CA on appeal from Norwich County Court (Mr Recorder evans) before the Vice Chancellor, Sedley LJ, Kay LJ. 20th March 2003.

JUDGMENT : THE VICE CHANCELLOR:

1. This is the first of two appeals arising out of unfortunate disputes between neighbours. The claimant, Raymond Konstantinidis, is the registered proprietor of 6 Further Granary Cottages, Wood Dalling, Norfolk, under title No: NK94208. The proprietorship register records that included in the title is: *"a right for the purchaser (in common with the vendor and the owners and occupiers for the time being of the retained land and the said adjoining property known as Wood Dalling Hall and each and every part thereof) to use the existing borehole situate on the retained land or any new borehole constructed by the vendor or its successors in title and the pipes leading therefrom for the supply of water to the property together with the right to enter upon the retained land for the purpose of carrying out maintenance and repairs to the existing borehole or any new borehole subject to the person exercising such rights making good all damage thereby caused to the retained land PROVIDED that neither the vendor nor its successors in title shall be under any obligation to construct a new borehole nor to connect the property to any such new borehole for so long as the property shall remain connected to the existing borehole."*

2. The defendant, Mr Townsend, is the registered proprietor of Wood Dalling Hall and the land in which the borehole (and filtration plant) is situated under title No NK 93226. The proprietorship register records that the land comprised in that title is subject to the rights granted to the proprietors of No 6 Further Granary Cottages.

3. At all material times both Mr Townsend, in respect of Wood Dalling Hall, and Mr Konstantinidis in respect of No 6 Further Granary Cottages, obtained supplies of water from the borehole.

4. Both Mr Townsend and Mr Konstantinidis derive title from Sudemoor Ltd which owned this and other land in the late 1980s. Mr Konstantinidis derives his title under a conveyance from Sudemoor to a Mr Longstaff dated 17th August 1990 and registered on 17th September 1990. Mr Townsend derives his title to the land in which the borehole is to be found under a conveyance from Sudemoor Ltd to Cromwell Ventures Ltd dated 21st July 1993, and a transfer from Cromwell Ventures Ltd to him dated 4th October 1993.

5. Neither of the conveyances or transfers from Sudemoor Ltd to Longstaff or to Cromwell Ventures Ltd (or indeed any other transfer from Sudemoor Ltd to one having a similar right to the use of the borehole) had been adduced in evidence. Thus, there is no evidence of what if any obligation regarding the borehole was undertaken by Sudemoor Ltd to its various purchasers who were entitled to obtain water from the borehole. The transfer from Cromwell Ventures Ltd to Mr Townsend contains covenants by Mr Townsend to maintain the borehole and filtration plant, but it is not suggested that Mr Konstantinidis is entitled to the benefit of that covenant.

6. The borehole is operated by a submersible pump by means of which the water is raised 140 ft from the foot of the borehole, whence it is piped to the filtration plant and thence to Wood Dalling Hall and Nos 5 and 6 Further Granary Cottages. Mr Townsend has since acquired No 5 which had also been sold off by Sudemoor Ltd to Cameron Paton by a conveyance dated 16th July 1990. It is common ground that the pump and filtration plant are the property of Mr Townsend and that there is no room in the borehole for another pump.

7. Before April 2000 there was an informal arrangement between Mr Townsend and the owners of Nos 5 and 6 Further Granary Cottages to share the cost of running and repairing the pump and filtration plant in the proportions 40:30:30. Mr Townsend then acquired No 5, so that Mr Townsend and Mr Konstantinidis thereafter by agreement shared the cost 7O:30.

8. In April 2000 Mr Konstantinidis put No 6 Further Granary Cottages on the market. Mr Townsend wrote to his agents inviting them to inform potential purchasers of what he contended was the position regarding use of the borehole. He wrote: *"Finally, I come onto water. No 6 has a legal right to draw water from a borehole owned by me and situate on my land. How you get it out from 140 feet down is entirely up to you. You have no rights to use my pumping and filtration equipment and no ownership of them.*

It should be clearly understood by any would-be purchaser of No 6 that Wood Dalling Hall has the ability to go onto the mains water at any time it chooses, and that this facility is not available to No 6, or to No 5. We are considering this at the moment, and may opt to do this at some point in the future. Should this happen, then the legal right of No 6 to draw water from the bore-hole remains, but the owner will have to purchase his own pumping and filtration equipment and site it on his own property."

Shortly thereafter, Mr Townsend offered to buy No 6 Further Granary Cottages and Mr Konstantinidis accepted his offer. Mr Konstantinidis then received a better offer from someone else and declined to proceed with the sale of No 6 Further Granary Cottages to Mr Townsend.

9. On 10th May 2000 Mr Townsend's solicitors wrote to Mr Konstantinidis in connection with his use of the borehole. They observed that: *"The pump and the filtration unit have of course been in situ and subject to occasional breakdowns have been utilised for the benefit of our client and your cottage and the immediate adjoining cottage to yours.*

Pages, the borehole specialists, have now advised our client that the filtration unit is fast approaching the end of its useful life. Accordingly, our client is not prepared to carry on providing pumped and filtrated water for your use.

Obviously you have an absolute right to use the borehole and to run pipes to the borehole. We would ask you therefore, either by yourself or in conjunction with your immediate neighbour, to now make arrangements for a pump to be provided for the borehole and to make such arrangements as to filtration as you may deem appropriate. Obviously the filtration unit is currently situate on our client's land and any filtration unit which you wish to utilise will either have to be placed on your property or your immediate neighbour's property.

To give you and your neighbours ample opportunity to make such alternative pumping and filtration arrangements as may be necessary our client is prepared to endeavour to keep the existing system working until the end of August 2000 but thereafter you will have to make your own arrangements for extraction of water from the existing borehole."

10. On 17th July 2000 Mr Konstantinidis instituted these proceedings concerning the use of the borehole and the line of the eastern boundary to No 6 Further Granary Cottages. In relation to the borehole, the relief he sought was: *"A declaration that:*

a) Unless or until the claimant or any successor in title becomes the sole beneficiary of the right to draw water from the borehole on the defendant's land the cost of maintaining the existing pump be shared between the claimant and the defendant in the proportions 30:70 (and, if any additional parties with such a right seek to exercise the same, in equitable proportions)

b) If or when the present pump ceases to function, or if the defendant withdraws its use, the claimant or his agents be at liberty to enter upon the defendant's land and replace such pump with a new submersible pump to the costs of which the defendant and any other users must contribute in the same proportions as above.

4) Further, or alternatively, a declaration that, upon a mains water supply being connected to the defendant's property, the claimant be at liberty to connect to the same in lieu of his right to connect to the defendant's borehole."

On 24th August 2001 Mr Townsend's solicitors wrote to those of Mr Konstantinidis, stating that: *"whilst the current circumstances exist at 6 Further Granary Cottages and at Wood Dalling Hall and whilst your client, the claimant, and our client, the defendant, continue to share the use of the existing borehole then our client will be content to share the costs of maintaining the existing pump which expression shall include its replacement, if necessary, on the proportions of 30% by your client, the claimant, and 70% by our client, the defendant."*

No satisfactory answer was received to that letter.

11. That part of the claim dealing with the borehole came before Mr Recorder Evans on 21st March 2002. Before quoting his conclusion, it is convenient to refer to two authorities on which he relied.

12. The first is Duke of Westminster v Guild [1985] QB 688. In that case, the issue was who was liable to pay for the repair of drains owned by the Duke of Westminster but through which Mr Guild had an

easement of drainage. The relevant principles were clearly expressed by Slade J, giving the judgment of the court in these terms: *"The subject of the dispute, that is the landlords' part of the green drain, is property in respect of which the tenant enjoys an easement of drainage governed by the general law of easements. It is well settled that the grant of an easement ordinarily carries with it the grant of such ancillary rights as are reasonably necessary to its exercise or enjoyment:* ***Jones v Pritchard*** *[1908] 1 Ch.630,638, per Parker J. In our opinion, therefore, it is plain that the tenant would have the right, when reasonably necessary, to enter the landlord's property for the purpose of repairing that drain and to do the necessary repairs. In contrast, however, it is an equally well settled principle of the law of easements that, apart from any special local custom or express contract, the owner of a servient tenement is not under any obligation to the owner of the dominant tenement to execute any repairs necessary to ensure the enjoyment of the easement by the dominant owner; apart from special local custom or express contract, the law will ordinarily leave the dominant owner to look after himself: see Gale on Easements, 14th ed. (1972), p47 and* ***Holden v White*** *[1982] QB 679,683-684 per Oliver LJ."*

Later, at page 7O3 Slade LJ added*: "The general law of easements applies and, as we have already pointed out, clearly imposes no such obligation on the landlord. On the contrary, the defendant himself, though theoretically under no obligation to repair the plaintiffs' part of the green drain, could find himself in practice obliged to do so, in order to avoid committing a trespass against the landlords by the escape of water through that part .... The fact that the relevant easement happens to have been granted to the tenant under a lease does not assist him in any way. If, at the time of the grant of the lease, he wished to imp ose on the landlords in relation to any easements granted to him more onerous duties than would be implied under the general law, it was in our judgment incumbent on him to ensure that the lease so provided."*

The second of the authorities to which the Recorder referred is **Rance v Elvin** (1985) 50 P & CR 9. In that case, a common vendor, to whom I shall refer as S, granted to Mr Rance the right of free and uninterrupted flow of water through certain water pipes on terms of paying a fair proportion of the cost of their repair and maintenance. S then sold the land over which the right had been granted to Malcway Ltd. The water flowing through the pipes came from the mains water supply and was metered on the land of Malcway as it flowed from the mains supply through the pipes to the land of Mr Rance. Thus, Malcway paid the charges for water used by Mr Rance. Mr Rance instituted proceedings in which he claimed the right to an uninterrupted supply of water through the pipes. He accepted that he should pay for the water used by him. Nicholls J (as he then was) dismissed the claim on the grounds that an easement was essentially negative so that the positive obligation to provide an uninterrupted supply of water was incapable of being an easement.

13. The Court of Appeal took a different view because they distinguished between the right of passage of water through the pipes and its supply. The former qualified as an easement but the latter did not. With regard to the supply of water, Browne-Wilkinson LJ (as he then was), with whom Griffiths LJ (as he then was) agreed, said*: "That is enough to dispose of the appeal, but it may be helpful to the parties if I say a word about the provision of water to the properties. As I have said, Malcway is under no obligation to make arrangements with the water company for a supply of water through the meter. If Malcway were to refuse to pay for such supply and the water company therefore determined it, it would be open to the plaintiff to make his own arrangements with the water company for such supply. But, since Malcway needs the supply for its own purposes, it is in practice most unlikely to refuse to take the supply.*

So long as the supply through the meter serves properties in different ownerships, questions will be bound to arise as to what liability there is to pay for the proportion of the water consumed by each owner. Mr Rattee wished to submit in reliance on ***Anglian Water Authority v Castle*** *that the water company was only entitled to charge Malcway for the water actually used by Malcway and that the owner of Chantry Farm House was himself liable to pay directly to the water company the charges for the water consumed by the plaintiff. If this is right (as to which I express no view) there would be no problem. But the water company is insisting on Malcway paying for all water passing through the meter and practicalities suggest that Malcway will have to do so. The plaintiff has voluntarily agreed to install a meter at his boundary and to repay Malcway for the water the plaintiff consumes. In my view, he would in any event be liable in quasi contract to re-imburse Malcway for expenditure by Malcway on water supplied to the plaintiff impliedly at the request of the plaintiff. It could not be*

right that the plaintiff is entitled to use water for which, to his knowledge, Malcway has paid without coming under an implied obligation to re-imburse Malcway."

The third member of the court, Sir George Waller, also agreed. At page 18 he added: *"The water company does not provide a free service and whenever a supply of water is provided payment must be made for the service. Thus, if the plaintiff draws 1,000 gallons of water, Malcway will have to pay an extra amount representing 1,000 gallons. In my opinion, this is not just a moral obligation. When the plaintiff draws that 1,000 gallons of water he knows that Malcway will have to pay the water company and Malcway know that their account is being increased by the amount of water taken by the plaintiff. In these circumstances, I am of opinion that the implied contract arises and the plaintiff is obliged to reimburse Malcway the amount by which his liability to pay the water company has been increased by the water which he has drawn. If the plaintiff did not pay, I am of opinion that Malcway could sue for the money and if the circumstances demanded it could sue for an injunction pending payment."*

14. The Recorder referred to both those cases and continued: *"As a matter of principle it seems to me, applying **Rance v Elvin**, it must be right that if the claimant incurs expense reasonably and necessarily to repair or replace the pump or associated in some way with the borehole, that he is entitled to a rateable contribution from other users of the borehole at the material time. And so I cannot make any determination in terms of proportions because, as Mr Dutton says, it may well be at some stage that the defendant terminates his own use of the borehole, in which event it may be that the entire expense falls on the shoulders of the claimant, or it may be at the material time that the defendant is still using the borehole. It may be that there are other parties -- if, for example cottage No 5 was occupied by somebody else. So there are clearly any number of unknowns, and they could only be determined in due course in the event of any particular dispute. But at this stage it does seem to me that I can make a general declaration that the claimant is entitled to a rateable contribution from any other co-users of the borehole in relation to any expense of repairing or maintaining the borehole or the pump to replacing the pump. Whether that suffices as a matter of drafting I do not know."*

The order that the Recorder made is in the following terms: *"the cost of supplying water to and through the borehole, including the cost of repairs and maintenance of both the borehole and any equipment required for pumping water and the replacement of any such equipment, is to be borne rateably by volume by the users of the borehole from time to time."*

15. Mr Townsend appeals from that conclusion with the permission of Tuckey LJ. He submits that there is no parallel between Rance v Elvin and this case. He points out that in that case there was a clear correlation between Mr Rance's use of water and the imposition of the relevant charge on Malcway. The one triggered the other, and there was an exact correlation between the use of water by Mr Rance and the cost to Malcway. But in this case the costs of maintaining and repairing the pump and filtration plant cannot be directly related to the use of water by anyone in particular. Some of them will be incurred if no water is pumped from the borehole at all. He submits that there was no evidence before the judge from which he could predict that the cost of repairs and maintenance in the future could be fairly allocated in accordance with water usage as prescribed by the declaration he made.

16. Counsel for Mr Konstantinidis support's the judge's conclusion but on a somewhat wider basis. He submits that (i) where one party incurs expense in order to provide a benefit shared with another, that other (if he chooses to enjoy the benefit) is obliged to meet a due proportion of the expense, and (ii) such expense is to be apportioned equitably. He submits that such a principle is to be justified on the basis of a quasi-contract or as a condition attached to a benefit which must be performed if the benefit is to be taken.

17. The futility of this dispute was demonstrated by each party's acceptance before us of the 7O:30 split so long as there is no change of circumstance. Under some pressure from the court, they agreed to a modus vivendi involving an agreement to share the costs in those proportions until a change of circumstances and to submit any later dispute to mediation. This goes some way to narrowing the dispute for the moment but does not absolve this court from deciding the appeal from the order of the Recorder.

18. I deal first with the contention of counsel for Mr Konstantinidis, that the judge's order is to be upheld on the basis of the principle of benefit/burden to which Sir Robert Megarry V-C referred to in **Tito v Waddell** [1977] Ch 1O6, 301, as limited by the speech of Lord Templeman in Rhone v Stephens [1994] 2 AC 310, 322E. But, as the passage from the speech of Lord Templeman shows, the principle applies to deeds or other documents conferring a benefit and imposing a burden which, being a positive obligation, is not normally enforceable against successors in title. The problem in this case is that nothing has been produced indicating that any obligation to contribute has been imposed in relation to the cost of repairing or improving the borehole or pump and other apparatus on any of those entitled to use it.

19. In those circumstances, as the decisions of this court in **Duke of Westminster v Guild** [1985] QB 688 and **Rance v Elvin** show, the normal rule is that there is no obligation to contribute transmissible to successors in title to the right. In my view, the conclusion of the judge cannot be justified on the basis of any principle of benefit and burden, such as counsel for Mr Konstantinidis relied on.

20. Accordingly, as the Recorder recognised, his order can be justified, if at all, only on the basis of quasi-contract. This depends on whether a request can be implied by one of two persons entitled to exercise the right to the other that the latter should incur the repair expenditure concerned. Counsel for Mr Townsend did not suggest that such a request cannot be implied in the light of the particular facts in relation to specific expenditure; or that, if it was, a quasi-contractual liability would not arise. But he did contend that, in the light of the circumstances in this case, it is impossible to find, as the Recorder purported to do, a sufficient request in all future cases whatever the circumstances. He pointed out that Rance v Elvin was a different case on its facts, in that the use of the water and the generation of the liability corresponded precisely.

21. I see no answer to the problems highlighted by counsel for Mr Townsend. It is easy to imagine circumstances in which two co-users honestly and reasonably differ as to what should be done and when by way of repair and replacement of the pump. Why should either be compelled to contribute to the cost of the works insisted upon by the other just because he is using the supply? If damage to the pump is caused by one user, why should the other pay the costs of the repair? There is no necessary correlation between the use and the cost. There is no provision for depreciation. No account is taken of the fact that the benefit to Mr Konstantinidis is, at least in part, the availability of the supply to his weekend cottage which cannot be measured by its use and no accounting period is specified.

22. In all these circumstances, I do not think that the declaration made by the Recorder, which would be binding on successors in title, can be justified. It does not merely declare a quasi-contractual right in the light of actual events. It seeks to provide for all future expenditure irrespective of the relevant facts except use. Such a declaration is not justified by ordinary quasi-contractual principles.

23. Whilst I cannot agree with the Recorder's conclusion, I commend his effort to find some solution to this dispute. In this court it became apparent that both parties were content to continue the sharing proportions of 70:30 so long as there is no change of circumstances. They eventually reached an agreement. It does not deal with the costs, nor is it likely to be of more than temporary effect. I hope that this judgment will assist those who may be involved in mediation in the future if these neighbours are unable to patch up their differences.

24. For all these reasons I would allow the appeal and set aside the declaration made by the Recorder.

25. **LORD JUSTICE KAY:** I agree.

26. **LORD JUSTICE SEDLEY**: I also agree.

ORDER: Appeal allowed; declaration set aside.

MR T. DUTTON (instructed by Messrs Druces & Attlee, London, EC2) appeared on behalf of the Appellant.
MR G. SINCLAIR (instructed by Messrs Cole & Co, Norwich) appeared on behalf of the Respondent.