PROPERTY DAMAGE BRIEFING: ARTICLE 2

The Common Enemy Rule: Works of flood prevention on one's own land

I am going to start this discussion with two examples.

Example 1: X lives in an area prone to flooding. He builds a waterproof fence around his property. When the winter comes, rainwater that would in the past have flowed from adjoining land onto X's property is diverted onto neighbouring land instead, raising the level higher than it would otherwise have been and thus causing damage to the neighbours' properties. When he built the fence, X knew that it might cause flood damage to his neighbours.

Example 2: A highway authority receives complaints that the road floods during periods of heavy rainfall. It investigates and finds that some of the water is flowing onto the road surface from neighbouring land. In order to reduce the amount of water flowing onto the road surface from neighbouring land, the highway authority raises the level of the road. When it next rains, some of the water that would previously have flowed onto the road is diverted instead into neighbouring properties where it causes damage. Again the damage was reasonably foreseeable.

Are the householder who erects the waterproof fence, or the highway authority which raises the level of the road, liable for the flood damage caused by their actions? No. They are both entitled to rely on the common enemy rule.

The name of the rule comes from the case of R v The Commissioners of Sewers for the Levels of Pagham (1828) 8 B & C 355. The Commissioners erected barriers to defend the coastline for which they were responsible against the sea. As a result of the seawater being unable to progress onto the Commissioners' land, it washed with greater force onto the land of their neighbour, who brought proceedings. Lord Tenterden CJ stated at page 361:

"I am of opinion that the only safe rule to lay down is this, that each land-owner for himself, or the commissioners acting for several land-owners, may erect such defences for the land under their care as the necessity of the case requires, leaving it to others, in like manner, to protect themselves against the common enemy."

There are limits to the application of the rule. It allows a landowner to prevent water from coming onto his own land and if he does so, he will not be liable simply because that water flows onto his neighbour's land instead. But it does not apply to any works which interfere with the established flow of a watercourse [R v Trafford (1832) 8 Bing 204]. Nor does it apply if the effect of the works is simply to increase the flow of water from the defendant's land onto the land of the claimant: Hurdman v NE Ry Co (1878) 3 CPD 168.

The clearest recent application of the rule is in the case of Arscott and others v The Coal Authority [2004] EWCA Civ 892. The River Taff overflowed naturally from time to time near the village of Aberfan. When it did overflow, some of the floodwater would find its way to an area of land owned by the Coal Authority. There had been some minor flooding of the gardens of nearby houses, but no floodwater had reached the houses themselves. The Coal Authority decided to raise the level of the land so that it could be made dry and used for recreation. It used spoil from a disused coal mine to raise the level by some 12 feet.

After the works were completed, the Taff overflowed. The flood water which had previously only resulted in a few soggy gardens caused flooding

in some 32 dwellings to a height of 1 metre. Many of the residents had to be rescued in the middle of the night. Some were uninsured. Nevertheless the trial judge and the Court of Appeal both upheld the common enemy rule and dismissed the claims. At paragraph 52 of the judgment, Laws LJ made it clear that the common enemy rule applies even if it is foreseeable that the flood defence work will cause flood damage to neighbouring properties. The Court of Appeal also held that the common enemy rule is consistent with Article 8 of the ECHR.

The common enemy rule is unusual in that it allows landowners knowingly to increase the risk of flooding to their neighbours' properties without consulting them and without becoming liable in the event that flooding takes place. At some stage, it may well be modified by the Supreme Court. However it remains a potent defence to claims that the execution of works has caused flood damage.

Geoffrey Weddell has substantial experience of acting for local authorities in tree root and flooding claims and other claims of negligence, nuisance and public liability. His most recent re-ported property damage claim is Legg and others v Aviva [2016] EWCA Civ 97.