

Holding back the tide: an exploration of the possible legal basis for a claim of a right to be protected from flooding*

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As there is no general right to be defended from flooding, any measures taken to protect communities from flooding would appear to be motivated by political considerations. This article explores the possibilities open to a party seeking to benefit from flood defences on another person's land. The possibilities include an action in nuisance (which is the most promising area, but is still beset by issues of causation and the possibility that the extent of the duty imposed on a defendant landowner is not by any means certain to extend to the actual repair of existing flood defences) and an attempt to establish prescriptive liability. Other avenues of legal recourse are more fraught and therefore less likely to prove useful here. The article concludes that the possibilities covered are of limited value in most cases and suggests that an alternative approach to flood defences might be used to achieve wider acceptance of the need for more sustainable flood planning in the future.

Introduction

We all have a right to be defended from flooding. That is the conclusion we may be forgiven for drawing from then prime minister David Cameron's oft-quoted speech in February 2014 following severe flooding in the Somerset levels: '... money is no object in this relief effort. Whatever money is needed for it will be spent. We will take whatever steps are necessary'.¹

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Indeed, the residents of Fairbourne in West Wales (a village built on land reclaimed from the sea and which sits only a few metres above sea level) are hoping for similar sentiments following the recent decision taken by Gwynnedd Council to stop funding maintenance of the sea wall protecting Fairbourne² and allow managed realignment of the coast in that area.

Unfortunately for the residents of Fairbourne, and as this article will show, whilst there may be a few possibilities (some in more obscure areas of the law on flooding), there is no such general right to flood defences in UK law. The action taken by the government in response to the Somerset levels flooding appears on the face of it to have been motivated by political considerations and not by any legal rights of those living and working in the area.

This article will look at the possibilities open to those seeking to claim the protection of flood defences that are not within their property (which in essence is a claim to force the owner of the flood defences to repair and maintain those defences), starting with the position in statute law and following on with the various opportunities available at common law, including an action in nuisance or negligence, prescription and the Crown's duty to maintain the coastline.

Statute law

The statute law on flood defences has traditionally been divided into two areas: inland areas (dealt with under three Acts of 1991 covering land drainage, water resources and the water industry,³ along with the Environment Act 1995) and coastal areas (dealt with under the Coast Protection Act 1949). The more recent Flood and Water Management Act 2010 attempts to merge the two regimes to a certain extent. However, all these Acts are notable for the overall lack of any duties on the parts of the public bodies concerned, other than in respect of flood risk planning and flood warning systems.⁴ The sections enabling the relevant public authorities to erect and maintain flood defences are all expressed as powers;⁵ in other

¹ From transcript of the Rt Hon David Cameron's statement on the UK storms and flooding, (11 February 2014) www.gov.uk/government/speeches/david-camersons-statement-on-the-uk-storms-and-flooding.

² Richard Spillett 'Village of the DAMMED: entire Welsh village to be "decommissioned" and its population forced to move after government warns it will be lost to the sea' *Daily Mail* (11 February 2016) www.dailymail.co.uk/news/article-3442264/Welsh-village-decommissioned-warnings-lost-sea.html.

³ Land Drainage Act 1991, Water Resources Act 1991 and Water Industry Act 1991.

⁴ William Howarth 'Legal perspectives on flooding: Canute, Foster and the Flood and Water Management Act 2010' (2014) 85 *Journal of Environmental Law* 21.

⁵ For example see Water Resources Act 1991 s 165 in relation to main rivers.

words, it is within the discretion of the body given the power whether to exercise it. Just because public authorities may have the legal power to act does not mean that they also have a duty to act. Without a statutory duty to provide adequate flood defences, anyone suffering from the absence of such flood defences is unlikely to be able to persuade a court to step in and compel the relevant public body to exercise its statutory discretionary powers.⁶

In spite of this, for a time Peter Marcic looked to have found a general right to be defended from flooding.⁷ In his case, a sewerage undertaker was found civilly liable by the Court of Appeal for its failure to prevent repeated sewer floods affecting his property.⁸ As contemporary commentators noted,⁹ this potentially opened the way for a general right to flood defences of a character that would have been incredibly difficult to fund and potentially impossible to deliver; flooding is a natural phenomenon over which humans cannot have complete control. (Even sewer flooding, which is less of a purely ‘natural’ event (involving the backing up of engineered waste water collection systems) than a cloudburst, did not (pre-*Marcic*) necessarily impose a liability to act, in this case, on the utility company.) It may seem trite, but the legend of Canute holds true. Humans cannot hope to hold the waters back completely; the best we can aim for is to provide protection against a certain level of flood risk, at a cost that has been justified as reasonable in light of that risk.

Luckily for those responsible for flood defences, the Court of Appeal in *Marcic* was overruled by the House of Lords.¹⁰ The Lords held that the proper course of action for Mr Marcic should have been to have recourse to the statutory scheme provided in the Water Industry Act 1991 and that to allow redress through the common law would run counter to the intention of Parliament in setting up such an ‘elaborate’ statutory enforcement and compensation scheme.¹¹

Marcic therefore reaffirmed the principle that where a statutory authority is given a power to take a course of action, the court will generally not step in and make policy decisions on the

⁶ *Bybrook Barn Garden Centre Limited v Kent County Council* [2001] Env LR 543 (CA).

⁷ *Marcic v Thames Water Utilities* [2002] EWCA Civ 64, [2002] QB 929 (CA).

⁸ Although this was under the common law principles set out in *Leakey v National Trust for Places of Historic Interest or National Beauty* [1980] QB 485 (CA) (see later for a full discussion of these principles) as the sewerage company owned the sewer that was the cause of the flooding on Mr Marcic’s property.

⁹ William Howarth ‘Flood defence law after *Marcic*’ (2003) 5(1) *Environmental Law Review* 23.

¹⁰ *Marcic v Thames Water Utilities* [2003] UKHL 66, [2004] 2 AC 42 (HL).

¹¹ *ibid* [57] (Lord Nicholls).

part of the statutory authority as to whether that power should be used in a specific case. All of which leaves landowners unable to require flood defence authorities to provide or maintain flood defences as a statutory right.

It should be noted that the *Marcic* case also involved a claim that the actions taken by the defendant sewerage authority were a breach of Mr Marcic's human rights. This claim was also unsuccessful in the end (on the basis that the scheme was broadly fair and fairly applied), although it is unlikely that it will be the last attempt to use human rights legislation to attain protection from flooding. A detailed consideration of the possibility of a claim for a breach of human rights is beyond the scope of this article; however, the same reasoning would apply to flooding as it did to sewerage flooding so a human rights claim is *prima facie* unlikely to be successful.

Common law

At common law there is no specific right to be defended from flooding. There are, however, a few opportunities for a party suffering from flooding coming from another party's land to seek to ameliorate their situation. The main opportunity is through the developments in nuisance and negligence law brought about by the judgment in *Leakey v National Trust*.¹² This will be discussed in detail below, along with a number of other limited opportunities stemming from common law.

Riparian rights

The system of riparian rights comes into play when both parties own land abutting a natural watercourse or where both parties own land abutting tidal waters.¹³ It is less likely, therefore, that the flood defences on one party's land would benefit a neighbouring property that also abutted the watercourse. The more likely situation is that such flood defences would increase the risk of flooding on such a neighbouring property.

¹² *Leakey and Others v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485 (CA).

¹³ *Reece v Miller* (1882) 8 QBD 626.

A full discussion of the remedies available to such a neighbouring landowner are beyond the scope of this article;¹⁴ however, it should be noted that a riparian owner is generally permitted to take reasonable action to prevent his or her land flooding, even if that might increase the risk of flooding for a neighbouring riparian owner. There are some circumstances in which this general rule will not apply and it is important also to remember the qualification that the principles of *Leakey* will apply (see further below for a full discussion of these principles) and so there must be a balancing exercise between what it is reasonable for the riparian owner to do to protect his own land and what it is reasonable to expect from the riparian owner with regard to preventing or minimising damage to any other riparian owners, whether upstream or downstream.

Nuisance and negligence

Which one?

At common law, a party seeking to assert a right to be defended from flooding by existing flood defences situated on someone else's land is likely to base its claim on either nuisance or negligence. As confirmed by Lord Cooke in the *Delaware Mansions* case, there is no longer any real distinction between nuisance and negligence in this area; rather, the key consideration is the concept of 'reasonableness between neighbours'.¹⁵

However, although Lord Cooke's statement means that the considerations to be made will be similar in either area of law, the choice of the basis of a claim is still important. In the main, this is because the remedies available to a claimant differ. A claim in nuisance can be made in advance of any harm occurring, with the intention of seeking an injunction in order to prevent the commission of a prospective nuisance. In this case, the claimant would be seeking a mandatory injunction to compel the defendant to repair and maintain flood defences on its property in order to avoid damage to the claimant's property by flooding as a result of the lack of repairs to the flood defences. At this stage it is important to note that a mandatory injunction will only be available if compensation with damages would not be suitable.

¹⁴ For a concise summary of riparian rights and flooding issues see John Bates 'Flooding and private rights' (2007) 18(5) *Water Law* 159–66.

¹⁵ *Delaware Mansions Limited v Westminster City Council* [2001] UKHL 55, [2002] 1 AC 321, 332 (HL) (Lord Cooke of Thorndon).

On the other hand, a claim in negligence only admits of a damages remedy and so it cannot be used in advance of flooding occurring. It would seem then that a claim in private nuisance would be the preferable course of action for our hypothetical claimant. However, there are circumstances in which such a claim would not be possible. At its heart, nuisance law is about rights and duties between landowners;¹⁶ where flooding has been caused (or allowed to occur) by the actions of parties other than the landowner (and where it is not possible to argue that the landowner adopted the nuisance),¹⁷ then negligence will be the only appropriate basis for a claim.

Nuisance and negligence: the key considerations

As Lord Cooke stated, both strands of law will now entail the same considerations in this area. However, to take a step back, before the evolution of the concept of reasonableness between neighbours, the leading authority in flooding cases was *Thomas & Evans Ltd v Mid-Rhondda Co-Operative Society Ltd*.¹⁸ In that case the defendant took down and re-erected a flood defence situated on its land but which also protected the claimant's land. The defendant failed to re-erect the flood defence adequately (leaving two small gaps in the defence to allow for the continued construction of the building the defendant was erecting on the site), with the result that flood water breached the defence and overflowed onto the claimant's property, causing damage. The court held that the claimant had no right of action against the defendant on the basis that it had no right to call for the flood defence to be erected and therefore it could have no right to require the continued existence of the flood defence.¹⁹

The principle that no one is entitled to require protection from flooding started to waver with the decision in *Leakey v National Trust*.²⁰ *Leakey* confirmed in English law²¹ the concept that has become known as the 'measured duty of care': an occupier or landowner owes a duty to its neighbours to do what is reasonable in the circumstances to prevent or minimise the risk of harm to the neighbour from the property of the occupier or landowner. The *Thomas* case was

¹⁶ For further discussion of the suitability of nuisance or negligence as a basis for a claim in respect of flood damage see William Howarth *Flood Defence Law* (Shaw & Sons 2002) 82.

¹⁷ As in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 (HL), in which the landowner was held to have adopted a nuisance created by a third party negligently placing a grate for a culvert on the landowner's property in the wrong position, with the result that after a period of heavy rain some three years later, a neighbouring landowner's property flooded.

¹⁸ [1941] 1 KB 381 (CA), [1940] 4 All ER 357.

¹⁹ *ibid* [389] (Sir Wilfred Greene MR).

²⁰ *Leakey* (n 12).

²¹ Building on the duty set out in *Sedleigh-Denfield v O'Callaghan* (n 17).

considered in *Leakey* and distinguished on the basis that it is lawful to take down a flood defence and so it is simply unlucky if the flood happens whilst the wall is down.

However, the labelling of *Thomas* as consistent with the reasoning of *Goldman v Hargrave*²² (such reasoning being the basis for the decision in *Leakey*) is problematic. *Thomas* was decided on the basis that there could be no general duty either to erect or thereafter maintain a flood defence for the benefit of another party. It appears to have been ‘distinguished’ on the basis that it is not unreasonable to take down a flood defence for the purpose of rebuilding it, which implies that the concept of reasonableness applies and that there could be a duty to maintain the flood defence if it would be unreasonable not to. This inconsistency was recognised in the Australian case of *Elston*²³ and then in *Green v Lord Somerleyton*,²⁴ where the court finally confirmed that the law had moved on from *Thomas* and that the measured duty of care was the applicable standard in cases of flooding.

It is therefore now possible for a party suffering from flooding that entered its land from neighbouring land to establish liability on the part of the neighbouring landowner to prevent that flooding. This will require the claimant both to establish that the defendant owes it a duty of care and then also that the scope of that duty extends to preventing the flooding; as Megaw LJ noted in *Leakey*,²⁵ the existence of a duty does not automatically mean that inaction will be a breach of that duty.

In establishing the existence of a duty of care, a claimant will need to deal first with causation. It will be necessary to establish that the damage caused by flood waters was as a result of the failure on the part of the defendant to maintain or repair the flood defences on its land. If the flood might have occurred regardless of such failure, then the claimant will be unlikely to be able to establish causation. This will be most problematic in situations caused by extraordinary flooding at a level above that which the flood defences were intended to protect against, or in situations where the distance between the flood defence and the claimant’s land is more than minimal.

²² [1967] 1 AC 645 (PC Australia).

²³ *Elston v Dore* (1982) ALR 577 (Australian HC).

²⁴ [2003] EWCA Civ 198, [2004] 1 P & CR 33 (CA).

²⁵ *Leakey* (n 12) [518].

Having established causation, the test for establishing a measured duty of care is set out in *Goldman v Hargrave*²⁶ and requires the defendant to have known about the hazard (or ought to have known), for the consequences of not removing the hazard to have been foreseeable and for the defendant to have had the ability to remove the hazard.²⁷ The last element seems to merge somewhat with the scope of the duty.

In *Leakey* Megaw LJ set out the test for considering the scope of the duty: a defendant is under a duty to do what is reasonable for him to do in all the circumstances to prevent or minimise the risk of damage to the claimant's property.²⁸ In particular, regard must be paid to the cost of the work required to prevent or minimise the danger and a level of consideration given to the means of the defendant and the claimant.

In *Holbeck Hall Hotel v Scarborough Borough Council*²⁹ the Court of Appeal considered the scope of the measured duty of care. The Court confirmed that the 'fair, just and reasonable' test set out in *Caparo Industries plc v Dickman*³⁰ must be applied both in determining whether to impose a duty of care and in determining the scope of that duty. In the *Holbeck Hall* case, the claimant owned a hotel near the edge of a cliff in North Yorkshire. The defendant council owned the land between the hotel and the cliff edge. The cliff was unstable and, following a slip, the defendant council called in engineers to inspect the cliff and recommend any suitable remedial measures. Some years later there was a massive slip and the defendant's land and part of the claimant's land collapsed. As a result, the hotel had to be demolished.

The Court of Appeal held that while the Council had owed a duty of care to the claimants, the scope of that duty was limited to warning the claimants of the risks that it was aware of or ought to have foreseen and sharing any information relating to such risks that it acquired. The decision turned upon the foreseeability of the damage that had occurred (the damage being much greater than anyone had imagined) and the fact that the defect in the land causing the slip had existed as much in the claimants' land as in the council's land.

²⁶ *Goldman* (n 22).

²⁷ The question of ability is discussed in detail later in this article.

²⁸ *Leakey* (n 12) [524] (Megaw LJ).

²⁹ [2000] QB 836 (CA).

³⁰ [1990] 2 AC 605 (HL).

Following *Holbeck Hall*, a claimant seeking to make a defendant prevent damage from flood waters coming onto the claimant's property from the defendant's property will therefore need to show that it would be fair, just and reasonable for the measured duty of care to extend to what is possible will be the significant capital costs of the maintenance works that would be required.

An additional possible caution should be noted from the case of *Abbahall Ltd v Smee*.³¹ That case concerned liability for repairs to the roof of a three-storey property, the ground floor of which was owned by the claimant and a flying freehold of the first and second floors of which was owned by the defendant. The defendant had failed to maintain the roof, with the result that water had leaked through and caused damage to the claimant's ground floor property. It was accepted that the defendant owed a duty of care to the claimant, and so the case turned on the extent of that duty. Applying the *Caparo* test, the Court of Appeal held that it was only fair, just and reasonable that those who will share in the benefit of the works should share the burden of paying for them.

Abbahall is not directly analogous to flooding cases involving adjoining properties. Indeed, in his judgment, Munby J noted that the decision was confined to the situation of flying freeholds and leaking roofs and that a different solution may be more appropriate in adjoining arrangements. He also noted that the decision might possibly have been different had the cost of the necessary repairs been much greater. *Abbahall* must therefore be considered, bearing these qualifications in mind. Nonetheless, the decision in *Abbahall* does mean that a claimant seeking to establish a liability in nuisance or negligence on the part of the defendant to maintain and repair an existing flood defence must consider the possibility that, should they be successful, they may be required to contribute to the costs of those repairs.

Artificiality

It is worth noting here that the measured duty of care will not apply in circumstances where there is an element of artificiality about the water involved. This is where, for example, the defendant landowner has brought water artificially onto his land,³² has artificially accumulated water that came naturally onto his land³³ or has erected artificial structures on

³¹ [2002] EWCA Civ 1831, [2003] 1 WLR 1472 (CA).

³² *Baird v Williamson* (1863) 143 ER 831.

³³ *Whalley v Lancashire and Yorkshire Railway Co* (1884) 13 QBD 131 (CA).

his land that have caused water to flow onto the claimant's land in a way that it would not have done without such structures.³⁴ In all such cases, the applicable standard will be that of strict liability set out in *Rylands v Fletcher*,³⁵ although even with strict liability, the defendant will only be liable for the damage caused as a result of the breach if such damage was foreseeable.³⁶

The obvious artificiality referred to above can be contrasted with the subtler artificiality of the English landscape. In *Green v Lord Somerleyton*³⁷ Parker LJ considered the issue of artificiality in the context of an argument by the defence counsel that the measured duty of care did not apply in relation to naturally flowing water. This submission was dismissed on the basis that *Leakey* had held that the duty of care is owed in respect of a hazard on the defendant's land, irrespective of whether that hazard is natural or man-made.

The important point to note is that, in the discussion as to the artificiality or otherwise of the watercourses relevant in the *Green* case, Parker LJ remarked that a significant proportion of the English landscape was man-made at some point or other in history and that it would be virtually impossible to separate out those features that are completely free from the influence of man. Indeed, he stated that: 'in the context of the English landscape a distinction between "natural" and "artificial" features is an inherently uncertain foundation on which to rest a decision as to the existence of liability in nuisance'.³⁸

Artificiality will therefore only be an issue in circumstances involving recent actions by the defendant or his predecessors in title and not in circumstances where the possible artificiality involved is in respect of the landscape that may have been influenced by man hundreds or even thousands of years ago.

Party resources

The issue of the resources of the parties involved in any matter was touched on when considering the scope of the measured duty of care above (with reference to *Abbahall Ltd v Smea*). It is worth expanding that consideration here as the matter has received some focus in

³⁴ *Hurdman v North Eastern Railway Co* (1878) 3 CPD 168 (CA).

³⁵ (1868) LR 3 HL 330 (HL).

³⁶ *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264 (HL).

³⁷ *Green v Lord Somerleyton* (n 24) [541].

³⁸ *ibid* (Parker LJ).

the case law that has followed *Leakey*. It seems that a defendant will only be expected to do what is reasonable for him to do in the circumstances.

In *Leakey* Megaw LJ stated that, where the action required to remove the hazard will cost money, ‘logic and good sense’ necessitate the consideration of the means of the defendant.³⁹ Similarly, the relative means of the claimant and therefore its ability to take its own remedial action should also be considered. In both cases, this should be a broad assessment and not a detailed consideration of the means of both parties. The distinction here is that the court will not be interested in a detailed account of the assets that each party owns, although it will consider any significant difference between the position of the two parties and, also, any significant difference between the position of either or both of the parties and the projected costs of the works required to alleviate the risk of flooding.⁴⁰

However, *Abbahall v Smee*⁴¹ considered the issue of the relevant means of the parties and held that neither *Leakey* nor *Goldman v Hargrave* should be held as authority for the proposition that the parties’ resources are the determining factor in establishing the scope of the duty of care. Indeed, there may be cases in which they are not relevant at all. As an illustration, in the *Abbahall* case the court held that the relevant circumstance was not that the defendant (who had not repaired the roof) was poor, but that she was choosing to live in a property with a roof that protected both her and her underneath neighbour, which she could not afford to maintain. The court found that in that circumstance (and having regard to the level of the specific costs involved, which were not considered to be excessive) it would not be fair, just or reasonable for the defendant to be able to avoid her responsibilities on account of her poverty.

Any claimant seeking to establish liability on the part of a defendant to repair and maintain flood defences on its land will therefore need to consider the relative resources of the parties involved and whether this may mean that the scope of any duty that the defendant is subject

³⁹ *Leakey* (n 12) [526].

⁴⁰ See for example Megaw LJ’s illustration in *Leakey* (n 12) 524: ‘If a stream flows through A’s land, A being a small farmer, and there is a known danger that in times of heavy rainfall, because of the configuration of A’s land and the nature of the stream’s course and flow, there may be an overflow, which will pass beyond A’s land and damage the property of A’s neighbour: perhaps much wealthier neighbours. It may require expensive works, far beyond A’s means, to prevent or even diminish the risk of flooding. Is A to be liable for all the loss that occurs when the flood comes, if he has not done the impossible and carried out these works at his own expense?’.

⁴¹ *Abbahall Ltd v Smee* (n 31).

to will be limited to information sharing and/or allowing access to carry out any necessary remedial action.

Statutory bodies

At this stage, it is useful to consider statutory bodies again. In some cases (particularly those concerning coastal flooding) it may be that the flood defence the relevant party is benefiting from and would like to see maintained is on land owned by a statutory body.

In *Dear v Thames Valley*⁴² it was held that the principles of *Leakey* and the measured duty of care have no application to public authorities. The responsibilities of public authorities must be determined with regard to the specific statutes governing them, even where (as in the *Dear* case) the behaviour complained of is not a breach of statutory duty.

However, the subsequent *Bybrook Barn* case⁴³ opens up a limited possibility for claimants by distinguishing two situations involving public authorities. The court held that in the line of cases culminating in *Dear*, the claimants had effectively been seeking to use the private law of nuisance to compel a public authority to carry out a public duty (in *Dear*, to address a flooding situation that impacted on many householders in the area). In other words, by using a private law remedy they were effectively seeking to avoid a consideration of budgets, priorities and other such policy decisions that a public authority must carry out before taking any action and into which it is not the court's place to interfere.

On the other hand, the situation in the *Bybrook Barn* case was of a claimant suffering flooding damage caused by a culvert built by and under the control of the public authority, which it would have had a statutory duty to enlarge (which would have prevented the flood damage suffered) had it been served with notice to do so. It would therefore not be open to the public authority to rely on considerations of budget, priorities or other policy decisions to justify not carrying out the work and so the claimant was not seeking to avoid this public law element by using the private law of negligence.

It is also worth noting that, although the majority of the statutory basis for flood defences is premised on the various statutory authorities having a power to do various things (rather than

⁴² (1992) 33 Con LR 43 (QBD).

⁴³ *Bybrook Barn Garden Centre Limited v Kent County Council* (n 6).

a duty, as we saw above), if a statutory authority chooses to exercise one of its powers it will then be under a duty to avoid making the situation worse.⁴⁴ In other words, if a statutory authority chooses to act in exercise of a power granted to it, it will be under a duty (as framed above) to ensure that its actions do not cause damage over and above that which would have been caused had the statutory authority not acted at all.

Summary

What does the current state of the law on nuisance and negligence offer then to our claimant seeking to require a defendant to maintain a flood defence on its property? If the defendant is (or should be) aware that the flood defence is in poor repair and that as a result of this flooding may occur which may damage the claimant's property, then the defendant will be under a duty to do what is reasonable in the circumstances to try and prevent that damage.

However, the key point for claimants to consider is that such a duty may not extend to carrying out any required repairs, especially if they are likely to involve a considerable amount of expenditure (this is the '*measured* duty of care'). Moreover, if the duty is held to extend to such carrying out of repairs, it is possible that the claimant may be required to contribute to the cost of such repairs, which may render a claim less attractive to a claimant.

The duty is also unlikely to be established where the defendant is a public authority, unless it would have a duty to carry out such repairs under a statutory scheme (after the service of any relevant notice or other such step).

Prescription

Liability to repair flood defences

The territory of prescription⁴⁵ at first provides promising ground for the basis of a claim to a right to be defended from flooding. Indeed, *Hudson v Tabor*⁴⁶ confirmed that it is possible for a prescriptive liability to maintain flood defences to arise and the Coast Protection Act 1949,

⁴⁴ *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74 (HL).

⁴⁵ In which a right over a property is acquired through long use provided there has been no force, secrecy or permission. There are three separate methods of prescription, but for present purposes the key element to all three is that there has been long use of a right (at least 20 years) supported by a legal fiction that such long use must presume a grant of the right at some point in history. A common example would be the acquisition of a right of way over a track through a piece of land through the long use of that track.

⁴⁶ (1877) 2 QBD 290 (CA).

for example, expressly recognises pre-existing obligations to undertake coast protection works (including obligations arising by prescription) and provides that they continue to apply notwithstanding the 1949 Act. However, on closer inspection, it is difficult to see how this possibility could be translated into anything useful in practice for flood defence claimants.

The court in *Hudson v Tabor* did not consider what would be required to prove a prescriptive liability, although a small number of subsequent cases have dealt with the issue. In *Jones v Price*⁴⁷ the facts concerned alleged liability for repairing a boundary hedge and the court held that prescriptive liability could arise in theory. However, the claimant would have to show that the defendant did more than merely carry out repairs over the requisite period of time; rather, that the defendant carried out such repairs ‘as a matter of obligation’⁴⁸ to the claimant. Scarman LJ affirmed this requirement in *Egerton v Harding*,⁴⁹ and added that it was doubtful whether prescription could be established (without further evidence) where the acts of repair are ‘as consistent with voluntary choice as with obligation’.⁵⁰ This line of reasoning means that a claimant seeking to establish that a defendant is required to repair and maintain flood defences that benefit the claimant by virtue of prescription will face a tricky task in proving that the acts of repair on which the claim is based were conducted only under an obligation to the claimant and not voluntarily.

However, supposing for the moment that a claimant were able to satisfy the requirements in *Jones v Price* and *Egerton v Harding*, the question becomes one of benefits, burdens and successors in title. The general rule is that a right to have something done (such as to have flood defences repaired) is not an easement.⁵¹ This means that the prescriptive liability that has been established must be a positive covenant, which is therefore incapable of running with the land and binding any successors.⁵²

It is possible that this general rule is a mistake. Waite⁵³ argues that the position taken by Gale is a relatively recent rule and that it is therefore possible that some positive easements may

⁴⁷ [1965] 2 QB 618 (CA).

⁴⁸ *ibid* 636 (Wilmer LJ).

⁴⁹ [1975] QB 62 (CA).

⁵⁰ *ibid* 68–69.

⁵¹ Jonathan Gaunt QC and the Hon Mr Justice Morgan *Gale on the Law of Easements* (19th edn Sweet & Maxwell 2012) 1–78.

⁵² See *Austerberry v Oldham Corporation* (1885) 29 Ch D 750 (CA).

⁵³ A J Waite ‘Easements: positive duties on the servient owner?’ (1985) 44(3) *Cambridge Law Journal* 458.

have survived.⁵⁴ Waite notes that historical case law shows that easements that were positive in nature were enforced and that no distinction appeared to be made between positive and negative easements. However, whatever the merit in this interesting line of reasoning, even Waite acknowledges that following the ruling by the Court of Appeal in *Rance v Elvin*,⁵⁵ it will take a decision by the Supreme Court to overturn the current position of the law, whether that current position is mistaken or not.

Waite goes on to argue⁵⁶ that it could be possible, despite the ruling in *Rance v Elvin* and the earlier decision in *Austerberry v Oldham Corporation*,⁵⁷ for a positive repair covenant to run with the land and bind successors in title where that positive repair covenant is annexed to an easement. However, the reasoning undertaken by Waite relies upon distinguishing *Austerberry* (in which the Court of Appeal held that the burden of a positive covenant does not pass to successors in title, either in equity or at common law) from the earlier case of *Holmes v Buckley*⁵⁸ and construing a line of case law starting with *Holmes*. What Waite declines to note is that Lindley LJ doubted *Holmes* in the *Austerberry* case on the basis that the reporting of *Holmes* was not accurate enough to permit it to be a guide.⁵⁹ It therefore seems questionable that a court could be convinced to follow Waite's line of reasoning and depart from *Austerberry* to hold that a servient owner can be liable to repair the subject matter of an easement.

A prescriptive easement for flood defences?

Using Waite's line of reasoning, however, a positive repairing liability could possibly be annexed to an easement. In these circumstances, could a landowner establish a prescriptive easement for the benefit of flood defences?

Starting with the classic test for the existence of an easement in *Re Ellenborough Park*,⁶⁰ there is a clear servient tenement (the land on which the flood defences sit) and dominant tenement (the land which benefits from the flood defences by being exposed to flooding less

⁵⁴ Indeed, in his historical assessment of the remedies for non-feasance, Waite includes reference to the writ of *reparari facias* in respect of an obligation to repair sea walls.

⁵⁵ (1985) 50 P & CR 9 (CA): the Court of Appeal overturned the previous High Court decision but upheld Nicholls LJ's ruling that a positive obligation was not capable of forming an easement.

⁵⁶ Waite (n 53) 470.

⁵⁷ See *Austerberry v Oldham Corporation* (n 52).

⁵⁸ (1691) Prec Chan 39, 1 Eq C Ab 27.

⁵⁹ *Austerberry* (n 57) 782.

⁶⁰ [1956] Ch 131, 140 (CA).

than it would ordinarily be) and we can assume separate owners of these tenements. The possible easement would also be for the benefit of the dominant tenement in that it would allow the enjoyment of the dominant tenement uninterrupted by flooding and the consequent damage which that could bring. Assuming that the prospective dominant and servient tenements are close enough together to satisfy the requirement for propinquity, the important limb of the test to focus on is therefore whether a right to benefit from flood defences on another landowner's land is capable of forming the subject matter of a grant.

It is submitted that this is where a claimant would struggle. If the easement is formulated as a right for the dominant owner to benefit from the flood defences already existing on the servient owner's land, then this is a wholly negative easement; the dominant owner does not have to do anything but enjoy the benefit of the flood defences (similar to enjoying the benefit of light or television reception). As alluded to by Lord Hope of Craighead in *Hunter v Canary Wharf Ltd*,⁶¹ the categories of negative easement are now all but closed and such an easement as described above does not appear within them. It is therefore extremely unlikely that an easement formulated in this way could be acquired by prescription. Indeed (and as was suggested by Lord Denning MR in *Phipps v Pears*),⁶² the way for the landowner to protect himself in this situation is through the agreement of a restrictive covenant preventing the flood defences from being removed.

If, in the alternative, the easement is formulated as a right for the dominant owner to go onto the servient owner's land and maintain and repair a pre-existing flood defence, then a prescriptive claim may be possible. Indeed, in *Simpson v Godmanchester Corporation*⁶³ the House of Lords upheld an easement permitting the dominant corporation to go onto the servient land to open up sluice gates and locks belonging to the servient owner so as to prevent flooding on the corporation's land. It is submitted that the entry onto servient land to repair flood defences is analogous to these facts. However, should a claimant manage to establish such a prescriptive easement, it would be for the claimant to carry out and fund the repairs⁶⁴ and so it may well be the case that such a right would be of little practical use to many facing the risk of flooding today.

⁶¹ [1997] AC 655, 726 (HL).

⁶² [1965] 1 QB 76, 83–84 (CA).

⁶³ [1897] AC 696 (HL).

⁶⁴ See *Taylor v Whitehead* (1781) 2 Doug KB 745, in which it was held that a servient owner is not bound to repair the subject matter of an easement and that if the dominant owner wants it repaired then it is for that

Thus, it can be seen that, in our circumstances, the only easement a claimant is likely to have any prospect of being able to establish is an easement allowing the dominant tenement owner to enter the servient tenement in order to maintain and repair the flood defences itself. In such a situation, Waite's reasoning, even if it is submitted that it is correct, is of no practical application.

Legitimate expectation

This article has not considered the prospects of a successful claim under legitimate expectation instead of prescription. A legitimate expectation is an expectation on the part of a claimant that he or she will be treated in a certain way by an administrative authority, despite there being no other legal basis on which to rest such a claim. Legitimate expectations arise out of the behaviour of an administrative authority (being either a representation or promise made by it or consistent past practice) and allow a court to hold that such an expectation could not be fairly disregarded.⁶⁵

It is beyond the scope of this article to review all the correspondence between government agencies and landowners that would be necessary to establish a claim to a legitimate expectation. Furthermore, since a legitimate expectation arises because of a reliance on specific government promises, it can be seen as the creation of a right through political rather than intrinsically legal mechanisms. A claim could easily be circumvented by government agencies (and, indeed, prime ministers) steering clear of making grandiose promises in specific circumstances.

Summary

The claimant who has managed to establish a prescriptive liability on the part of a defendant to repair a flood defence is therefore left in a vulnerable position. Whilst it may be possible to establish a prescriptive liability, such a liability is unlikely to be binding on successors in title and is therefore of reduced use to claimants seeking effective protection from flooding.

dominant owner to do so himself. See also *Gale on the Law of Easements* (n 51) 1–94, in which it is noted that generally both the dominant owner and the servient owner have a right to repair the subject matter of an easement, but that neither party can require a contribution to such repairs from the other party unless there is some express right to do so.

⁶⁵ See *R v Devon County Council, ex parte Baker* [1995] 1 All ER 73, 88–89 (Simon Brown LJ) (CA) for an explanation of the four categories of legitimate expectation that may arise.

Commutation

It should be noted at this point that if a duty to repair flood defences could be established through prescription, the issue of commutation must be considered. Where the flood risk the defences are designed to protect from emanates from a ‘main river’, then the Environment Agency⁶⁶ is under a duty⁶⁷ to commute any private repairing obligations arising out of tenure, custom⁶⁸ or prescription.⁶⁹ Commutation briefly entails the Environment Agency taking on the duty in return for a payment by the duty holder of a sum equal to the estimated costs of fulfilling that duty for 30 years.⁷⁰ Following commutation the duty rests with the Environment Agency in perpetuity.

Designation as a ‘main river’ is usually given to larger rivers and streams, but the designations vary across England and Wales.⁷¹ Duties relating to flood defences on ordinary watercourses (those not designated as ‘main rivers’) can be commuted by the relevant internal drainage board or lead local flood authority, but there is no duty to do so.⁷²

It could therefore be the case that the Environment Agency (or Natural Resources Wales) is under a duty to maintain and repair flood defences in certain locations following previous commutations. Equally, they may find themselves subject to such a duty if a claimant is able to prove a repairing liability that is eligible for or requires commutation. The extent of the duty that the Environment Agency is or will be subject to in such circumstances is not clear from the wording of the relevant statutes, but it is submitted that it is unlikely that the duty

⁶⁶ In Wales, Natural Resources Wales.

⁶⁷ Water Resources Act 1991 s 107(4).

⁶⁸ It is possible that a claimant could establish a customary right to benefit from flood defences on another party’s land. Custom is very similar to prescription in that both require long usage of a right, however, prescription can only be established by a specific person (or persons), whereas custom is established in favour of a specific locality and exists for the benefit of everyone from time to time residing in that locality. As the two concepts are very similar, similar rules apply in seeking to establish a custom as for prescription. It is therefore submitted that a claimant would be unlikely to be successful in establishing a customary right to have flood defences maintained and repaired given the considerations detailed above with regard to proving claims of prescription.

⁶⁹ But not contract; see *Eton Rural District Council v River Thames Conservators* [1950] Ch 540 (Ch).

⁷⁰ See Land Drainage Act 1991 s 34 for further details of the calculations involved.

⁷¹ For historic reasons the designation of watercourses as main rivers was not initially done centrally and so the size of watercourses deemed appropriate for designation varied across the country. See William Howarth, Simon Jackson *Wisdom’s Law of Watercourses* (6th edn Sweet & Maxwell 2011) for further commentary on designation of main rivers.

⁷² Land Drainage Act 1991 s 33, as amended by the Flood and Water Management Act 2010 Sched 2 para 35.

would be interpreted as requiring repairs and maintenance to a greater standard than that required at the time of commutation.

Duty to maintain coastline

It might be possible, in very limited circumstances, to establish a duty to maintain⁷³ the coastline; however, this is not likely to be much help to those at risk from rising sea levels and the effects of managed realignment.

In *Attorney General v Tomline*⁷⁴ the plaintiff's land was adjacent to the sea and was frequently below the spring tide high-water level. It was protected only by a natural barrier on the beach, formed from shingle. The defendant, lord of the manor and claiming to be owner of the foreshore, had been taking shingle from the barrier and selling it for ballast. The Court of Appeal upheld the injunction granted to the plaintiff to prevent the defendant from removing any further shingle, holding that it is a duty of the Crown to 'save and defend the realm from encroachments of the sea',⁷⁵ either by maintaining natural barriers or by erecting artificial barriers.

Such a duty is imperfect as it cannot be enforced against the Crown. However, in upholding the injunction, the judges took two different lines of reasoning, both arriving at the same conclusion. For Brett LJ, whilst the Crown's duty is an imperfect one, the separate tenet that a subject cannot do something that it would be unlawful for the Crown to do means that subjects who come into the ownership of land previously held by the Crown (as all foreshore once was) cannot do anything to a natural sea barrier to allow the sea to come through and cause damage by flooding. For Cotton LJ, the Crown's duty attached to the land so that when the land was subsequently granted to a subject, it could not be granted free from that duty, so that a subject cannot use the land in any way that would destroy the natural barrier against the sea.

Therefore, where land is protected from the sea by a natural flood defence, although there is no enforceable obligation upon anybody to maintain such a defence, it will be unlawful for

⁷³ Used in its limited sense.

⁷⁴ (1880) 14 Ch D 58 (CA).

⁷⁵ *ibid* 66 (Brett LJ).

any party to remove the defence or any part of it if that would expose the relevant land to the risk of flooding.

Conclusion

As our tour through the various avenues of statute and common law has shown, there is very little in the way of prospects for those seeking to claim the benefit of flood defences not situated on their property other than a possible claim in nuisance and a hope that the government will step in. However, the prospect of flooding damage is one that increasing numbers of us will have to face in the coming years if sea levels rise as predicted and instances of extreme weather become even more frequent than at present. How we as a society respond to these pressures will probably need to include reconsidering our current notion of the fixed allocation of land, particularly where this is in conflict with nature's intentions (as on the Somerset levels and in Fairbourne).