CA. before Pill LJ, Mummery LJ, Lady Justice Hale on appeal from Ch.Div (His Honour Judge Behrens) : 19th February 2002

1. **LORD JUSTICE PILL**: This is an appeal by Mr and Mrs Peter Childs ("the appellants") against a decision of His Honour Judge Behrens sitting as a Deputy High Court Judge, on 19th January 2001. Judgment was given in favour of Mr and Mrs John Martin ("the respondents") for damages for trespass in the sum of £100. A counterclaim was dismissed. The judge gave permission to appeal limited to an issue on the construction of a conveyance and thereby to the issue of trespass.

2. The parties own adjoining properties at St John's Chapel, Bishop Auckland: the appellants a house known as High Hill Top and the respondents a farm known as Hill Top Farm. The dispute arose because of a shared water supply. A water main serves a storage vessel south-east of the farm. From there a one inch diameter black pipe runs first to the farm and then to the house. Because of the use made of the supply of water at the farm, the supply to the house is frequently interrupted and water pressure at the house is frequently low. The appellants attempted to overcome that problem by laying a new 32mm pipe from their premises across the respondents' premises to connect with the black pipe at a point between the storage vessel and the farm buildings. When work was commenced on that project, the respondents brought proceedings in trespass to prevent the laying of the pipe on a route different from that of the existing pipes. The appellants claimed a right to lay the pipe, relying on the terms of a conveyance dated 19th June 1992 by which the house was conveyed to them. It is suggested that on one issue the judge made wrong findings of fact, namely the difference in capacity and dimensions between the two pipes but for reasons which will appear, the appeal does not turn on that issue.

3. The appeal turns upon the construction of the first schedule to the conveyance in which the farm is described as "the retained land", the conveyance of the land on which the house stands being by former owners of land on which the farm stands.

4. By paragraph 2 of the First Schedule there was conveyed with the house:

   "(2) A right for the Purchasers and their successors in title to the Property to run water electricity and other services through any pipes cables wires or other channels or conductors ('the Conduits') which may at any time during the period of Eighty years from the date hereof be in or under or over the Retained Land and a right to enter onto so much as shall be reasonably necessary of the Retained Land for the purpose of installing repairing renewing maintaining cleansing and inspecting the Conduits and to connect into the Conduits for the purposes of obtaining any such services subject to the Purchasers or other persons exercising such rights

   (a) causing as little damage as possible and making good all damage caused to the Retained Land

   (b) paying a fair and reasonable contribution towards the cost of repairing renewing maintaining and cleansing any of the Conduits which do not exclusively serve the Property and paying all costs incurred in repairing renewing maintaining and cleansing any Conduits which serve only the Property."

5. There was in the conveyance a reservation in very similar terms in favour of the vendors. The respondents acquired the farm ("the retained land") in 1994. The conveyance to them expressly granted the retained powers and also made clear that the sale was subject to the rights granted in the 1992 conveyance.

6. In the present proceedings the appellants' right to a supply of water by virtue of the clause in the conveyance has not been challenged. There was before the judge an expert's report, and the judge found that, having regard to the respondents' farming activities, the water supply was inadequate to serve both properties all the time. The judge found that the new pipe proposed by the appellants would improve their flow at the expense of that to the farm. It was urged on behalf of the appellants that the respondents were making excessive user of the water. The judge declined to hold that the user by the respondents was excessive and dismissed the counterclaim alleging that it was.

7. The issue thus turns on the construction of the clause in the conveyance. For the appellants, Miss Allan submits that the presence of the word "install" determines the issue in favour of her clients. Installing is a different activity from repairing, renewing or maintaining. It describes the initial procedure of placing an item in its place of operation. Any lesser activity would be described, and

adequately described, by words such as "replace", "repair" or "renew". Each word must be given its own meaning, a submission with which Mr Denehan for the respondents does not disagree. Miss Allan submits that the right to install pipes includes a right to introduce pipes onto a new route across the respondents' farm and that the laying of new pipes is contemplated in the conveyance. It is confirmed, it is submitted, by reference later in the clause to connecting into the conduits. A right to install is a right over and above that of works to the existing system. If something more than repair or renew had not been intended by the deed, there would have been no need for the right to connect to have been conveyed. That word implies permission for additional pipes and pipes on a new route across the respondents' land.

8. The scope of the grant should be construed having regard to its purpose, it is submitted, relying on the words of Schiemann LJ in Peacock v Custom [2000] 1 EGLR 87 at 91C. (Mr Denehan does not challenge that proposition as such.) Had the vendor intended to reserve to the farm a priority claim to the water supply in any event, that would have been made explicit in the deed. The purpose of the clause, it is submitted, was to provide an adequate water supply to the house which it was known was to be lived in and the clause should be given a broad construction accordingly.

9. Having stated that he did not find the question of construction easy, the judge concluded:

"I do not think that it was ever intended at the time of the grant that either of the parties should effectively be able to alter the existing priority, so far as taking water from the pipes were concerned. I do not think that the use of the word install, in sub-paragraph 2 of the first schedule, was designed to permit either of the parties to install a completely new system, which effectively is what this new pipe would do. No doubt had the pipe been defective, or required to have been replaced, it would have been open to Mr. and Mrs Childs to put a new pipe, or indeed a larger pipe, in the same place as the existing pipe, but I do not think that it was the intention of this clause, and I do not think that a reasonable person construing this clause, knowing the layout of the land, knowing the order in which water was being taken, would construe it to allow or to permit someone to effectively change the order of priority, even if it means that the priority becomes equal."

10. A part of that finding by the judge is further criticised by Miss Allan on the basis that the judge's erroneous view on priorities influenced his approach to the construction of the clause. There is force in that submission to the extent that it is common ground that the issue which is before the court does not turn upon any priorities in relation to the supply of water. If the judge was influenced in his construction by consideration of priorities, it would have been a wrong approach. However, it may well be that all the judge had in mind in the second part of the extract from his judgment I have quoted was that in the construction of the clause it should be borne in mind that no new situation had been contemplated by the parties, but, rather, that the position of the existing pipes should be the dominating factor.

11. For the respondents, Mr Denehan seeks to uphold the judge's conclusion. He also submits that a distinction should be made between the principal or basic right created by the 1992 conveyance, which was the right to run water and other services through the conduits, and the ancillary right to enter upon the retained land in order to carry out the specified activities. The reference to the period of 80 years was inserted, he submits, out of caution and did not affect the central issue of construction. Each of the words "installing", "repairing", "renewing", "maintaining", "cleansing" and "inspecting" are necessary to ensure that the principal right to run water through the conduits is protected. The presence of those words does not extend the principal grant so as to create a right to insert new conduits on a different route over the respondents' land. An attempt to assert that right was correctly held by the judge to be a trespass.

12. I accept that the word "install" has a different meaning from each of the words "repair" and "renew". It contemplates the introduction of a new conduit which may be required to enable the right to services to be enjoyed. The possibility of additional services such as modern services by way of gas or cable television, requiring the installation of new pipes may have been contemplated, though I accept that in this particular location neither of those particular services is likely. The right does not in the present circumstances include the right to insert, over an entirely new route over the retained land, a new conduit to serve the house. That would be a more extensive right than is contemplated in the subclause. What is properly described as "the principal right" is the right to run services through

conduits on the retained land. The activities contemplated by the wording in the second part of the clause are only to ensure the enjoyment of that right. A right to install a conduit over a route different from those taken by existing conduits on the land, or subsequently positioned by the owners of the retained land, is not included.

13. In my judgment, the first of the judge's findings to which I have referred, namely that the word "install" was not designed to permit the appellants to install a completely new system, was a correct finding. It is not contaminated by reason of the judge's reference to priorities, even if that is construed in the way most favourable to Miss Allan, in the later part of his reasoning.

14. This court is in the somewhat frustrating position of giving its legal ruling without thereby solving what undoubtedly is a practical problem. In my view the court's powers, in the light of what has happened in this litigation, are confined to giving a ruling upon the effect of the conveyance of 1992. It is not open to the court to consider whether such rights as are conferred by the clause are being infringed by the respondents' conduct.

15. I do express considerable doubts as to whether the judge approached that question which was, or may have been, raised in the counterclaim in the correct manner. It may be it was not raised in the way it could have been. The judge does refer in terms to a counterclaim which alleges *"excessive user against Mr and Mrs Martin*". But the judge went on to say, having found that the use by the respondents of the water was not excessive: *"Equally, to my mind, it is not sufficient to establish excessive user for Mr. and Mrs Childs to establish that they do not have enough water."*

16. I understand that what is said on this subject is obiter and to an extent speculative. But it does appear to me that the relevant issue, having regard to the overall dispute between these parties, was whether there had been interference by the respondents with the rights conferred by the clause. However, the action has been brought to this court on the issue of trespass and that alone.

17. I can only express the hope that inconvenience, to the appellants' use of their home being plain upon the evidence before the judge and this court, arrangements can be made by the appellants or by arrangement between the parties for such measures as may be possible along the existing line of pipes, or otherwise, to remedy the defects in the water supply to the house. However, for the reasons I have given, I would dismiss this appeal.

18. **LORD JUSTICE MUMMERY**: This is an action for trespass to land. It was brought by Mr and Mrs Martin against Mr and Mrs Childs, arising out of the commencement of excavation operations on Mr and Mrs Martin's land. The excavations led to an application to the Bishop Auckland County Court for an interlocutory injunction, which was granted and kept on foot until the trial of the action.

19. At the trial the judge was concerned principally to deal with the claim for trespass. It was common ground that the trespass claim turned on the construction of the provisions in the first schedule of the conveyance of 19th June 1992 of the land and property known as High Hill Top to Mr and Mrs Childs.

20. The conveyance contained a description of the parcels conveyed together with:

"(2)a right for the Purchasers and their successors in title to the Property to run water electricity and other services through any pipes cables wires or other channels or conductors ("the Conduits") which may at any time during the period of Eighty years from the date hereof be in under or over the Retained Land and a right to enter onto so much as shall reasonably be necessary of the Retained Land for the purpose of installing repairing renewing maintaining cleansing and inspecting the Conduits and to connect into the Conduits for the purpose of obtaining any such services..."

21. The rest of the clause is immaterial.

22. For the reasons summarised by my Lord, Judge Behrens found in favour of Mr and Mrs Martin on that point, which meant that there was a trespass committed by Mr and Mrs Childs.

23. The appeal to this court has been limited to that issue. There was a counterclaim in which an injunction was sought by Mr and Mrs Childs restraining Mr and Mrs Martin, whether by themselves or by instructing or encouraging anyone else, from interfering with the water supply to the property known as and situated at High Hill top. It was pleaded in the counterclaim that the Martins had knowingly interfered with the Childs' water supply without giving them notice, causing them

distress, inconvenience and embarrassment. In the discussion which followed the giving of the judgment by Judge Behrens, he stated that he was only giving permission to appeal on the construction of the 1992 conveyance. That is made clear in the reasons which he later gave in writing on 23rd January 2001, refusing permission to appeal, on the issue which he described as whether Mr and Mrs Martin were making "excessive use" of the water. On that point he said there was insufficient water for both properties. He refused permission on that point as the appeal had no real prospect of success. But he recognised that the Court of Appeal might take a different view on the construction of the parcels clause in the 1992 conveyance. He confined permission to that point.

24. There was no application to this court, either before the hearing or today, to expand the grounds of appeal. This is unfortunate in some ways. As my Lord has said, we are faced with a situation in which we are asked to solve a legal problem, namely the construction of the conveyance, which we all know is unlikely to solve the human situation between these two neighbours.

25. However, we have to apply the law and the proper procedure. Looking only at the question of the construction of the document, I am in no doubt that the judge construed it correctly, though, like my Lord, I have doubts as to whether the judge was legally accurate in referring to questions of "priority" in relation to the construction of this document.

26. As I read the parcels clause dealing with the relevant grant of rights, it falls into two parts. The first is the grant of the easement. The easement is to run water through pipes in or under the land. There is also an easement which may apply to other services using pipes, cables or wires. That is confined to the perpetuity period at 80 years from the date of the conveyance. So far as water is concerned, there were pipes already in position in the land and water was running through them. The easement was clearly in respect of running water through those pipes and not through any other pipes. The second part of the clause deals with the right to enter into Mr and Mrs Martin's land. That right is expressly limited for specific purposes. It is not a general right to enter. The specific purposes are for installing, repairing, renewing, maintaining, cleansing and inspecting the conduits and to connect into the conduits for the purpose of obtaining any such services.

27. Miss Allan focused her argument almost entirely on the force of the word "installing". In my judgment, however, it does not help her to establish what she seeks to establish, that is a right to enter into the land for the purposes of laying new pipes in a different position or of a different dimension. The word "installing" could more appropriately refer in the context to the provision of other services where there was not, at the date of the conveyance, an existing pipe, cable, wire or other channel. It does not, in my view, confer the right to alter the position or size of the existing pipes for the running of water.

28. I come to that conclusion not only on the wording of the parcels clause, but also on the basis of the well established rule of construction that, in dealing with the extent of rights which are granted by a conveyance, regard is had to the circumstances existing at the time of the conveyance and known to the parties or within the reasonable contemplation of the parties at the time of the conveyance. At the time of this conveyance in 1992 the position was, as I have mentioned, that water was running to existing pipes. The easement was therefore confined to those pipes. The right to enter for the purposes of dealing with those pipes, whether by way of renewal or repair, was limited to those pipes and did not extend to the laying or installation of new pipes.

29. So, this leaves an unsatisfactory situation from the point of view of these two neighbours, which, like my Lord, I hope can be resolved by other means. Dealing with the only matter which is raised on this appeal, I come to the conclusion that the appeal should be dismissed.

30. **LADY JUSTICE HALE**: This is a highly unsatisfactory state of affairs. The top of Weardale is a rugged and beautiful place, but it is not so wild that in this day and age its inhabitants should not have a reasonable expectation of an uninterrupted supply of clean running water. The parties to the conveyance in issue in this case presumably assumed that the rights which it gave would be enough to secure that expectation. I have been reluctantly driven to the same conclusion as my Lords as to the

extent of the rights that it granted. It turns out therefore that the parties were wrong in that assumption.

31. The cause of the problem is set out in a report by Mr Daniels of RPS Water Services dated 20th March 2000:

"Fundamentally, the 3/4" black poly supply pipe cannot pass enough water to supply both dwellings at times of greatest demand. Due to the fact that Hill Top Farm is approximately 10m lower in level and 250m in length closer to the storage tank than High Hill Top, Hill Top Farm will always receive an adequate level of service, to the detriment of High Hill Top. High Hill Top will lose its supply every time Hill Top Farm draws water of a velocity close to that of the maximum that can be passed through a 3/4" supply pipe."

32. The options for solving the problem were canvassed in his report and in an earlier report prepared on joint instructions by Mr Glozier, a water efficiency manager of Northumbria Water. His report is dated 11th July 1999. It lays out, among others, option 2. That involved:

"...extending the 32m blue polyethylene pipe [which is the one installed by the appellants] to the storage vessel at point 'C' and connecting into it, then connecting into the pipe leading to High Hill Top and capping off the pipe at Hill Top Farm at point 'F'. Non-return valves should be installed in both pipes at their lowest points to minimise the risk of air-locking. This option has advantage of ensuring that both properties are fed by their own pipes and that cross-connections no longer exist."

33. It also detailed various ancillary things that might need to be done. Mr Daniels' report again supported that option as the only realistic one which would satisfy both parties. It would mean that neither party would suffer as a result of one of the parties drawing off a large amount of water.

34. It is not possible to understand on the basis of the information before us why that solution has not been agreed. There is a clear possibility - I put it no higher than that - of further litigation unless this matter is resolved. It is a dispute which is eminently suitable for resolution by mediation or other forms of alternative dispute resolution. There are well-known organisations capable of providing that and well able to deal with the apparently intractable disputes between neighbours such as this. I would add to the urgings of my Lord that this matter be explored at the earliest possible opportunity between the parties if this matter is to reach anything approaching a satisfactory solution to both parties.

35. For the reasons given by my Lord, however, I agree that this appeal must be dismissed.

Order: Appeal dismissed with costs, which are to be the subject of detailed assessment unless agreed.

MISS NICOLA ATJAN (Instructed by Messrs Hodgson & Angus, 62 Front Street, Stanhope, Durham DL13 2UD) appeared on behalf of the Appellants.

MR EDWARD DENEHAN (Instructed by Messrs Latimer Hinks, 5-8 Priestgate, Darlington, DLI 1NL) appeared on behalf of the Respondents.