6. Riparian owners

Riparian rights and duties

1. The proprietor of land on the banks or under the bed of a natural watercourse is entitled to the enjoyment of what are commonly known as 'riparian rights', based on common law. Where a channel is not of natural origin the same rights may not apply; further comment is made at 6.31–6.33 below. For these rights to arise, it is necessary for the water to flow in a defined channel, which may be over or below ground. The flow may only be intermittent for the channel to be a watercourse at common law (*Stollmeyer v. Trinidad Lake Petroleum Co.* (1918) A.C. 485). Percolating water and water which lies or flows generally over the surface is not the subject of riparian rights.

2. Lord Wensleydale, in *Chasemore* v. *Richards* (1859) 7 H.L. Cas. 349, said, 'It has been settled that the right to the enjoyment of a natural stream of water on the surface *ex jure naturae* belongs to the proprietor of the adjoining land as a natural incident to the right to the soil itself; and that he is entitled to the benefit of it, as he is to all the other advantages belonging to the land of which he is the owner. He has the right to have it come to him in its natural state, in flow, quantity and quality, and to go from him without obstruction, on the same principle that he is entitled to the support of his neighbour's soil for his own in its natural state. His right in no way depends on prescription or the presumed grant of his neighbour, nor from the presumed acquiescence of the properties above and below'.

3. The engineer will be required to deal with various types of riparian owner, including the agricultural landowner, the industrial or commercial landowner, the owner of dwelling premises and the developer, i.e. an owner of land on which it is intended to carry out development such as housing, industrial units, etc.

4. Generally, the traditional position of a riparian owner at common law was relatively privileged. Accordingly, such owners would not be liable to maintain the channel of a watercourse, either to prevent erosion or to remove silting. Similarly, the owners of riparian land enjoyed extensive rights to discharge water from land and to prevent flooding of land even where these activities had adverse effects on other properties. However, some doubt has been cast upon the extent of these rights by an indication that the courts may

in future be more willing to hold landowners liable in situations where naturally occurring states of the land give rise to a hazard to other landowners.

5. In *Leakey v. National Trust* (1980) 1 All E.R. 17 a landowner was held liable for naturally occurring slides of soil, rocks, tree-roots and other debris from a bank onto a neighbouring property. In deciding the case the court stated that there existed a general duty on occupiers in relation to natural hazards occurring on their land, so that where the hazard encroached or threatened to encroach on another's land there was a duty to do all that is reasonable in the circumstances to prevent or minimise the risk of foreseeable damage to the property of others. It is notable that the case was not concerned specifically with drainage matters, and is in direct conflict with previous authorities, but it may be indicative of a change of thinking about the proper extent of drainage responsibilities. Hence one commentator has suggested that a riparian owner or occupier will now be liable for any nuisance caused if he fails to remedy any defect in a bank or sea wall within a reasonable time after he became, or ought to have become, aware of it (J. Bates, *Water and Drainage Law* (1990, updated) para.2.39). The uncertainty generated by the *Leakey* case has not been resolved by subsequent court decisions (though see 6.12 below), and the following discussion states the traditional view of the rights and duties of riparian owners whilst recognising that the law may have been implicitly changed as a result of the decision.

6. A riparian owner must accept alterations to the state of a natural stream which changes could not be practicably avoided as a result of work carried out under statute (*Provender Millers (Winchester) Ltd.* v. *Southampton County Council* (1940) 1 Ch. 131). The extent to which a planning permission similarly provides a defence against an action in civil law is not presently settled in law, but it would appear that, unless the permission changes the character of a locality, successful civil claims will remain possible (*Wheeler v. Saunders* (1995) 2 All E.R. 697; *Hunter and others* v. *Canary Wharf Ltd.* (1995) *The Times*, 13 October). In general, however, the issue will be determined according to the general rules of interpreting the statute in question.

7. Traditionally, a riparian owner is not liable for damage, e.g. by erosion, caused to adjoining land by virtue of the natural action of water on the land adjoining or downstream, provided that there is no negligence or wilfulness involved (*Rouse* v. *Gravelworks Ltd* (1940) 1 K.B. 489).

8. The proprietor of land has a natural right to collect and discharge the surface water run-off from his land on to adjoining lower land even where he has created an increase in flow by an improved system of drainage or by other means (*Durrant* v. *Branksome U.D.C.* (1897) 76 L.T. 739). This right does

not permit an owner or an authority to act in a wilful manner, as where a highway authority deliberately drained its land on to the land of adjoining occupiers (*Thomas* v. *Gower R.D.C.* (1922) 2 K.B. 76). However, a lower occupier of land is under no obligation to receive water and may take steps to pen back the flow of water even if this causes damage to higher land. Moreover, the right to prevent water entering land is not an absolute one and will only allow the lower landowner to take reasonable steps to prevent the entry of the water (*Home Brewery plc v. Davis and Co.* (1987) 1 All E.R. 637).

9. It follows that increased natural flows from upstream must be accepted and dealt with by the proprietor of land downstream. The flow may flood the downstream land unless adequate drainage works are carried out by him to prevent it. However, if flooding is caused by inadequate capacity further downstream, the downstream riparian owner has no common law duty to improve the watercourse.

10. The overall situation might be described as a 'sequential system of rights to discharge'.

11. While riparian owners therefore have the responsibility to accept the flow, it might be unfair to expect them to carry out extensive and important works to deal with substantial additional flow, e.g. from a proposed development. A developer wishing to obtain planning permission will need to satisfy the planning authority that adequate drainage arrangements will be made.

12. An owner who collects and keeps on his land anything which is likely to do mischief if it escapes, e.g., a water reservoir, will be liable for any reasonably foreseeable damages caused by the escape (*Rylands* v. *Fletcher* (1868) 19 L.T. 220; *Cambridge Water Company* v. *Eastern Counties Leather* (1994) 1 All E.R. 53). But an owner who stores water on his land, exercising reasonable care, is not liable for an escape of water which injures his neighbour, if the escape is caused by a factor beyond his control, such as a storm the impact of which is practically, but not physically, impossible to resist (*Nicholls* v. *Marsland* (1875) 33 L.T. 265). Another exception to the basic rule in *Rylands* v *Fletcher* is where the owner has no control over the reservoir or knowledge of the conditions which led to the escape (*Box* v. *Jubb* (1879) 3 Ex. D-76; *Nield* v. *London & N.W.Rly.Co.* (1874) L.R. 10 Ex. 4).

13. If a watercourse overflows on to his land, the riparian owner has no remedy unless he is able to show that the injury is due to a wilful or unlawful act of another riparian owner, either upstream or downstream (*Mason* v. *Shrewsbury and Hereford Rly. Co.* (1871) 25 L.T. 239; see also 6.8 above).

14. Alternatively, it would be necessary for him to show that the damage has been caused by the failure or neglect of some other body or person with responsibilities to maintain the channel (*Harrison* v. *Great Northern Rly.*

Co. (1864) 3 H&C 231; *Smith* v. *River Douglas Catchment Board* (1949) 113 J.P. 388; *Sedleigh-Denfield v. O'Callaghan* (1940) 3 All E.R. 349).

15. Although public authorities are not normally liable for not exercising lawful duties where the duty is owed to the public as a whole rather than to individuals (see, e.g., 13.34 below), there is a general duty upon both land drainage bodies and riparian owners not to take an action which would have the effect of exacerbating damage which would have been suffered if no action was taken (*East Suffolk Catchment Board v. Kent* (1940) 4 All E.R. 527).

16. From the riparian owner's point of view, problems may arise, owing to the need to reach agreement, where opposite banks of a watercourse are in different ownership, since, in spite of the riparian duty to maintain flow, different owners can adhere to different standards of maintenance. In some cases, this disparity can result in improvement to only one side of the watercourse, with a resulting increased risk of flooding on the other and the possibility of consequent legal liability (*Menzies v. Breadalbane* (1828) 3 Bli. N.S. 414).

17. Problems arise less frequently where there is common ownership of both sides of a watercourse. Such problems can be minimized further as a result of the eligibility for 25% grant aid to riparian owners (though not lessees) towards the cost of approved improvement schemes (on grant aid generally see Chapter 14 below).

18. A riparian owner is entitled to protect his property by building a defence against flooding, provided that such defence is not built in the channel so as to cause obstruction. Such works may constitute development as an engineering or other operation for which planning permission is required under TCPA 1990 (see Chapter 10 below). Consent must also be obtained from the internal drainage board (or otherwise from the Agency; see 3.21 above), and the defence works must not cause actual injury to a neighbour's property or rights (*Bickett* v. *Morris* (1866) 30 J.P. 532).

19. In *Hanbury* v. *Jenkins* (1901) 2 Ch. 401, it was stated that a riparian owner may place stakes and wattles on the soil of a river to prevent erosion by floods, and to make pens to prevent cattle from straying. However, he must now obtain planning permission for revetment works and obtain consent from the Agency where a main river is involved. In *Hudson* v. *Tabor* (1877) 2 Q.B.D. 290, it was held that a riparian owner was under no duty in the absence of some specific obligation to keep his banks in repair.

20. There is a 'natural' right of support to land from adjoining land, but the obligation is negative, i.e. to refrain from any act which will diminish support. The owner is not obliged to take active steps to maintain the things that give support. For instance, there is no legal remedy against subsidence caused by

the natural erosion of a river bank (on the right of support of property by water generally see *Stephens v. Anglian Water* (1987) 3 All E.R. 379).

Nuisance

21. The riparian owner must not only exercise due care in the above matters, but must also not cause or perpetuate a nuisance. In the Court of Appeal in *Pemberton and Another* v. *Bright and Others* (1960) 1 All E.R. 792, the first defendants were held liable for flooding caused by a blocked culvert constructed by the highway authority, without a protecting grid, on the grounds that they had continued the nuisance. The Court applied the principle of law laid down in *Sedleigh-Denfield* v. *O'Callaghan* (1940) 3 All E.R. 349, that an occupier of land on which a nuisance has been created by another person is liable if he allows the nuisance to continue.

Obstruction to flow — consent procedure

22. Riparian landowners or householders are frequently unaware of the requirements of S.23 LDA 1991 by which the consent of the drainage authority is required before the construction of, or alteration to, any mill dam, weir, or similar obstruction or culvert in an ordinary watercourse. As far as a culvert in particular is concerned, it is necessary for a proposed culvert to be 'likely to affect the flow' before the requirement for consent will apply (see 13.13 below in this respect; see also *Dear v. Thames Water* at 13.34 below for an illustration of a riparian owner being unwittingly liable for a culverted watercourse).

23. Where the proposed works (which may include a culvert or any of the 'obstructions' referred to above) concern a main river across or alongside their land, riparian owners commonly appreciate requirements for consent required by SS.109 and 110 WRA 1991.

Disputes regarding ditches

24. If a dispute occurs between adjoining landowners over the maintenance of ditches, the matter can be taken to the Agricultural Lands Tribunal (SS.28–31 LDA 1991). Additional information concerning ditches, ownership problems, etc., is given at 8.3–8.6 below.

Disputes between neighbours

25. Although there are powers for statutory authorities to organize or carry out work where several riparian owners are involved, it is sometimes difficult for a small number of them, or perhaps one alone, formally to request such work. The difficulty arises because there is a reluctance to force issues with unwilling neighbours, in spite of the considerable rewards, particularly for farmers, which can result from the improved drainage of agricultural land. In general, there is a tendency for such difficulties to be solved by agreement once the drainage problem becomes sufficiently serious (see 5.37 above, and 8.9 below).

Powers of entry

26. Riparian owners generally accept the need for wide powers of entry which are possessed by land drainage authorities, and usually little difficulty is experienced in reaching agreement without the use of such powers. Requirements for notice are contained in S.64 LDA 1991.

Problems regarding grant aid

27. Riparian owners sometimes encounter difficulty in obtaining grant aid from MAFF for watercourse improvement schemes. Grant aid (usually 50%) is not, however, made available on the same basis as for ditching and tile drainage schemes. An IDB or a county council or unitary authority may carry out work on behalf of a landowner at his expense under S.20 LDA 1991. The landowner's expense can be reduced by any government grant made under S.59(6) LDA 1991. Any local authority may contribute to works by drainage bodies under S.60 LDA 1991.

28. Many councils are not prepared to exercise the above powers. Where the powers are exercised, it has also been reported that the resulting costs to the riparian owners can be excessive. This view is, however, necessarily somewhat subjective.

29. Some of these problems, like so many others associated with land drainage, fall largely into the group which might be described as 'problems of willingness to pay'.

Flooding emergencies

30. In a case arising from flooding, the riparian owner or householder will rely heavily on the assistance of the local authority, which may provide such assistance under S.138 Local Government Act 1972, e.g. for the provision of sand bags, pumps, driers, etc. (see 5.29 above).

Artificial watercourses

31. An artificial channel made for a particular purpose will not give rise to riparian rights if it is needed only for the temporary circumstances of that use. Riparian rights would not normally attach, for example, to a mill race used only to serve the mill. Rights to discharge to the mill race or to receive or use water from it may, however, have been acquired by grant or prescription even though the mill may have fallen out of use.

32. A watercourse of a permanent character may have been constructed originally and subsequently used in all respects as a natural watercourse when riparian owners will have acquired the same rights as if it had been a natural stream. Generally, if there is no record of the construction of the channel, and it has not been used for some private object, riparian rights will have been acquired. If it is determined that riparian rights have not been acquired, then the question arises as to what easements in the flow of water have been granted either expressly or by use if at all. For the law relating to easements, reference can be made to Gale, *The Law of Easements* (15th edn, 1986).

33. A person diverting a stream into a new and artificial channel for his own convenience must make it capable of carrying off all the water which may reasonably be expected to flow into it, irrespective of the capacity of the old and natural channel. It is the duty of anyone who interferes with the course of a stream to see that the works which he substitutes for the natural channel are adequate to carry off the water brought down even by extraordinary rainfall, and if damage results from the deficiency of the substitute which he has provided for the natural channel, he will be liable (*Greenock Corporation* v. *Caledonian Railway Co.* (1917) A.C. 556; *R.* v. *Southern Canada Power Co.* (1937) 3 All E.R. 923).

Obstruction and flooding

34. A riparian owner is under no common law duty to clear a watercourse which becomes silted or obstructed through natural causes. Under statute law, however, drainage authorities may require and enforce riparian owners to

carry out such works under the LDA 1991 and the PHA 1936 (see 5.9–5.26 above). A riparian owner is not liable if other land is consequently flooded (but see 13.26 below for natural obstruction of a culvert). An owner cannot remove obstructions which have through time become embedded and form part of the bed if the result is to increase the flow downstream. Action can be taken by drainage authorities under the LDA 1991 or S.259 PHA 1936.

35. A riparian owner may construct flood banks on his own land to protect it from flooding if he does not thereby cause or increase the severity of flooding to other property (*Menzies* v. *Breadalbane* (1828) 3 Bli. Ns. 414). In the case of an extraordinary flood, a riparian owner may turn floodwater from his land without regard to the consequences if he is acting to ward off a common danger and not merely protecting his own property from floodwater (*Nield* v. *London & N.W. Rly.* (1874) 44 L.J. Ex. 15). However, consent may be necessary from the Agency or the local authorities under the provisions of the WRA 1991, the LDA 1991 or the Land Drainage Byelaws.

8. Development either side of a watercourse

1. The following observations may be of assistance to engineers who encounter a situation where development on either side of a watercourse gives rise to urban land drainage problems.

2. Houses have often been built on either side of a watercourse with their gardens extending to it. Alternatively, a watercourse may pass the frontage of the properties, between them and the highway. In both cases, drainage problems may arise and require expenditure to put them right and give rise to disputes over ownership (see Chapter 6 above).

3. Section 62 of the Law of Property Act 1925 provides that 'a conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey with the land all buildings, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights and advantages whatsoever appertaining or reputed to appertain to the land or any part thereof.' This section operates only in the absence of any contrary intention expressed in the conveyance.

4. There is a rebuttable presumption that where there is a ditch and a bank on the boundary of a property, the person who dug the ditch must have dug it at the extremity of his land and thrown the soil on his own land to make the bank. If there is evidence to identify a different boundary, this presumption will be rebutted (see *Fisher* v. *Winch* (1939) 2 All E.R. 144)

5. In general, the ownership, control and occupation of the bed or banks of a watercourse are even more relevant to land drainage problems than are riparian rights. It may be seen from the discussion above, therefore, that where the householder's own land adjoins a channel, his responsibilities are not always absolutely clear. It is sometimes found that the deeds to the properties extend to the boundary of the watercourse, and sometimes to a fence or hedge set on the bank of the watercourse.

6. Nevertheless the wording of the deed may not be conclusive because of the (rebuttable) legal presumptions in S.62 of the 1925 Act, and that a person whose land abuts on a river owns the bed of the river up to the middle (*Blount* v. *Layard* (1891) 2 Ch. 681).

7. A drainage board or local authority that wishes to serve notice under S.25 LDA 1991, requiring works to maintain the flow of a watercourse, may

encounter an inability or unwillingness of the owners to accept that they are responsible for paying for, or carrying out, desirable, although possibly expensive, works. It will help to minimize legal confusion over establishing responsibilities if officers familiarize themselves with the law in such cases.

8. District councils and unitary authorities have a discretionary power to carry out works themselves, for the prevention of flooding, in this type of case (SS.14 and 15 LDA 1991). If the authority decides to do so, it will then generally wish to accept responsibility for subsequent maintenance, in order to prevent future problems. In many cases, therefore, the problem may ultimately relate to an inability or unwillingness to pay, rather than a real problem of confusion on the legal question of responsibilities.

9. Section 60 LDA 1991 provides that a local authority may contribute to the expenses of the execution or maintenance of any drainage works by a drainage body 'such an amount as, having regard to the public benefit to be derived therefrom, appears to the local authority to be proper'. No power exists to contribute towards the cost of an individual's private scheme. Section 60 LDA 1991 is in fact used to empower contributions between local authorities and other drainage bodies.

10. When development takes place on land adjoining a main river or ordinary watercourse, it has become common practice for the planning authorities (on the advice of the Agency or an IDB) to require the developer to leave a strip of land, at least 5–8 m wide, free of development along one or both sides of a watercourse, in order to provide access for future maintenance. This strip also provides a suitable area for spreading spoil, but problems can be created unless careful consideration is given to detail. Under most Agency Regional Land Drainage Byelaws, these strips can be required under the formal consenting procedure for main river watercourses, and this requirement is not excluded by the granting of any planning permission under the TCPA 1990 (see Chapter 10 below). A waste management licence for such spreading is not required if the deposits result in agricultural or ecological improvements (Waste Management Licensing Regulations 1994, Reg.17 and Schedule 3, para.25; DoE Circular 11/94, para.5.74).

11. In promoting its flood defence and other duties, particularly those involved with conservation and the environment, the Agency regards the land associated with a watercourse as a 'river corridor' to be protected and enhanced. Use of this corridor will include maintenance purposes, although this is only one of a whole range of water environment interests.

12. Similarly, some river corridors of particular nature conservation importance are now being designated as Sites of Special Scientific Interest under the Wildlife and Countryside Act 1981 (see further 17.11–17.13 below). In

preparing development plans for their areas, planning authorities must now have regard to linear and continuous structures such as rivers and their banks where these are essential for 'the migration, dispersal and genetic exchange of wild species' (Reg.37 Conservation (Natural Habitats, etc) Regulations 1994; see 10.11 below).

13. The width and configuration of any corridor should be the subject of joint agreement between the drainage body and/or the Agency and the local planning authority, depending on particular circumstances. Environmental and topographic surveys, plus other studies, are now frequently required in order to determine the desirable corridor extent and configuration.

14. Development up to the bank of any watercourse should be avoided. It may amount to an assertion of land ownership but will create problems of access, damage to the banks, risk of disposal of garden refuse into the watercourse, and generally be contrary to the need to preserve an attractive river corridor.

15. The careful choice of layout of any new development should include the enhancement of the watercourse as a feature, perhaps with houses, footpaths and roads built to face it, and to have the corridor identified as a 'green chain' of open spaces.

16. This enlightened approach to the treatment of river corridors benefits from co-ordinated planning at an early stage in the process. To avoid the problem of unsightly and neglected land, where possible the ownership should not be left with the developers but preferably with a responsible body or organization with such agreements as may be appropriate to ensure the aftercare and maintenance of the land. Commuted sums of money could possibly be obtained from the developer for this purpose (see 10.27–10.28 below).

17. It may be possible for the open land to be maintained by the local authority as public open space and amenity land, using powers under S.137 Local Government Act 1972.

18. Small sites and redevelopments can have particular problems and the local authority may seek other informal options, partly because of the expenses involved. It may, for example, request the developer to include a restrictive covenant within the deeds of the properties, although it may not be able to insist on this as a planning condition.

19. In cases where no maintenance strips exist to provide access to the watercourse, the powers available to drainage bodies under SS.165 and 167 WRA 1991 and SS.14, 15 and 64 LDA 1991 are adequate for the purpose of carrying out maintenance works. However, considerable inconvenience, including practical problems and public relations difficulties, may arise in the

exercise of those powers. High compensation costs may have to be paid, especially if there is disruption of a number of well-established gardens.

20. Some statutory control of the provision of maintenance strips is available to the Agency under its Regional Land Drainage Byelaws for main rivers (see 8.10 above). Similarly, the establishment by IDBs, district councils or unitary authorities of byelaws for ordinary watercourses is possible under S.66 LDA 1991, and is thus to be encouraged to improve control. Byelaws might require consent to be obtained before any structures etc. are erected, or landfilling is carried out within a defined distance from a watercourse. Significantly, those works of drainage bodies or the Agency exempt from a planning consent under the provisions of the Town and Country Planing (General Permitted Development) Order 1995 (Schedule 2, Parts 14 and 15), but for which an EA would not be required, may thereby be brought under control (see generally Chapter 10).

9. Extension of the 'main river' designation of watercourses

1. As noted previously, a crucial distinction in land drainage and flood defence law is that between main rivers and ordinary watercourses (see 1.9 and 3.27–3.28 above). Practical problems have been encountered with regard to the designation of further stretches of watercourses as main rivers, but the legal position in this matter is reasonably clear.

2. Some of the difficulties reported concern situations in which a local authority is prepared to improve a watercourse provided that the Agency agrees to recommend its designation as a main river thereafter. However, such agreements may involve what are seen as expensive design requirements being specified by the Agency. Whether or not the suggested design requirements are actually excessive is a matter for agreement between the engineers of the respective authorities. An example might be a flood alleviation scheme carried out under the powers conferred by SS.14–16 LDA 1991, where the consent of the Agency is required (see 3.9 above).

3. In such cases, it is highly desirable that the design parameters and methods should be discussed and established at an early stage. Where grant aid is being obtained from MAFF or the WO, early agreement should also be sought with the Regional Engineer (for addresses, see Appendix 4).

4. If alternative design parameters and costings can be established and discussed at a sufficiently early stage, this can sometimes avoid arguments later from more entrenched positions. The statutory duty of the Agency, however, is to exercise overall supervision and to provide the lead in making decisions concerning standards (S.6(4) EA 1995).

5. A number of engineers have suggested the possibility of extending main rivers upstream, either to the uppermost outfall of a sewage works or to a public sewer outfall on the watercourse. However, it is for the RFDC to recommend the extent of the main river designation, taking due consideration of the resource implications of the designation. A review of policy and guidelines on this matter has been initiated by the NRA, which also sought to define more clearly when its support should be given to requests for extensions of main river designations.

12. Roadside ditches

Ownership problems

1. The question of ownership of ditches alongside the highway and consequent maintenance responsibilities gives rise to frequent difficulties. The powers of highway authorities are constrained by statute and common law and are narrower than generally appreciated.

2. Where a highway authority has acquired, by agreement or compulsory purchase, the freehold of a site occupied by a road, ownership of that land will lie with the authority. However, where a highway is created by dedication, as is usually the case, ownership of the soil beneath the highway remains with the owner of the land who originally dedicated it, or his successors in title. Accordingly, the highway authority usually owns only the surface of the road and as much of the soil below, and air above, as is required for its control, protection and maintenance.

3. The lateral extent of a highway is in general terms a question of fact, applying the presumption (subject to evidence to the contrary) that a highway extends between the hedges or fences. Section 263 HA 1980 makes it clear that the whole of the 'highway', together with 'the materials and scrapings of it', vests in the highway authority. The section of the highway (vertically) that vests in the highway authority is only that which may be necessary to enable it to carry out its duty of maintenance and to enable the public to pass and to re-pass. Denning L.J. said that the depth below the surface that vested in the authority may be said to be 'the top two spits' (*Tithe Redemption Commission v. Runcorn District Council* (1954) 2 W.L.R. 518).

4. Where a ditch lies between neighbouring land and the carriageway there is a presumption that the ditch does not form part of the highway, and the highway authority therefore cannot alter it or otherwise deal with it, except with the consent of the owners. This was affirmed in *Hanscombe* v. *Bedfordshire County Council* (1938) 1 Ch. 944, where the council claimed that it was entitled to act in relation to the ditch by common law or, if not so entitled, it was authorized to act under S.47 Highways Act 1864 (now S.72 HA 1980), and S.67 Highway Act 1835 (now S.100 HA 1980), but the council lost the action. Farwell J. said: 'The rights of the public in a high road are to pass and re-pass along it, and their right to use the way for that purpose is not limited to that part of the way which is metalled or made up, but extends to the whole highway. When, therefore, the whole portion of a highway which is bounded

by a fence or hedge is capable of being used to pass and re-pass, the whole portion is deemed to have been dedicated to the public. When, however, a portion of the whole is a ditch which *prima facie* is not adapted for the exercise by the public of their right to pass and re-pass, the presumption, in my judgement, is that the ditch does not form part of the highway. That is a presumption which may be rebutted (see *Chorley Corporation* v. *Nightingale* (1906) 2 K.B. 612; (1907) 2 K.B. 637), but the onus lies on those who assert that the ditch is part of the highway.'

5. The status of ditches in relation to the highway have been considered by the courts on many occasions and the following decisions may be found instructive: *Chippendale* v. *Pontefract Rural District Council* (1907) 71 J.P. 231; *Simcox* v. *Yardley Rural District Council* (1905) 69 J.P. 66; and *Walmsley* v. *Featherstone Urban District Council* (1909) 73 J.P. 322.

6. Highway authorities are empowered by S.100 HA 1980 to provide for the drainage of highways on land in or adjoining the highway and to take effective action if drainage works are interfered with. Compensation is payable to an owner or occupier of land who suffers damage by the exercise of these powers. A highway authority may not, in exercising these powers, interfere with a watercourse or other works vesting in a drainage authority, without the latter's consent. In *Hanscombe* v. *Bedfordshire County Council* (1938) 1 Ch. 944, a highway authority placed pipes in a ditch belonging to the owners of land abutting the highway without their knowledge or consent, and filled in the ditch. The pipes effectively drained the adjoining land and the highway. It was held that the statutory provisions did not entitle the highway authority to trespass on the ditch and to lay pipes without the permission of the owners concerned. In *Attorney General* v. *Waring* (1899) J.P. 789, it was held that the owner of land adjoining the highway has a common law duty to scour and cleanse the ditches that adjoin the highway to prevent them from causing a nuisance to the highway, and that the highway authority can, notwithstanding its statutory remedies, bring an action against the owner for an injunction restraining the continuance of the nuisance.

7. In *Provender Millers (Winchester) Ltd* v. *Southampton County Council* (1940) 1 Ch. 131, where the county council diverted the flow of a watercourse when carrying out its highway duties, it was decided that, even though the council was carrying out its duties under statutory powers, it had no general right to invade the rights of others: 'such an invasion may render them liable in damages or to an injunction, unless they can show that the work done was reasonably necessary and was properly performed in all respects, and that, if it resulted in damage, there was no way of doing it that would not have had the effect'.

8. If a highway authority has from 'time beyond memory' discharged water from the highway on to an adjoining owner's land from a highway drain, the court must presume a legal origin for this right if it is challenged and if the authority can show no document conferring the right (*Attorney General* v. *Copeland* (1902) 1 K.B. 690).

9. In *King's County Council* v. *Kennedy* (1910) 2 I.R. 544 there was a bank by the side of the highway and a hole in the bank by means of which surface water from the highway was discharged on to the defendant's lands. There was no evidence as to the origin of the hole nor was there any defined channel on the defendant's land into which the water discharged could flow. This hole had been in existence for at least 29 years. It was held that the court ought to presume a legal origin for this outlet.

10. In general terms, it is usual for the roadside ditches to be the responsibility of the adjoining landowner; exceptions to this rule are where the ditch was constructed to drain the highway or where it falls within land owned by the highway authority.

Filling in or culverting

11. In a situation where a ditch appears to a highway authority to constitute a danger to users of the highway, S.101 HA 1980 gives the highway authority the power either

(a) to fill in the ditch if it is considered unnecessary for drainage purposes, if the occupier agrees; or
(b) to place pipes in substitution for the ditch, if the occupier agrees, and to fill in the ditch (see further Chapter 13 below).

The highway authority must pay compensation to the owner or occupier of any land who suffers damage from these actions.

12. If the landowner wishes to carry out the piping himself he must make allowance for the established right of discharge by the highway authority and he will retain the responsibility for its maintenance.

13. Before culverting any watercourse (which term includes ditches), the consent of the drainage authority is required (S.23 LDA 1991).

Powers of diversion

14. Section 110 HA 1980 empowers the highway authority to divert a non-navigable river or watercourse or to carry out any other works on any part

Drainage to existing sewers

18. Section 264 HA 1980 establishes the right to drain a highway to existing drains and sewers, and the dispute resolution procedures concerning this (see also 5.48 above).

Run-off on to highways

19. A number of engineers have reported that difficulties have arisen in dealing with the problem of the discharge of surface water from fields through farm gateways and on to the highway. While the legal position over the maintenance of roadside ditches is clear, there has been some doubt as to the powers available to deal with this problem. It has been suggested that the powers under S.163 HA 1980 could be used (see 5.47 above).

Right of statutory undertakers to discharge into a ditch or watercourse

20. Statutory provisions relating to the pollution of water are now provided for under Part III WRA 1991. Section 100 HA 1980 entitles a highway authority to discharge from a drain without committing the offence of polluting controlled waters unless the discharge contravenes a notice of prohibition under S.86 WRA 1991.

21. At common law, a discharge may be made to a watercourse as long as the effluent does not prejudicially affect the quality of the water in the watercourse and a nuisance is not created. In *Durrant* v. *Branksome Urban District Council* (1897) 2 Ch. 291, it was held that a discharge could lawfully be made although it contained some sand and soil. A nuisance can be created if the discharge contains oil or other pollutants washed off the surface of the highway.

Ditches maintained by highway authority

22. In certain circumstances, a highway authority will take over responsibility for roadside ditches. This is regarded as a responsible working arrangement which is neither embodied in statute nor based on court decisions, as far as is known. The basis is that if work is done by the highway authority for the improvement of highway drainage then the highway authority should be

responsible for the maintenance of the new drainage works. The circumstances relevant are:

(a) where the ditch has been materially interfered with and significantly regraded by the highway authority in order to assist the drainage of the highway;
(b) where the highway authority was responsible for realigning a ditch, e.g. following a highway improvement; or
(c) where the highway authority had piped a length of ditch in accordance with S.101 HA 1980.

23. Where a highway floods as a result of an obstruction in a roadside ditch and where the landowner responsible is clearly not prepared to remove the obstruction, the highway authority will often undertake the necessary clearance work. This practice is frequently adopted for expediency, although the owner has a liability to clear the obstruction.

24. Water passing along ditches eventually leaves the side of the highway either by being transmitted on to adjacent land or by entering a watercourse. In the case of water transmitted on to adjacent land, this can vary from what is little more than a hole in a hedge to a substantial culverted watercourse across adjacent land. The right to transmit water in this manner can be established as an easement in a formal deed, or alternatively by long usage. In either case, the highway authority would probably be liable for maintenance of the drainage facility to whatever extent is necessary to ensure the highway is effectively drained.

Highway or land drain

25. Where water is present on a highway and is removed through a gully and highway drain, some highway authorities take the view that they are responsible for the maintenance of the drainage system only until a point is reached where water other than that originating from the highway enters the system. This principle will justify a finding that a surface water drainage system on a new housing site is a liability of the highway authority, provided that no house or land drainage is connected to it.

26. In distinguishing between a highway drain and a lain drain, the courts have adopted a functional test rather than one based on the historical origins of the drain. In *Att.-Gen. v. St. Ives R.D.C* (1961) 1 All E.R. 265, the Court of Appeal approved the test put forward by the Judge in the lower court who said that:

> There are, of course, road drains and gullies whose main, if not whose only, function is to drain the highway. The repair of such drains and gullies is, in

my judgement, clearly a function with respect to highways. There are often drains and ditches whose sole function is to drain agricultural land and which cannot in any way affect highways. The repair of such drains and ditches is equally clearly not a function with respect to highways. Then there are drains and ditches that affect both agricultural land and highways. Whether or not the function of maintaining and repairing these drains and ditches can properly be described as a function with respect to highways depends, in my view, on the degree to which the drains can be truly regarded as land drainage or road drainage.

27. The devolution of responsibility over what are sometimes termed 'awarded drains' must therefore be investigated with care and is likely to depends on the facts of each individual case (see also 5.52 above).

13. Culverted watercourses

Summary of problems

1. The substantial number of practical problems which arise in connection with piped and culverted watercourses generally fall into three main categories:

(a) problems generated by engineers, riparian owners and developers, who favour culverting, without being fully aware of the practical problems and environmental disadvantages which may arise;
(b) problems associated with the cost to developers, riparian owners and/or local authorities complying with design criteria for culverts, stipulated by drainage bodies in consents required under S.23 LDA 1991, S.109 WRA 1991, or S.263 PHA 1936; and
(c) problems resulting from a failure to consult with the appropriate drainage body and to obtain a written consent as above, with the result that flooding and other problems arise subsequently, mainly because of inadequate culvert design.

2. Some local authority engineers feel that this last problem is less relevant to those culverts provided for new development than it is with failures on the part of riparian owners to apply to the district council or unitary authority for permission under S.263 PHA 1936 for the culverting of ditches. It is generally agreed, though, that inadequacy of control is a common problem, and in many cases the situation is probably attributable to an ignorance of the law.

3. The Agency resists the culverting of natural watercourses for both hydraulic and environmental reasons. Its statutory responsibilities to promote and further the conservation and enhancement of watercourses and associated land (see 17.4–17.5 below) are generally in direct conflict with the principle of culverting. Developers should therefore not be surprised if a refusal to consent an application is received, or development proposals modified to incorporate open watercourses as important landscape features to be retained and enhanced. Even where planning permission has been obtained, an enforcement notice may still be served on an illegal structure (see also 10.1 above).