-029-123, 21 June 2010 at [103].

is calculated to impede the free flow of water, and whether it is likely to cause relevant damage.

[19] Preliminary legal issues in relation to the nature of an obstruction and the impeding of free flow of water are first dealt with below.

What is an obstruction?

[20] It could be argued that a class of “obstruction” is established by s 62(1A), being naturally occurring obstructions and not deliberately/permanently erected structures. There is reference elsewhere in the Act to trees, fallen branches and so forth (for example, ss 26 and 27) supporting a narrow interpretation.

[21] On the other hand, an “obstruction” is defined to be a “thing that impedes or prevents passage or progress; an obstacle or blockage” which is potentially wide. Moreover the section applies to obstructions “of any kind”, subs (1A)(a) on its face being a non-exhaustive list, so that the wording supports a wide interpretation of obstruction, consistent with how the word is ordinarily defined and used.

[22] Also, s 25(1) requires a Drainage Board to cause all watercourses and drains vested in it or under its management to be so constructed and kept so as not to become nuisances or injurious to health, and to be properly cleared, cleansed and maintained in proper order (presumably to facilitate the purpose of avoiding nuisance or injury). The section states that s 25 does not prevent the Board from exercising any power set out in s 62. Section 61 provides that local authorities have and may exercise – in regard to the cleansing, repairing or otherwise maintaining of watercourses or drains – the powers of Boards. Section 62 clarifies one such power. A construction of s 62 in light of s 25 would support a wide interpretation of the types of things that may qualify as “obstructions” capable of causing nuisance or injury to health.

[23] So the causeway culvert crossing is capable of being an obstruction for purposes of s 62.

Is the obstruction “calculated to impede” the free flow of water?

[24] As Judge McElrea opined in *Titford*, an obstruction *calculated* to impede the free flow of water is one that is *likely* to impede the free flow of water. It is not necessary that the obstruction be created with the intention of impeding such flow.

[25] The culvert here was (admittedly, and there is no argument on this) not intended to be an obstruction to the waterway. The question though is whether its presence is nevertheless likely to impede the flow of water. This is a matter of fact to be decided on the evidence. There was no dispute about that interpretation and approach.

Burden of proof

[26] Counsel were agreed there was an evidential onus on the Council, the jurisdiction of the Court being original. Judge McElrea stated in *Titford* in relation to the challenge to administrative action in appeals of this nature²:

Thus, while the Court’s role is appellate in name and form, its jurisdiction may be (and is, in my view) original – i.e. deciding for the first time whether, in all the circumstances (including those not put before the local authority) the order shall have effect.

[27] Accordingly, evidence of the Council witnesses was heard prior to the evidence for Mrs Byles.

Evidence

[28] The Council’s evidence was from Mr Unkovich and Mrs Sackfield, who were owners upstream of Mrs Byles’ property, and Mr Howse, the Council’s engineer. Both Mr Unkovich and Mrs Sackfield referred to water banking up behind the culvert and stone wall on the causeway in flood events and their properties being consequently flooded in part. They each referred also to the horticultural and other uses to which their properties have been put or which are intended.

² At [25].

[29] Mrs Byles gave evidence. She still lives at the property. The culvert was constructed in April 1949 by Mr Grove, who was the farmer at the time and the subdivider in 1997, following which the Byles purchased. Expert evidence for Mrs Byles was given by Mr Blackburn (of the firm of Hawthorn Geddes), an engineer with hydrologic and hydraulic engineering experience.

Discussion

[30] There did not seem to be any grounds to dispute that there was a relevant watercourse or stream draining through Mrs Byles' property, and that the presence of the culvert within the watercourse constitutes an obstruction, for purposes of s 62.

[31] There were then two central issues. The first was whether the obstruction was likely to impede the free flow of water. On that there was some difference of opinion but it seemed to me a degree of evident consensus. The second issue concerned the Council's having grounds to issue the notice.

[32] For the appellant, Ms Prendegast emphasised that Mr Blackburn had given independent engineering evidence which was apparently unchallenged expert evidence. Ms Prendegast was at pains to point out to Mr Howse during her cross-examination or interview of him that he was (apparently) not an expert, or alternatively to ask Mr Howse if he were an expert and invite him to acknowledge that he was not, all of which Mr Howse dealt with rather well. Ms Prendegast's point was that it was Mr Blackburn who had requisite expert experience with respect to modelling of the stream and the constraints within it and that Mr Howse had no experience in such modelling, the suggestion being this was noteworthy. Significantly also, Ms Prendegast submitted and suggested to Mr Howse that he was not independent and was seeking simply to defend actions of the Council.

[33] I thought that Mr Howse had qualifications and experience which were relevant. He was of course able to give evidence of his own observations and opinions, which were useful and supplemented Mr Blackburn's opinions, based on his experience. Mr Howse's evidence, for example, concerning the stream being blocked at the culvert with silt was important and an observation (with his attendant

opinion) that he was able to make without running foul of the Evidence Act 2006. Likewise, Mr Howse's opinion concerning full bank measurements was also relevant and admissible. He may have lacked technical modelling experience but that did not affect important relevant evidence he gave.

[34] I commented immediately at the conclusion of the hearing that I had found the evidence of both Mr Blackburn and Mr Howse useful and that I considered both had given their evidence fairly and in a forthright and professional manner. I do not consider that Mr Howse displayed any partiality in his evidence generally or the opinions he offered to the Court. I do note that Mr Howse's forthrightness seems to be reflected also in some of the correspondence I reviewed, and in particular answers which Mr Howse gave in his evidence concerning the history of contact with Mrs Byles and the difficult decisions which have faced the Council in relation to this matter. I accept this has not been straightforward at all for the Council and that Mr Howse and the Council have acted in good faith to attempt to broker a sensible compromise which sadly has not eventuated.

[35] Nevertheless, I do of course acknowledge that Mr Blackburn's opinion carries considerable weight as an expert in the relevant field, and I accorded his evidence that weight. Mr Mathias did not and could not properly challenge that.

[36] That said, I considered that it was plain from the evidence that the culvert creates an obstruction and constitutes an impediment to the free flow of water because of silt at least. The stream and the culvert is evidently prone to sedimentation. I accept that Mr Blackburn concluded nevertheless that "removal of the causeway is unlikely to *significantly* reduce the flood risk on the Sackfield property" (*emphasis added*). But nevertheless the conclusion I had was that there would be a reduction of flood risk which meant that the culvert impedes the free flow. That was the obvious conclusion from the evidence.

[37] Mr Howse confirmed in evidence that there is significant blocking through siltation at the present time. I accepted the broad thrust of the evidence of the upstream owners in relation to flooding in storm conditions, noting that their evidence was nevertheless not detailed or specific.

[38] It was significant that Mr Blackburn conceded that the culvert is susceptible to siltation and obstruction and, in the event such conditions exist, that there is potential for damage in storm conditions for upstream properties. He was fair and explicit in relation to that in cross-examination by Mr Mathias. Mr Blackburn accepted that the upstream owners gave observed accounts of the previous flood events supporting the view that the causeway culvert causes an obstruction. He noted that:³

In the degree of sedimented state that it was during and apparently subsequently recorded, yes you're talking about a culvert that is obstructed to three quarters of its depth with sediment, it only has 25% or less of available capacity.

[39] Mr Blackburn did comment on the relative low level of the invert of the culvert and thus susceptibility to accumulation of sediment. He thought this might nevertheless be offset by the possibility of self-cleansing via flow velocity during significant rainfall. Nevertheless, this seemed a possibility only.

[40] Mr Blackburn advised me that irrespective of the sedimentation issue, removal of the culvert or its replacement with a larger culvert has the "potential to reduce the risk of flooding" on upstream properties. That was a realistic and fair assessment I thought.

[41] I should note that I have not overlooked Mr Blackburn's opinion also that the culvert sits within a natural basin with a higher level downstream meaning the basin would accumulate sediment irrespective of the culvert.

[42] Further, although I am not sure Mr Blackburn addressed the point directly, it seems axiomatic Mr Blackburn's modelling would not have involved a sedimented culvert.

[43] Overall there was simply no other conclusion available on the evidence. The culvert impedes the free flow of water. If it were not there, there might be still a build up of sediment which was an impediment. But for so long as it is there, there is a greater impediment. If there were a larger culvert better placed then this would

³ NOE page 70, line 29

likely reduce the risk of flooding. Those conclusions were unavoidable. I gave my immediate view accordingly at the hearing.

[44] I formed the view that Northland Regional Council did have grounds upon which to form the opinion leading it to issue the s 62(1) notice. The Council had complaints of damage (by flooding) to upstream properties, particularly following the 2011 Cyclone Wilma flood event and Mr Blackburn's 2011 report accepting the culvert would cause upstream flooding in storm conditions. Whilst there may be issues as to the extent of flooding attributable to the culvert, on no sensible view is there any doubt some relevant flooding occurs. The Council proved on the balance of probabilities that all preconditions to the issuing of an order under s 62 were met.

[45] Accordingly, on the face of it the causeway culvert crossing is a candidate for removal under s 62.

The Court's residual discretion

[46] However the Court has a discretion as to whether or not the order of the Council shall have effect pursuant to s 62(2) "having regard to all the circumstances of the case". That is potentially very wide.

[47] In *Titford*, Judge McElrea's view was that there is no limit to the circumstances that might influence the discretion of the Judge. The factors considered relevant in that case included the responsibility for the obstruction, the operation of the doctrine of natural servitude, the benefits or lack of benefits flowing to the adversely affected owner from the obstruction, the cost of removing the obstruction when weighted against the nature and extent of the likely damage to be caused, and the previous history relating to the flow of water in such watercourse or drain. Those matters seem sensible considerations which would inevitably require evaluation.

[48] A little history is relevant. The Byles purchased their property in 1999 with the culvert causeway structure in place. The existence of the culvert causeway

structure and its contribution to the amenity values of the property was, I accept, a reason influencing the Byles' purchase.

[49] Mrs Byles said that prior to purchase of the property they were made aware that the land in the subdivision was low-lying and that the area around the stream running through the land to be subdivided was subject to flooding. They had a consultant report confirming to a large extent what they had been told by their vendor Mr Grove, that parts of the land were low-lying and poorly drained, suitable for pastoral use but totally unsuitable for horticulture. She was "particularly taken by the aesthetics and contribution made by the causeway to the amenity of the property".

[50] Mrs Byles said they were first contacted by Mr Howse for the Council in April 2011, when they were told of the Council's receipt of a complaint from neighbours upstream. This was associated with Cyclone Wilma. There was a subsequent meeting on 31 May 2011 with upstream property owners but it was clear they were not prepared to contribute to any remedial works and no resolution was achieved.

[51] In relation to formal notifications, Mrs Byles said the first abatement notice was served 26 July 2011 requiring modification or removal of the culvert. Hawthorn Geddes were engaged by the Byles to provide an expert report and assessment.

[52] A second abatement notice was issued on 6 March 2012 requiring modification or removal of the culvert crossing structure by 6 April 2012, and cancelling the earlier 2011 abatement notice. The modifications required – lowering of the crest and provision of voids in the stonewall in accordance with the recommendation in the Hawthorn Geddes report – were those the Council had previously recommended against. This March 2012 notice was itself then cancelled on 18 April 2012 on the grounds that drainage improvements may be achieved through alternative means, which Mrs Byles described in her evidence in this way:

- (a) We were required to reposition some large rocks from the middle of the stream channel to the side (which we did immediately).

- (b) The upstream owner was to be requested to clean the accumulated silt from the stream to a level consistent with the base of the culvert.
- (c) Northland Regional Council was to liaise with and encourage NZTA to undertake improvements to the road drainage network to reduce the volume of runoff being diverted from the road network.

[53] The Council had reassessed its position by 3 January 2013, reflected in the Council's letter then to Mr Unkovich:

...

We have reassessed our position with the culvert crossing on the Byles' property. Our position has been reached after consideration of the following points.

- The area that floods upstream of the Byles' property is recorded as a flood prone area in the District Plan maps.
- The storage shed upstream of the culvert crossing was constructed in recent times, by a previous land owner who constructed the shed in awareness of the flood risk and downstream culvert crossing.
- The Byles did not construct the culvert crossing, it is understood the crossing was constructed during the 1940's.
- Flooding occurs on an infrequent basis in this area, during high intensity rainfall events, and the area will still be prone to flooding without the culvert crossing in place (particularly given the other culvert crossings located immediately upstream).
- The significant potential cost to ratepayers in seeking an enforcement order to modify the culvert crossing, when this will not resolve the flooding issues associated with this land.

We suggest that the most appropriate course of action is for the crossing landowner and upstream landowners to meet, and attempt to agree to a shared course of action where all parties contribute equitably to address the situation. We would be prepared to facilitate a meeting for this purpose. Please feel free to contact me if you would like to discuss this further.

...

[54] There is other relevant history, including meetings between affected parties to broker an acceptable compromise, which appear to have failed. I am not aware of the detail.

[55] But what is clear from all the correspondence I was referred to is that the Council has not had a consistent line on the problem the causeway presents, the

origin and extent of flooding damage that is relevant to upstream owners, and the actual liability and indeed responsibility of Mrs Byles in the circumstances. Obviously there is an acceptance that flooding occurs and that, in the Council's view, fairness dictates that all parties contribute to a solution.

[56] The nature or extent of the interference with the free flow of water is particularly relevant with respect to the exercise of the Court's discretion. Whilst the Council has succeeded in establishing that there is an obstruction which impedes the free flow of water, the extent of it and the resultant consequences could not be considered serious on the evidence. I could not overlook Mr Blackburn's expert evidence there might not be significant improvement with removal of the culvert, although I could not accept the view (which he may once have had) that the culvert may not constitute any impediment at all.

[57] Specifically, it is likely that the upstream properties are currently suffering some flooding beyond what could be expected to arise in storm events and that this is contributed to by the culvert. The extent of this is not however certain, or was not detailed and specific, and is not significant, based on the evidence. There was no clear or satisfactory evidence on the potential of the upstream land or improved development and productive use of the upstream land that would be profitable. It is not necessarily true that future development opportunities are presently available and precluded on the evidence.

[58] I have not overlooked Mr Mathias' submission concerning the likelihood a sedimented culvert contributes more to flooding than a clean one already does, as suggested by Mr Blackburn's modelling. The point remains, however, that I did not find the relevant flooding significant and moreover, irrespective of the culvert, there would it seems be significant sedimentation at that point.

[59] The issue of natural servitude, being the obligation on a downstream property owner to receive water flowing naturally from higher ground, is not a relevant factor. There was no evidence that the upstream properties were adding to the water flowing from their properties naturally.

[60] There was no evidence of the actual cost of removal or any other reconfiguring which might be optimal. There is, however, obvious expense that would be involved in removal and/or reconstruction.

[61] Mr Mathias submitted there was no evidence of any significant impact upon the Byles property which might be offset against a removal order. He submitted no significant inconvenience or major cost to the appellant has been made out. On that point, I have taken into account the history which Mrs Byles referred to in relation to the acquisition and the use of the causeway as affording access. It was sensible, I thought, to conclude that the Byles property would suffer if mere removal of the culvert was ordered. Less convenient alternative access, for one thing, would need to be created. In any event, mere removal would be at a reasonable cost if no cost sharing mechanism were agreed or approved by the Court. In contrast I acknowledge that if there is no removal there may remain a risk that there is further flooding which may not be prevented by constant optimal maintenance and upkeep. But that is just a factor which has to be considered in the mix.

[62] Ms Prendegast put it all rather simply and extravagantly when she submitted that a decision to dismiss the appeal would be, in effect, an acknowledgement that the opinion of unqualified persons with an interest in the outcome carries greater weight than the independent expert opinion of a qualified professional chartered engineer experienced in hydrologic and hydraulic engineering. There is some relevant obstructions to the free flow of water here and the requisite assessment of all the circumstances is not dictated by an expert view on the obstruction.

[63] There are obviously a range of solutions available here, including preservation of the culvert but increasing its efficiency, agreeing its replacement with a modified culvert and in any event at a shared cost and so forth, and this all may have been considered by the parties.

[64] Ideally perhaps, the culvert should probably be removed and replaced on a basis agreed to by the Council and on a shared cost basis which sees upstream owners contributing.

[65] Some work needs to be undertaken to reduce the flooding risk. I have no evidence on, and am not asked to assess the relative merits of, any particular possible works. I do not know the likely cost involved.

[66] I am, however, satisfied that responsibility here for the relevant obstruction (even if not significant) that affects upstream owners cannot be laid entirely at Mrs Byles' door. It might be concerning that Mrs Byles has not done more, for example, in relation to clearing maintenance and that she seemed (at the hearing) relaxed about inquiry or inspection. She likely could have done more, but I did not overlook Mr Blackburn's final comments to me that it was a "natural basin" anyway which attracts sediment. It is at least concerning too that the upstream owners have appeared unwilling to contribute to a solution they say they would evidently benefit from. Of course, any compromise should involve the Council's contribution too.

[67] Mr Mathias has submitted in effect that the Court cannot decree terms of compromise notwithstanding a reasonable solution cries out to be implemented. He may well be right on that. After all, s 62 simply refers to a determination of whether a removal order (that an obstruction be removed) take effect or not take effect, having regard to all the circumstances. Discretionary factors inform an assessment of those circumstances and do not extend to crafting an appropriate or another order. The submission was that the issue is removal or not, sans jurisdiction in other words to make such order that the Judge sees fit to impose.

[68] That said, it is appropriate, I believe, that the parties be given the final opportunity formally to consider an agreed outcome. The respective experts, Mr Howse and Mr Blackburn, might be able to jointly recommend a reasonable compromise and sensibly there must be a case for cost sharing which recognises the responsibility of and benefits to all parties, the history of the causeway, the existence of some flooding and the nature of the properties and so forth – all the relevant circumstances.

[69] I invite counsel to advise by brief memorandum within two weeks whether there is any possibility of an agreed outcome the parties wish recognised in this proceeding, whether further time would assist, or rather whether I should issue a decision immediately on the final outcome of the appeal.

L I Hinton
District Court Judge