



Case No: D80LS343

IN THE COUNTY COURT AT LEEDS

Leeds Combined Court Centre,
1 Oxford Row, Leeds LS1 3BY
Date: 03/10/2018

Before:

HIS HONOUR JUDGE DAVIS-WHITE QC

Between:

ALISON JANE MURPHY **Claimant**
- and -
BARNSELY METROPOLITAN BOROUGH **Defendant**
COUNCIL

Mr Angus Gloag (instructed under the Direct Access Scheme) for the **Claimant**
Mr James Sharpe (instructed by **Kennedys**) for the Defendant

Hearing dates: 3, 4, 5, 6 September 2018

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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**HIS HONOUR JUDGE DAVIS-WHITE QC (SITTING AS A JUDGE OF THE
CHANCERY DIVISION)**

His Honour Judge Davis-White QC :

Introduction

1. This is a claim in nuisance brought by the Claimant, Alison Murphy (“Ms Murphy”), against Barnsley Metropolitan Borough Council (the “Council”). The claim form was issued on 26 June 2017. The claim is brought in respect of a disused stretch of canal owned by the defendant. The claimant’s case (as refined at trial) is that the defendant has failed to maintain the canal such that, on occasions, it overtops its banks and floods the claimant’s land. This, it is said, has resulted in loss of grazing income from the land. Modest damages, and, more significantly in economic terms, an injunction requiring remedial and maintenance works are sought.
2. The claimant was represented by Mr Angus Gloag. The defendant was represented by Mr Sharpe. I am grateful to both of them for their assistance during the trial.
3. Ms Murphy is the freehold owner of approximately 60 acres of agricultural land adjoining Croft Farm, Willow Bank Barnsley (the “Murphy Land”). That land is bisected by a disused canal, Wilthorpe Canal (also referred to as Barnsley Canal). The section of the canal that I am concerned with (the “Canal”) is technically a branch of the Barnsley Canal, many sections of which have, as I understand it, been filled in since it closed to traffic. The canal as such was abandoned in about 1953, part of the problems experienced having been caused by subsidence due to underground coal mining. The section that I am concerned with, as is clear from the plans and videos that I have seen, comprises areas of open water, marshland and reed-fringed margins. It falls within a designated Local Wildlife Site. A description from a LWS Assessment and Phase 1 survey prepared by TEP for the Council dated January 2011 (edited December 2011) states (at page 18):

“Barnsley Canal was closed in 1953 following many problems with mining subsidence. The section of the canal within the site has been left largely unmanaged. Only a few sections of open water remain, and a build-up of silt and organic matter has occurred so that much of the canal has now been populated by aquatic and marginalised plants.”

Under the heading “Fragility” it comments:

“The two main areas of standing water/swamp on site, the old course of the River Dearne and the disused canal are both vulnerable to drying out as there is little supply of fresh water into these habitats. Natural build-up of organic matter will occur, and the swamp habitat will encroach into the standing water and over time succession of these areas into scrub will follow. Management of these habitats will be required to retain there [sic] current mix of swamp and standing water”.

4. The Murphy Land slopes, from what may loosely be referred to as its South side, down to the Canal to the North. Croft Farm is on this southern side of the Canal and some of the Murphy Land surrounds Croft Farm. In this judgment, to aid

comprehension I have used the broad terms “North” “South” “East” and “West” rather than the applicable more accurate points of the compass and it was common ground that that was an appropriate and convenient manner of identifying and explaining the site.

5. On the other side of the Canal to Croft Farm, the Murphy Land continues to slope downwards in the direction of the River Dearne (the “River”). The Murphy Land on the North side of the Canal is referred to by Ms Murphy and her family as the “Bottom land”. At the north eastern extremity, a corner of the Murphy Land touches the River Dearne. At about that point a new cut has been made in the River so that it runs in a straight line in a North Westerly direction, avoiding a number of meanders along its old course. The old course of the River continues to form the boundary to a large part, perhaps as much as 50%, of the Bottom land. That disused part of the River continues to hold water. At times it acts as an overflow to the River and water can run back along the old course of the River to the River itself at the eastern end, though I understand its western end to be separated from the new course of the River.
6. The Murphy Land is managed on a day to day basis by Ms Murphy’s brother, Mr Wayne Hadfield (“*Mr Hadfield*”). In addition, it is said that Ms Murphy has an agreement with Mr Hadfield (the “*Grazing Agreement*”), under which he is given grazing rights over the Murphy Land with a right to “sub-let or sub-licence”. In this connection, I shall hereafter use the terminology of leases for convenience but make clear that I am not making any finding as to the legal nature of the rights under which the Murphy Land is grazed and whether or not these amount to a licence or a lease.
7. In reality, not just the Murphy Land but the claimant’s case has been managed by Mr Hadfield and it is his evidence on which it is largely based.
8. In a number of respects, preparation for the case was, on both sides, highly unsatisfactory. Mr Gloag for the Claimant was instructed very shortly before the trial began. As such he cannot be criticised for all the failings on the part of the Claimant.
 - (1) No skeleton argument was produced by the Claimant though one had been ordered to be produced 3 days before the hearing (which in the light of CPR r2.8 meant 3 clear days). Given the first day of the trial was a reading day, this was extremely unhelpful, especially in the light of developments prior to the commencement of the trial, most importantly a large amount of agreement between the experts. Time at trial had to be taken up in eliciting the claimant’s case as it then stood. It wasted a great deal of time and was wholly inconsistent with the overriding objective. In effect I had to spend some time extracting the claimant’s case (and the manner in which it had to be narrowed) in the light of the experts’ reports and their subsequent joint report setting out where they agreed and disagreed.
 - (2) Although it was desired to deploy video evidence at the trial no contact had been made with the court to make relevant arrangements. Almost half a day was wasted, in part due to arrangements having to be made and a laptop obtained from outside the court for these purposes. In the end four of us (counsel, the witness and myself), had to crouch over a laptop to try and see the relevant video extracts and take evidence about them at the same time.

- (3) The Defendant's sole witness of fact, Mr Gladstone had very little, if any, direct knowledge of the Canal and the history of interaction with Mr Hadfield, the claimant's brother. His evidence was primarily about the leisure and wildlife status of the local wildlife site as a whole. As such his evidence was of very limited value to the resolution of the dispute before me.
- (4) The parties appeared to rely on the expert reports not just for expert opinion but for stating certain basic facts in the case without troubling to confirm the same from witnesses of fact. As such the expert reports contained an amalgam of expert evidence and fact, the source and/or basis of the latter often being unclear.
- (5) The experts went beyond the pleaded cases of the parties.
- (6) In the case of Mr Blake, expert for the claimant, it emerged that he had seen more material than that referred to in his expert report. Further detail had to be given about this at trial though, to be fair, it did not result in any application by the defendant either to re-open cross-examination or to supplement its evidence.
- (7) No-one had identified, or attempted to identify, the obvious visible extent of the flooding from any overtopping of the Canal as opposed to flooding from the river or from adjacent land (once it had become clear, as it did, well before trial, that the experts were largely agreed that the most of the large area of flooding relied on by Mr Hadfield and shown in many photographs was not caused by overtopping of the Canal but rather by the River flooding or rising ground water).
- (8) No attempt had been made to identify the content of any injunctive relief nor what it was likely to cost nor how carrying it out would or might be impeded by reason of the local wildlife status of the Canal.
- (9) Large numbers of photographs were in evidence but what they showed (in terms of where they were taken from and what I was supposed to get from them) was in most cases completely lacking. Much time was wasted at trial trying to clarify these matters. There was a huge amount of duplication and there had been no proper collation so that different references to what was the same item could be clearly identified as being such.
- (10) In their expert reports and subsequent documents (for example containing the result of the joint meeting between them to seek to narrow the expert issues between them), each expert to a greater or lesser extent, advanced in the sense of putting forward, the case of their client which was not otherwise properly particularised by the pleadings. The order permitting their evidence, permitted expert evidence on surveying matters. However, in the documents before the court, the experts went well beyond matters for their expertise and beyond their function of giving expert evidence on relevant facts: for example, both experts reached conclusions on legal (and factual) matters such as ownership and responsibility for drains and what was described as a "breach in the canal" which I deal with below. Dr Hill for the defendant put forward a whole case as regards the wildlife status of the canal and matters appertaining thereto. He

also effectively made submissions about how blockages to certain outfalls to the canal had come about (giving evidence, for example, about likely weight of a bale of straw/hay which had blocked an outfall from the Canal and the circumstances (of a non-surveying nature) as to how he thought it might have got there). He also usurped the court's function by stating facts, not otherwise in the evidence, about the inspection system in place for the Canal and stating his opinion as to whether it was in all the circumstances adequate and reasonable.

- (11) Finally, the sheer volume of pages of the experts reports and their joint report (and addendum thereto) taken together with the repetition therein made it very difficult to identify clearly the issues between the experts and indeed the parties.

The Witnesses

9. Witness statements were filed by the claimant, Mrs Murphy, and Mr Hadfield for the claimant. In addition, the claimant relied on the expert evidence of Mr Blake. All three were cross examined.
10. I found Mrs Murphy to be a truthful witness doing her best to assist the court. As she made clear she regards herself as very much a housewife and she has left the management of the Murphy Land to her brother, Mr Hadfield. Although she says that she walks the Murphy Land most days she was unable to give much if any useful evidence about the state of the Murphy Land and the extent of flooding. So far as financial arrangements were concerned, she seemed to have a very hazy idea of the position, as I shall go onto explain.
11. Mr Hadfield, I found to be a truthful witness doing his best to assist the court. He was hampered however by his frustration that, over time, the defendant had not, to his mind, engaged with him. He was so convinced of the rightness of his cause that he has never understood why there is any dispute about it. Unfortunately, the concrete evidence that he was able to produce and to speak to was limited. Only two videos of the canal overtopping its bank onto the Land, from March and April of this year, were produced. Most of the other videos and photographs showed either flooding, but not clearly where it came from or its extent, or general pictures of the canal but from which I was unable to draw any key inferences.
12. I deal with Mr Hadfield's evidence in more detail later in this judgment. I was referred to a number of other disputes that have arisen between Mr Hadfield and the Council. One relates to tree preservation orders and I was provided with a copy of the judgment of Garnham J ([2018] EWHC 866 (QB)) on that topic. At the end of the day, I did not find the judgment to be of much assistance to me in terms of evaluating the evidence of Mr Hadfield, which was the reason, as I understood it, that the judgment had been provided to me. It was, in any event, common ground that relations between the Council and Mr Hadfield were bad and the content of the judgment was just one example of this.
13. I reached one clear conclusion about Mr Hadfield as a witness. He is so convinced that he is right that he tends in his righteousness to go beyond the true position, although he honestly believes what he is saying at the time. The Claimant has only

produced two videos showing overtopping of the Canal happening on 12 March 2018 and 19 April 2018. However, in his evidence he made constant assertions that there were hundreds of videos and photographs showing overtopping of the canal and that either he hadn't looked through them all yet and/or that he had been advised not to disclose them and/or produce them because, in effect, it would be disproportionate to do so. As a result of such assertions, I required the lawyers acting for the claimant to consider whether or not disclosure in this case was complete. The next day I was provided with a witness statement confirming that full disclosure had taken place and that Mr Hadfield had become confused as to whether his solicitor had been given all the material that he had in his possession but that in fact he had done so. However, I note that Mr Blake in his evidence repeated the assertion that there were "numerous other videos available" to show the asserted flooding which "had not been disclosed". He confirmed that that is what he had been told. In reality, that can only have come from Mr Hadfield (directly or indirectly). This confirmed to me that Mr Hadfield's allegations about the existence of such material had not arisen simply from confusion in the witness box but was a long-standing position that he had adopted. Part of the explanation given to me was that there had been such material, but it had been lost on earlier computer hardware. However, that did not explain why the assertions were made that there was such material available not the explanation that it had not been produced on advice and/or because it had yet to be looked through. I consider that Mr Hadfield would have provided any material that was relevant, either at the time it was produced or at trial, having carefully kept it safe, and I find there is not and never was any such other material clearly showing overtopping as alleged by Mr Hadfield.

14. Another example where Mr Hadfield's evidence was not entirely satisfactory was when he denied that he had been asking the local authority to gift the Canal to him in 2014, at the time of the start of correspondence complaining about flooding and which in effect said that if the Canal was not gifted to him or his family the Council would end up facing litigation and having to pay out large sums of money in compensation and/or to prevent the flooding. The correspondence on this is clear. Mr Hadfield's assertions that he did not want the Canal and that this was part of a scheme whereby a conservation body was to take the Canal free, and not him, and that he had not sought a gift of the Canal was simply inconsistent with the clear correspondence. Whatever arrangement was in place between him and some wildlife entity, about the Canal Mr Hadfield was clearly seeking that it gift the canal to him or members of his family. I do consider that his desire to get the Canal "for free" and to use the threat of maintenance costs of the Canal if not gifted to him (whether or not he intended to gift it on as part of some wider deal), has been a factor in motivating him to exaggerate the factual position with regard to overtopping, albeit he now believes that exaggerated position to be the truth.
15. The defendant's sole witness of fact was Mr Gladstone, Director of Place. I understand that as such he has overall responsibility for a number of departments including housing and culture, environment and transport, economic regeneration and property. The designation "Place" remained a mystery. He was at such a senior level of management that he had very little, if any, direct knowledge of the Canal and the history of interaction with Mr Hadfield. His knowledge was largely hearsay and based on the available documents. His evidence was therefore necessarily of limited assistance. He attempted to assist the court as far as he could and was obviously a witness of truth. As I understood it, the Council decided not to deploy evidence from

other employees because they were concerned such employees might be harassed. This led to some surprising deletions from documents of employee names in emails and other documents, though usually their designation was clear (and who they are would almost certainly be known to Mr Hadfield) and it was unclear to me what this sought to achieve. At the end of the day, the absence of evidence from persons who could give relevant evidence was unhelpful. In addition, the defendant relied upon the expert evidence of Dr David Hill.

16. I found both experts, Mr Blake and Dr Hill, to be reliable witnesses with relevant expertise. Mr Blake's initial report was some 11 pages long (excluding appendices which comprised various letters, plans and photographs). It did not deal with his qualifications or experience but that was covered in cross-examination. His expertise is primarily as a highways engineer and he has given expert evidence in other cases in relation to general building defects. His drainage expertise is largely based on drainage in the context of highways.
17. On the other hand, Mr Blake apparently relied upon videos and/or photographs not referred to in his report. In the Joint Report, a number of videos are said to have "added" to Mr Blake's Report and the factual position is then queried by Dr Hill in the Joint Report. This way of dealing with matters is highly unsatisfactory. If new material is to be introduced into an expert evidence it should be done properly way by way of a supplemental report, for which there is court permission, so that the process is transparent to the parties and the lawyers. Dr Hill's report (excluding appendices and annexes) ran to some 145 pages. He too has an impressive career record and list of qualifications.
18. Each expert was asked and answered questions put to them in writing in accordance with directions given by the Court. The experts then produced 111 pages (not including exhibits) of what is described as a Joint Expert's Report (and subsequently an addendum). This included not only matters such as the Dr Hill's comments on his own report but his comments on the replies to the Part 18 Request made to the Mr Blake but even Mr Blake's statement of truth and Mr Blake's statement of the duty to the court, found in his, Mr Blake's, report. Later a further addendum or joint report was also produced.
19. There is a real need for expert evidence to be limited to the area of expertise of the expert and for which permission has been granted. As I have indicated, that was not the case here.
20. The two experts were essentially civil engineers/surveyors who were competent to give expert evidence upon the alleged flooding, its causes and physical extent and effect and any remedial steps needed, and their cost, to prevent the same recurring. As such it was surprising to see that both reports went beyond this, for example in making cases as to legal responsibility for drains and culverts and, apparently, ownership of the canal at a point where a breach had been made as well as evidence as to whether or not council employees had made the breach in question. Dr Hill went even further in expressing opinions as to the circumstances in which outfalls to the canal had become blocked, what would be an appropriate inspection regime and a number of other matters that were not matters for his expert evidence (such as data "date stamping" of photographs and dating of photographs and videos). It is

unfortunate that, with the assistance of the lawyers, the expert reports were not better focussed and, following them, that a joint document was not produced setting out far more shortly and concisely what they agreed and disagreed. The witness statements, the expert reports and the final joint expert report failed to identify the extent of flooding caused by alleged overtopping of the Canal and any remedial engineering works and their cost.

21. During the trial the experts agreed the extent of the flooding caused by overtopping by way of a plan which was put before me. However, although agreeing the extent by reference to a plan they widely differed in evidence as to whether the area was in the region of 40 metres by 40 metres (Dr Hill) or 100 metres by 100 metres (Mr Blake).
22. As regards any works said to be necessary, these and their costs were estimated before me by the experts, effectively “on the hoof” or as little more than a “guestimate” and with little time for consideration by either side’s lawyers or the producing of considered calculations. Accordingly, neither could be given much weight.
23. On the relevant matters the experts were, at the end of the day, largely in agreement. There were two main areas on which they disagreed to which I shall return. Dr Hill was criticised for addressing a number of matters that were not within his area of expertise. In my judgment, there was some force in those criticisms, however they do not impact upon the weight and validity of Dr Hill’s expert conclusions on the key areas where his expertise was properly relied upon by the Council. I found both experts, as one would hope, anxious to assist the court, and properly experienced and qualified. Although to some extent each could be regarded as having championed the case of the lay client ultimately instructing them, I am satisfied that on matters where their professional expertise was engaged they remained independent and carried out their function as expert properly, providing the court with an independent expert opinion.
24. I also found it difficult to identify which parts of Mr Blake’s report were his recitation of instructions given to him, on which he was to base his report, and which parts were his own evidence.
25. Finally, I should say that although I have criticised the end products of the experts in certain respects I am unable to tell whether, in any or all of the relevant respects, the fault lies with the expert or their instructing solicitor/party.

The Claim

26. As set out in the Particulars of Claim, the claim is based on an alleged failure by the Council adequately to maintain the Canal over many years including (a) failing to remove, by dredging or otherwise, substantial amounts of rotting vegetation; (b) failing to repair underground culverts, intended to drain excess water from the canal. These failures are said to have led to water overflowing from or overtopping the Canal causing “extensive flooding” over many years including many occasions from 1 July 2011. The relevance of the 1 July 2011 is that the Claim Form was issued on 26 June 2017 and that for limitation purposes claims would need to be made in respect of damage occurring up to 6 years before that date.

Non pleaded claim: flooding caused by breach in the Canal

27. The report of Mr Blake went beyond the particulars of claim, in that he said that flooding resulted not only from the two matters set out and relied upon in the particulars of claim (water overtopping the banks of the canal and water emanating from broken culverts) but also from water migrating onto neighbouring land, via a breach cut in the canal banks by the Council, and then flowing onto the Murphy Land. As regards this “migrating water”, the same was said to flood onto the Murphy Land, entering from the West from neighbouring land. According to Mr Blake’s instructions, some-time after notification on behalf of Mrs Murphy to the Council of flooding, Council workmen undertook work to the North bank of the Canal (not bordered by Murphy Land but to the West of it) and excavated a breach in the canal bank to allow water from the canal to discharge over land belonging to a third party. The breach was then spanned over by timbers. Unfortunately, it was unclear (until cross-examination) to what extent Mr Blake’s expert report on this area was simply repeating his instructions or some form of independent factual evidence by him. Neither factual witness for the claimant dealt with this point.
28. The matter not having been pleaded, this aspect was not addressed in the Defence.
29. In the Joint Expert Report, Dr Hill “commented” on the relevant part of Mr Blake’s report. In effect he asserted that the breach in question was in a part of the Canal bank not owned by the Council and there was no factual evidence that the breach had in fact been caused by the Council (by its workmen). This Joint Report was signed the same day as the witness statement of Mr Hadfield (8 August 2018) and a week after 31 July 2018 when Ms Murphy had signed hers. Other than the fact of the breach or (as described by Mr Hadfield) gouging, neither factual witness statement touched further on the point. Mr Blake in the Joint Report commented that there was no documentary evidence that the defendant caused the breach. This is an example of the experts going beyond the pleaded case and entering into the arena and dealing with points not properly within their expertise or role as expert witnesses.
30. At the time the trial opened before me the question of whether the Claimant still relied upon the Council being responsible for any leaks from the “man-made breach” in the Canal bank was unclear. After taking some instructions Mr Gloag confirmed that the Claimant was not pursuing this aspect of the claim. However, it remains the case that according to the Claimant’s witnesses, factually the Murphy Land is being flooded in any event because of the alleged breach and that I must assume that this is no responsibility of the Council. No-one endeavoured to explain or elicit evidence as to the extent of any such flooding from the “breach” to the Murphy Land, via other adjacent land.

Flooding caused by broken culverts

31. There are two relevant outfalls on the Canal which operate as “overflow” drains. Once the water level of the Canal reaches a certain level, water will start to drain away down these two outfalls. From the outfalls to the old river course there are land drains or culverts running under the Murphy Land which carries the water down to the old river course. It was agreed by the experts that the culverts in question are in a lamentable state of repair. Water, instead of flowing away under the Murphy Land, is effectively bubbling up and running over the surface of that land.

32. The defence simply ignores the allegation concerning the culverts.
33. Dr Hill was asked, as part of his instructions, whether the culverts were in a state of disrepair and contributing to the flooding. In his report, with which Mr Blake agreed, Dr Hill set out his view that the underground culverts are in a “deplorable” state of repair and are part of the flooding problem. However, he then majored on the question (eagerly taken up by Mr Blake) as to whose was the legal responsibility for maintenance of the culverts. Dr Hill asserted that as the claimant is the riparian land owner she is responsible. His report contains an extended section on the responsibilities of owners of riparian land under law and an assertion that the claimant is such an owner as regards the culverts. These were matters of fact and law that were not within the scope of Dr Hill’s job as an expert nor was he instructed to deal with them. Mr Blake, however, took up the challenge, and denied that this was a case where riparian law applied at all. Indeed, at one point in the Joint report, he denied that the Council had the right to discharge water into the culverts.
34. The factual (i.e. no expert) evidence did not go into the question of ownership of the culverts or the rights in respect of them.
35. At the start of the trial, again after taking instructions at my request, Mr Gloag confirmed that it was no part of the claimant’s case that the Council was responsible for flooding to the Murphy Land caused by the state of the culverts.
36. The claimant’s case having been narrowed through Counsel I did not have to grapple with the very real problem of factual and legal submissions being put forward by experts and, apparently, no-one else.

Diversion of watercourse into the Canal

37. A watercourse runs downhill, towards the Canal, on the Murphy Land to the South of the Canal. That watercourse assists in draining that “upper” land. I have seen video clips of the watercourse with the water coloured by a green dye. The water running down it at the time of the video was not insubstantial. This watercourse, when it reaches the Canal, is supposed to go into a culvert underneath the canal and then drain away through a culvert on the Murphy Land North of the Canal down to the old river course.
38. At some date and time unknown the access or entrance to the culvert under the Canal was blocked. The watercourse currently enters the Canal. Attempts have been made, as I understand it by Mr Hadfield, to dig a trench in the Canal to carry this water to or near to one of the Outfalls that I have mentioned. At the point of entry of the diverted watercourse, the canal appears to be heavily choked with weeds and to have silted up. Unfortunately, the video clip that I saw did not show where the water (dyed green) went or ended up and, in particular, whether it simply dispersed into the Canal or went down one of the two outfall points that I have mentioned. Dr Hill pointed out in his expert report that it was the responsibility of the Murphys (or technically the claimant) to unblock the relevant culvert and to direct the watercourse into the culvert under the Canal rather than into the Canal. Mr Blake confirms that the claimant intends to undertake that work. Dr Hill’s opinion is that the diversion into the Canal has “significantly increased” the flow of water directly into the Canal and added to the threat of the Canal overflowing. Mr Blake disagrees with the word “significantly”.

As I shall explain, the times and circumstances in which there has been overtopping of the Canal (and it is accepted there has been overtopping and indeed I saw a video of the same) are wholly unclear. Nevertheless, on the basis of the materials before me, including the video evidence, I agree with the assessment of Dr Hill that the diverted watercourse is a possible contributory cause to any overtopping of the Canal. The problem is that necessary work has not been undertaken to demonstrate, one way or the other, whether the diverted stream creates merely a theoretical threat of overtopping or it is likely to have caused actual overtopping.

Overtopping of the Canal and extent of flooding caused

39. The case against the Council that I have to deal with is therefore one of flooding of the Murphy Land by way of overtopping of the Canal. To explain that, at some points of the Canal its Northern bank, on which the towpath runs, has sunk (probably as a result of subsidence as a result of coal mining). At one point, approximately 75 metres or so to the West of one of the outfalls that I have mentioned (oral evidence was to the effect that the experts agreed a distance of 75m though in descriptions in documents prepared as indices for me 50m was used. Counsel corrected this orally in closing), it is accepted that the water level in the Canal has resulted in water flooding the towpath which runs along the top of the bank and, on at least two or three occasions, apparently overtopping the Canal and running down the side of the bank onto the Murphy Land. Photographs show, apparently, two washed away areas or very shallow channels, very close to each other, on the side of the Canal bank consistent with mild overtopping. Although grass has been washed away the “channels” down the side of the bank are not particularly pronounced. I shall refer to this point as the Overtopping Point. As I have said there are only two videos showing this occurring in March and April 2018.
40. Before turning to the question of legal liability, if any, I must first consider the factual matters as to what overtopping there has been and the extent of any resulting flooding to Murphy Land and what factually has caused the overtopping.
41. In his witness statement Mr Hadfield says that about 12 years ago (i.e. in about 2006) he found that the Canal was overtopping and flooding the fields at the North east side of the Land. The position (as far as he was concerned) was suddenly remedied apparently as a result of someone making a hole in the Canal Banking at a point adjacent to other land so that water from the Canal flooded onto adjacent land rather than the Land. This is a reference to the breach in the Canal that I have referred to earlier.
42. Mr Hadfield says that there were no further problems until about 2010 when overtopping started again. He says that it happens nearly every time it rains in winter and nearly every time there is a thunderstorm at any time of the year. He says that he obtained an expert report sometime after 2010 and before 2013 but that the report is not now available. The report he says, indicated that the Canal was overtopping due to it not being maintained adequately. Silt and weeds were said to inhibit water escaping down the drain and at times of heavy rainfall, water was running in more quickly than it could flow away. He said that this was obvious to him as a lay observer. He said that the defendant was provided with a copy of the report, it said that it had cleared a blocked drain which had been found but in practice the situation got no better. There

is no record of any expert report being sent to the Local Authority and I find that none was sent to it.

43. More particularly Mr Hadfield says that a complaint was raised almost weekly during the winter months. He has produced a number of photographs and videos but is unable to date many of them.
44. It is agreed that on occasions the Canal has overtopped its bank at that point. It is also agreed as to the extent of the resulting flooding (by way of a plan agreed between the experts). This was produced in response to my enquiry as to the extent of the flooding caused by overtopping. Mr Hadfield had effectively asserted that the Murphy Land was extensively flooded by reason of the Council's failure to maintain the Canal. However, in the light of the expert's joint position, it had become clear by the start of the trial that some flooding was caused, or at least on the Claimant's case, caused by the matters that I have identified (the "breach" in the Bank and the inadequately maintained culverts or land drains carrying from the outfalls) which it was now accepted were not the responsibility of the defendant. In addition, it was agreed that large areas of flooding to the Murphy Land, as shown in the photographs and videos shown to me, were highly likely to have been caused not by overtopping of the Canal but by (1) flooding from the River Dearne and/or the old watercourse of that river and (2) by high levels of groundwater, effectively contained and trapped within the ground near the surface. Dr Hill demonstrates convincingly in his report that for the extensive flooding shown in the videos and photographs to have been caused solely by the Canal then the Canal would have had to fill and empty some 13 times approximately and this is on the basis that the entire length of Canal was one full of water only, whereas, as I have said, large areas are effectively silted up. It is not irrelevant that the Murphy Land lies within an area designated as a "high risk" flood plain by the Environment Agency.
45. However, although the extent of flooding from overtopping has been partially agreed (by map but not in measured area) the number of occasions when overtopping occurred has not been agreed. As to this I am not satisfied on the evidence that actual overtopping of the Canal has been a frequent occurrence. Although Mr Hadfield asserts that it was a frequent occurrence, and in the winter almost a weekly occurrence, other than the two videos I have mentioned, he has provided no contemporaneous photographic or video evidence of the same. He has produced a number of photographs and video clips. In the majority of cases the dates when they were taken is unknown. In only two cases is overtopping of the Canal shown.
46. Dr Hill has taken various dates from 2014 onwards when flooding is said to have occurred. Doing the best that he can (without precise dates of the alleged flooding), in nearly every case he reaches the conclusion that relatively low average rainfall at the relevant times are not extraordinary enough to have caused the extensive flooding shown in photographic/video evidence and does not consider that the Canal could have overtopped and caused the extensive flooding in question nor indeed overtopped its banks at all unless Outfalls were blocked. Of course, another possibility is that there was simply no overtopping on most of the dates in question.
47. Mr Hadfield's letters to the Council do not reveal that he was asserting that overtopping was regularly and frequently occurring. He suggested that complaints

prior to 2014 (that being when there is first evidence of written complaint) were oral and the Council were sick of them. There is no record at the Council of any such oral complaints and I am satisfied that there would have been a record of the same if made. Mr Hadfield suggested in oral evidence that he was aware that he needed to produce independent objective evidence of flooding and overtopping from about 2014 when he first saw solicitors and obtained an expert report but the only evidence is that of the two videos that I have referred to. Had there been such obvious overtopping I am confident that Mr Hadfield would have photographic or video evidence of the same. Other than the two videos I have mentioned the evidence shows the Canal only close to overtopping or as to (possible) overtopping onto the towpath but not down the side of the bank. I should add that Ms Murphy's evidence on his issue, as generally, was vague. Further, the very limited "channels" on the side of the Bank which appear to have been made by water escaping from the towpath down the Canal bank onto the Murphy Land are consistent with limited flooding.

48. I also bear in mind the other assertions made by Mr Hadfield, at various times, to the effect that all the flooding he complained of was obviously caused by overtopping but his assertions that it was also caused by the breach in the canal further along the canal bank that I have referred to and/or the damaged culverts.
49. Accordingly, I am not satisfied that the overtopping has been other than on a few occasions, say a handful at most. This is also consistent with the minimal channels gouged out of the side of the Canal at the Overtopping Point, the absence of contemporaneous photographic/video evidence, and the absence of clear complaint to the Council on this specific point.
50. As regards the extent of the flooding, I was provided with a plan but no clear basis upon which I can decide between the evidence of Dr Hill and that of Mr Blake regarding its extent in measurement terms. I can take it to be agreed that such flooding as there has been caused by overtopping extends to an area about 40m by 40m but no larger. The onus to establish any larger area of flooding is on the claimant. It has not been discharged. In any event, what is very clear is that area is far smaller than the wide extent of flooding relied upon in the Particulars of Claim and the factual evidence of Mr Hadfield.
51. Further, and in any event, and as Dr Hill, points out, without precise information as to dates it is impossible properly to identify the causes of any flooding or overtopping.

Cause of overtopping: silting up?

52. It is at this point that the first of the two crucial differences that I have referred to between the experts emerges. It is a simple point. Dr Hill asserts that the outfalls are sufficient in size or capacity to take away excess water in the event (for example) of heavy rain or snow melt which increases the volume of water within the Canal. I do not understand Mr Blake to disagree with this position. However, where the experts disagree is that Dr Hill says, in effect, that water can and will find its own level and that water can flow to and then out of the outfalls before overtopping occurs. This is particularly the case as regards the open water area close to the Overtopping Point which, says Dr Hill, can find its way to the outfall ("Outfall No 2") 75 metres nearby even though near Outfall No 2 there is a lot of reed and vegetation. When there has

been overtopping he says that this is likely to have resulted from the outfalls (or possibly one of them) being blocked (as they clearly have been on occasion by persons unknown, as I shall go on to explain). Mr Blake, as I understand it, accepts that if the outfalls are blocked then overtopping is likely. However, he also asserts that excess water in the Canal at the Overtopping Point cannot reach the relevant outfall, Outfall No 2, before the Canal overtops. This is because, he says, the Canal is silted up with decaying vegetation and growing vegetation. As such, he says that excess water (particularly from the open water where the overtopping occurs) cannot get to an outfall, or at least cannot get to the outfall quickly enough, before the Canal overtops its bank at the Overtopping Point. I was shown a photograph of Outlet No 2 in the Summer with reeds growing close to it but couldn't begin to come to any view as to whether this vegetation (or anything underlying it) was such as to block the Outfall or to prevent water reaching it from areas of open water on times when eg. it rained.

53. I have been referred to the principles in *Milton Keynes Borough Council v Nulty* [2013] EWCA Civ 15; [2013] 1 WLR 1183. I found the case of limited assistance.
54. I am not satisfied on the balance of probability that Mr Blake is correct that overtopping has occurred because the Canal is silted up and water cannot reach the Outfall (or reach it quickly enough) to prevent overtopping. Accordingly, in my judgment the claimant has not made out her case on this point. Quite simply neither expert seems to have carried out any measuring or testing or in-depth assessment of the position, but each seems to have reached their conclusion simply by looking at the Canal from the towpath and reaching their conclusion based on their impression. Absent anything more than experience and (for these purposes) a fairly cursory examination of the site on each side by the experts, I am unable to say that either expert is right or wrong and the matter must therefore be decided in accordance with the burden of proof. Accordingly, I am not satisfied that the canal is so silted up that overtopping is the necessary result. I should add that I am also not satisfied that the diversion of the watercourse on the Murphy Land south of the Canal such that it runs into (rather than under) the Canal is not a contributory or (if there has been overtopping with blockages) causal factor of overtopping.
55. That does not mean however that the Council will not have to monitor the position in the future and, if necessary, take action to prevent liability if overtopping occurs in the future. It may well be that what I would describe as the silting up of the Canal in the process described in the LWS Assessment and Phase 1 Survey that I have already referred to will at some point be such that Outfall No 2 does become ineffective to prevent overtopping. All I am deciding is that I am not satisfied on the balance of probabilities on the evidence before me that such has been the state at any stage up until
now.
56. It follows that there can be no liability on the Council in respect of overtopping to date on the basis of a case that silting up of the Canal is the cause of the overtopping.

Cause of overtopping: blockage of Outfall?

57. That leaves the question of blockage. The question is whether I am satisfied that blockage of the outfall close (75m or so) to the Overtopping Point, Outfall No 2, is one that has been caused by blockage of that outfall or not. I am satisfied that at least some overtopping that there has been, has been caused by such blockage. If I am wrong about this then I am unable to identify the cause of the overtopping and I am unable to determine that legal liability for it rests with the Council under the principles in *Leakey v National Trust* [1980] 1 QB 485, with which I deal later in this judgment.
58. So far as outfall blockage is concerned, both the relevant outfall close to the point of overtopping (referred to as Outfall No 2) and that some distance to the East, nearer to Smithies Lane (referred to as Outfall No 1) have been blocked on occasions, and on occasion apparently maliciously, by persons unknown. In brief (and the following are the main examples identified by me in the evidence, if they are not complete or completely accurate it does not alter my overall assessment):
- (1) In 2013, apparently, the Council unblocked one of the Outfalls, but there is no further detail regarding this episode (This information is taken from Dr Hill's report).
 - (2) In January 2015 a nearby inspection chamber below the Canal was found by the Council to have been deliberately blocked with concrete, which was removed, and the outlet cleared. As I understand it this related to Outfall No 1.
 - (3) In April 2015 the Council cleared debris and vegetation from Outfall no 2, following an inspection on 23 February 2015.
 - (4) In September 2015 Outfall no 1 (there was a dispute at trial as to whether Outfall 2 was the relevant Outfall as asserted by Dr Hill in his report, but it is clear from the relevant photographs that it was Outfall 1) was found to be blocked with a hay bale and large polythene sheet. That was cleared.
 - (5) On Dr Hill's second visit to the Canal on 16 February 2018, a plastic bag was found to be blocking Outfall No 1, stopping the Outfall operating correctly. It was removed and once removed and after a relatively short period of time, the water level dropped significantly in that part of the Canal.
 - (6) Also, on 16 February 2018, a section of the brickwork from the wall of Outfall no 2 was found to have been dislodged and to be partially blocking Outfall No 2.
59. In my assessment, the evidence shows that the Council reacted fairly speedily to matters once they came to their attention. I also consider that the Council must be taken to be aware (at least since 2014/early 2015) of the risk of the Outfalls becoming blocked, either by vegetation/natural occurring debris and/or malicious intervention.
60. I should also add that although the evidence of blockage to Outfall 1 is such that, in my judgment, it has put the Council on notice of the possibility of malicious or other blockage of Outfalls generally, including Outfall 2, it shows that the times at which Outfall 2 has been found to be blocked are few which is consistent with limited overtopping having taken place as a result of blockage of Outfall 2.

61. There was some dispute at trial as to whether Outfall No 1 and Outfall No 2 were connected in some way (by a pipe) and whether or not blockages of Outfall No 1 might have an impact on Outfall No 2 and on flooding at what I have described as the Overtopping Point. At the end of the day I understood it to be agreed that I should treat any blockage of Outfall No 1 as irrelevant to the cause of overtopping at the Overtopping Point. The relevance of blockages of that Outfall (No 1) are relevant therefore insofar as system of dealing with potential blockages is relevant: both in terms of finding out about any blockages and dealing with the same. The whole debate about the role of Outfall No 1 seems to have come about because, as it emerged, Dr Hill had been told by the Council that there was a pipe connecting the same. This is another example of the lack of transparency of the expert reports and the failure to follow the correct procedure of clearly setting out the substance of an expert's instructions and evidencing relevant factual matters contained therein by factual evidence from a witness of fact.
62. The question that arises at this point is whether the systems in place for dealing with blockages are adequate such that the Council is not liable in respect of flooding caused by such blockages. It is at this point that I have to revert to the case of *Leakey*.

Leakey v National Trust

63. In the well-known *Leakey* case (*Leakey v the National Trust for Places of Historic Interest or Natural Beauty* [1980] 1 QB 485), a large quantity of earth and some tree stumps fell from a large mound on the defendant's land onto the plaintiffs' land. The plaintiffs (they would now be called claimants) brought a claim in nuisance. The defence was that the defendant was not responsible as the damage was caused as a result of a natural movement of land. The relevant principles are set out at page 524E-H of the law report. In my judgment, they apply equally (a) if I am wrong in my factual assessment that overtopping has not been proved to be caused by silting up of the canal (a natural cause) and (b) if the overtopping has been caused by a blockage of the relevant Outfall, either by natural causes (such as debris/vegetation and/or by the acts of malicious unknown third parties).
64. The principles to be applied may be summarised as being that there is a duty to do that which is reasonable in the circumstances to prevent or minimise a known risk of damage or injury to the Murphy Land by flooding. In deciding the scope of that duty in terms of what is reasonable (and whether it has been breached) it is necessary to consider all relevant factors and weigh them together including (for example) the extent of the risk, what so far as is reasonably foreseeable are the chances that the damage will occur? What is the extent of the same if the risk becomes reality? Is it practicable to prevent or minimise the risk? Was there sufficient time for preventative action to be taken? If practicable how simple or difficult are the measures which could be taken (how much and how lengthy and at what cost would the work to be carried out)? It will immediately be apparent that some of these factors are relevant to other issues that I have to deal with: such as whether as a matter of discretion a mandatory injunction should be granted (or damages in lieu) and if so in what terms and what any damages should be (or would be likely to be) if it is established that flooding is legally caused by breach of any duty which is established.
65. I therefore turn to consider some of the relevant factors in more detail.

Actual damage and possible damage

66. Although the precise extent of the flooding is not agreed by the experts its area as a proportion of the Murphy bottom lands is agreed by reference to the agreed plan. On Mr Blake's view, which is the most favourable to the claimant, the area of flooding caused by overtopping is perhaps 2.5 acres out of 60. That 60 comprises, as I have said, boggy land which is, on the evidence, clearly the subject of extensive flooding for not insubstantial periods, caused by other circumstances and which is situated in flood plain with a high risk of flooding.
67. The claimant seeks general damages in a sum not exceeding £3,000 and special damages of £6,665. As regards the special damage, this is said to be specific loss incurred in respect of letting of the Murphy Land for grazing. In effect it is said that grazing rights were let on an annual basis but that the annual fee income had to be remitted or returned in part to reflect the fact that the Murphy Land was unsuitable for grazing due to the flooding. I will return to that claim ("Grazing Loss") later. Other than that, no specific general loss was identified save that the Particulars of Claim refer to "the inhibition of the Claimant in being able to make, seek and implement plans for the development of new commercial uses for the Murphy Land." ("Inhibition Loss").
68. As regards Inhibition Loss I am not satisfied that any such loss is made out. Although I accept that Mr Hadfield may have had ideas as to how to develop the Murphy Land south of the Canal for use other than grazing I am not satisfied that any planning for the same has been prevented from the occasional overtopping that I have identified. In the absence of anything more concrete in the evidence that planning has been prevented I am not satisfied any such loss has been made out. Given there is no evidence of planning, I am also not satisfied that implementation of any of the ambitious plans referred to by Mr Hadfield (e.g. establishment of a recreational lake) are made out.
69. So far as Grazing Loss is concerned, I am satisfied that Mr Hadfield let the Murphy Land out to a Mr Benson on an annual basis from 24 September each year to 23 September the following year for an annual rent of £4,000, the first such arrangement commencing in September 2011 and continuing until December 2016. I am also satisfied that for a four-month period each year Mr Benson did not use the grazing rights and because of the general flooding, a compensatory payment of £1,333 was made to Mr Benson (or the payment that he otherwise had to make was reduced by that sum) in respect of each of the tenancy years commencing in September from 2011 to 2015. In respect of the year commencing September 2016 the tenancy ended in December 2016. I am not satisfied that a rent of £1,333 was repaid or not received for that period. Doing the best that I can (the matter was not really explored in cross-examination) I consider that the amount of the reduction would have been, on the most favourable case to Mr Hadfield/the claimant about £651.50. I should add that I am not satisfied that any further losses occurred. None have been claimed and I notice that in at least one of the contemporaneous photograph/videos there appear to be at least 10 horses still grazing on the Murphy Land south of the canal (It was confirmed in evidence that the only relevant grazing rights were over the Bottom lands).

70. However, I am not satisfied that this loss arose as a result of any flooding caused by overtopping of the Canal. As pleaded and evidenced, Mr Benson's position arose because of the extensive flooding that the experts agree did not have any relevant causal link with the Canal.
71. On that basis the question is whether, assuming a relevant breach of duty is shown, any more general loss should be compensated for. Doing the best that I can, in that eventuality that most by way of damage that I would award would be a sum of say £100 a year, assuming that overtopping occurred at least twice a year and caused some flooding to land that is shown to be the subject of extensive flooding in any event. As regards damage to the value of the Land I heard no expert evidence that the limited flooding that I have identified or the risk of the same caused any. Doing the best that I can on the evidence I am not satisfied that the value of the land from such a risk would be reduced by very much at all. The only evidence of the value of the land is the land register showing that it was acquired by Mrs Murphy for £40,000 in June 2005. I accept that that may well not have been full market value then (and may not be the now market value) but, as I say, I have nothing further to go on. Given the area of land affected by flooding caused by overtopping, the likelihood of overtopping occurring (limited to it occurring because of outfall blockages) and the overall nature of the bottom land I would assess the damage to the value of the Murphy Land as being at most £1,000.
72. As regards the loss said to have arisen in connection with the Benson transaction, there would be a further question which is whether with such loss amounts to a loss to the claimant (as opposed to a loss solely to Mr Hadfield). The evidence regarding this was unsatisfactory. In her evidence the claimant said not only that she had suffered the loss but that Mr Hadfield had "demonstrated" to her his loss of £6,665 in this connection, but she was unable to explain how he had done so. Her evidence was that in consideration for the grazing rights granted to her brother, he had a liability to her equal to any income he obtains from sub-letting those rights. However, she said, this liability to her is offset against liabilities of her to him. In cross-examination Mrs Murphy became hopelessly confused and unable to explain these arrangements or, adequately, her evidence in connection with them. This led Mr Hadfield to shouting at her from the body of the court not to say things she did not know anything about. Later, in giving evidence he tried to explain the arrangements in question which were that half of the rental income from third parties went to his (and Ms Murphy's) father and half to him. As I understood it, he was saying that his obligation to pay his sister half of the income was, he said, offset against her and her husband's liability to pay for a house that they lived in on land provided by Mr Hadfield and constructed of materials paid for by Mr Hadfield, which they would ultimately buy from him in the future. The explanation as to why Ms Murphy did not know the detail was, said Mr Hadfield, because arrangements were made between him and Mr Murphy. The reason this detail did not appear in the witness statements or the pleaded particulars of claim was, said Mr Hadfield, because the solicitors had advised not to go into that sort of detail. This is another example of the unsatisfactory nature of Mr Hadfield's evidence.
73. On balance I am, but not without some hesitation, just about persuaded that the sums credited to Mr Benson were subtracted from any sums that would otherwise be sums

for which Mr Hadfield would give his sister credit. However, this is academic in light of my finding as to the cause of the relevant loss.

74. In conclusion, the actual loss suffered is fairly modest. The potential loss if flooding occurs is also fairly modest.

Remedial measures

75. As I have indicated, the expert reports did not begin to address the identity and costs of any remedial measures.
76. As regards blockages, the evidence is that the Council acted fairly promptly when alerted. I was shown evidence of 6 monthly checks (which did not in terms cover checking the Outfalls but the work in 2013 suggests that either they are checked or when the matter was reported, the council reacted). I was also taken to the terms of an agreement between the Council and the Yorkshire Wildlife Trust (“YWT”) dated 14 March 2016 coupled with details of what reports had been made and how often the YWT had personnel on the site. Checking matters such as the Outfalls is not explicitly covered by the agreement and YWT personnel are not required to be nor are they frequently on site for that sort of purpose (among others).
77. I also consider that the Murphys who walk the Murphy Land every day and who have such a vested interest in the matter, could be expected to report any blockages that were apparent to them to the Council and that this is a relevant factor when considering the *Leakey* duty.
78. In light of my finding regarding access to the Outfall from the open water where the Overtopping Point is located (that the water can access the Outfall Point and is not prevented from doing so by silt and/or vegetation), the question of what measures would be required to deal with silting is academic.
79. I had originally floated the idea of the question of any injunctive relief (or whether there should be damages in lieu) could be put off, if it arose, to a subsequent hearing. However, having considered *Leakey* further it does not seem to me that this is possible. The question of the remedy for the problem is heavily tied up with the question of the scope of the duty of care and its breach. I invited the experts to opine as to the manner of dealing with the problem, if there was one.
80. Dr Hill had already referred to the wildlife status of the Canal, but it remains unclear to me whether any of the projected works that each expert dealt with “on the hoof” would adversely impact on any protected species of animal or plant. As I understood it, the experts were agreed that a survey would have to be undertaken in that respect once the relevant works (and their location) had been identified.
81. Mr Blake asserted initially (through counsel) that a fairly narrow dredged channel (a metre by a metre) to connect the open water close to the Overtopping Point to Outfall No 2 (a length of about 75 metres) would suffice. In oral evidence however, he asserted that the Southern bank of the Canal would also need to be made up. In this respect he thought that a length of bank of about 20 to 30 metres would have to be made up. His estimate of the costs for the bank works (some £3,000 £5,000 plus VAT) and the dredging (some £30,000) was well below £50,000. This does not fit

with Mr Hadfield's evidence (contemporaneous and historic) which was that the costs of repairs could run into at least £100,000. Further, it was inconsistent with Dr Hill's assessment that if the bank was to be built up it would be necessary to empty the canal, support the bank and that the costs could be £500,000 to £600,000 though, as he fairly said, "how long is a piece of string".

82. Other than having a system to check for blockages of Outfall 2, I am left in a position where I have little if any reliable evidence as to what if any works might be needed or what they might cost (a) to deal with the position if (contrary to my decision) it is established that there is silting of the Canal preventing water from the Overtopping Point reaching Outfall 2, either at all or sufficiently quickly to prevent Overtopping or (b) to limit the effect of any blockage of Outfall 2 or to buy more time to deal with the same by building up the Southern bank of the Canal at the Overtopping Point.
83. It seems to me that the burden is on the Claimant to establish a breach of duty and therefore to satisfy me on matters relevant to the *Leakey* decision as well as to identify precisely the form of mandatory injunction she seeks, that it is one that is capable of being obeyed (and that, for example carrying it out would not breach any wildlife protections in place) and the likely costs of carrying out the same. In circumstances where the evidence as to the efficacy of (at least some) of the remedial works suggested by the claimant (and their ability to be carried out) and (on any view) the cost of each of them is one that I cannot sensibly resolve on the state of the evidence, it is, in my judgment, a matter on which I must give the benefit of the doubt to the defendant.
84. Looking at the matter in the context of what the scope of the defendant's is and/or whether it was breached:
 - (1) I have held that I am only satisfied that flooding caused by overtopping was caused by blockages.
 - (2) The blockages were limited in number and once reported quickly cleared.
 - (3) The claimant or members of her family could be expected to report blockages.
 - (4) The extent of any flooding was limited. It had limited effect given its size and the nature of the bottom part of the Murphy Land.
 - (5) I did not hear evidence as to the cost of any inspection process. For the future it seems to me the Council might wish to consider making the checking of the Outfalls an express part of any inspection and to consider not just 6 monthly inspections but inspections tied more precisely to the cycle of the seasons (as one would do, I assume, in other areas e.g. when a householder will be advised to inspect gutters before the winter and when leaves have fallen). I am satisfied that the costs of frequent inspection could be significant.
 - (6) Works going beyond inspection could prove significantly expensive and disruptive.
 - (7) If I am wrong in my decision in (1) above, and if silting has caused the relevant problem of overtopping, I am not satisfied, applying the *Leakey* test

to the scope of the duty and balancing the various factors, that there has been any breach of duty in nuisance by the Council in relation to the overtopping that has occurred. I am not satisfied that the steps suggested as necessary to deal with the position are “reasonable”.

85. Overall, in all the circumstances, including (without limitation) the limited risk of overtopping (because of blockage), the limited damage that flows, the likelihood that the Murphys/Mr Hadfield would report actual outflow blockages, the manner in which the council has reacted to reports, the inspections that it in fact carried out and the cost and extent of any works that might otherwise be required, that the system in place was adequate to discharge any duty of care by the Council as regards overtopping caused by blockages.
86. I am also not satisfied that a case for an injunction on a *quia timet* basis has been made out.

Conclusions:

87. There has been no nuisance and no breach of the *Leakey* duty as regards such overtopping of the Canal that has occurred. It follows that no damages should be awarded.
88. No case for a *quia timet* injunction is made out.
89. Furthermore, the terms of any injunction going ahead, whether because of (contrary to my judgment as to the position) past breaches or on a *quia timet* basis have not been formulated, nor has any impact of the wildlife position on such injunction been addressed. I am unable therefore in any event to make any appropriate mandatory injunction even if I had been otherwise minded to do so.
90. This appears to be one of those unusual cases where the case is decided upon the burden of proof.
91. It follows that the case should be dismissed, with costs on the standard basis to be the subject of detailed assessment if not agreed. I indicated in the draft of this judgment handed down that I proposed to make that order on handing down this judgment, unless I received any submissions to the contrary before then. I understand that the claimant should pay costs on the standard basis is not resisted but that any order for payment on account is not agreed at this stage. The defendant seeks to join Mr Hadfield for the purposes of seeking a costs order against him too. Such joinder and/or costs order is also not agreed at this stage. I will order that any application to join Mr Hadfield to seek a costs order against him and an application for costs must be issued (supported by witness statement evidence, if appropriate) by 4pm on 17 October 2018. Otherwise I will adjourn all consequential matters (including but not limited to permission to appeal, and the question of any payment on account of costs) to a day to be fixed with a time estimate of one hour. That hearing can be by telephone if the parties agree. The hearing should be fixed as soon as possible for a date no sooner than 3 weeks from 3 October 2018. Skeleton arguments should be filed and served not less than two clear days before the resumed hearing. A draft order giving effect to this paragraph should be lodged and served by the defendant by 4pm two clear days after the hand down.