

Memo

To: Director of Planning.
From: Legal Department
Date: 24th July, 2007
Re: Canal Lot Right of Ways

Legal Department Case Reference: **GLD 1825/2007** (please refer when replying).

Reference is made to your request for advice in relation to the captioned matter that is right of way along canal lots.

ISSUES:

1. Whether an inherent element of natural watercourse is that the lots adjoining the natural watercourse will have access over the natural watercourse, even if this is not expressly specifically prescribed in the conditions of approval? Yes
2. What is the position in relation to road front lots and right of ways even if this is not expressly specifically prescribed in the conditions of approval of the CPA? Yes
3. Whether an inherent element of canal subdivision is that the canal front lots will have access over the canal, even if this is not expressly specifically prescribed in the conditions of approval? Unclear but it seems no.
4. Whether the Planning department has the legal right not to sign the revised final survey plan unless it indicates that the canal lots will have a right of way over the canal?

BACKGROUND

5. INTENTION:

The Applicant stated that he does not want the proposed owners of the canal lots to be granted a right of way over the canal.

However email dated 22nd May 2007 it is stated that "the canal access is really just an added bonus which will be implemented in due course when the owners start developing their parcels etc".

Therefore the intention is unclear. If the intention is to give the landowners of lots adjoining the canal access along the canal, then it would be prudent to include it in the plan at this stage and or have this expressly stated.

6. ISSUE

Whether owners of land adjoining a canal have an implied right of way access along the canal?

LAW

7. What is a canal?

'A "canal" means any channel works which provide sea water direct access to inland areas which would not normally be in direct contact to the sea.' See section 2 of the Water Authority Law (1996 Revision).

Section 33 of the Development and Planning Regulations (2006 Revision) states as follows:

"Canals shall not be straight and, at the point of entrance from the sea, so designed as to provide adequate protection from storm surges and, wherever possible, to meander through the area with an inlet to provide circulation of water.

8. Whether an inherent element of natural watercourse is that the lots adjoining the natural watercourse will have access over the natural watercourse , even if this is not expressly specifically prescribed in the conditions of approval? Yes

9. Halsburys Vol 49(2) fourth edition:

"65. Rights of access of riparian owners. An owner of land abutting on water (a riparian owner') is entitled in the natural course of things to access and

regress from that water, whether it is a tidal or a non tidal river, a lake or the sea, where it is in contact with his frontage, provided that his land is in actual daily contact with the water, either laterally or vertically.[North Shore Rly Co v Pion (1889) App Cas 612 PC]"

10. Halsburys Vol 49(2) fourth edition para 67:

"67 Rights of lessees and licensees. The right of access of the riparian owner to water on which his land abuts is exercisable by the occupier under a lease or tenancy granted by the riparian owner subject to any reservation contained in the relevant instrument..."

11. Halsburys Vol 49(2) fourth edition para 66:

"66. Nature and exercise of rights of access. The right of a riparian owner' to access to the water on which his land abuts is a private and not a public right, and any interference with it is actionable without proof of special damage. It does not depend on ownership of the bed of the river or other water, and is wholly distinct from the public right of navigation. In addition to his right to access to and regress front the water, he is entitled:

(1) to land or to pass over the shore or bed at all states of the water for that purpose even if the shore or bed is not vested in him; and to moor vessels adjacent to his land .."

12. Gale on Easements 14th edition By Spencer Maurice at page 223-224:

" The rights in the water of artificial watercourses have been the subject of numerous judicial decisions in delivering the advice of the **Privy Council in Rameshur v. Koonj** (1878) 4 App.Cas 121, 126 said:

"There is no doubt that the right to water flowing in a natural channel through a man's land and **the right to water flowing to it through an artificial watercourse constructed on his neighbour's land** do not rest on the same principle. In the former case each successive riparian proprietor is prima facie entitled to the unimpeded flow of water in its natural course, and to the reasonable enjoyment as it passes through his land, as a natural incident to his ownership of it. In the latter, **any right to the flow of the water must rest on some grant or arrangement, either proved or presumed, from or with the owners of the lands from which the water is artificially brought, or on some other legal origin.**"

13. Gale on Easements 14th edition By Spencer Maurice at page 223-224:

In ascertaining the rights in respect of an artificial watercourse; there must be taken into account, first, the character of the watercourse, whether it is temporary or permanent, secondly, the circumstances under which it was presumably created, and thirdly, the mode in which it has in fact been used and enjoyed."

14. City of London Land Tax v Central London Company 1913 AC 364 at 371-372 a **House of Lords decision** in relation to the fixing and determining the extent and limits of the close or tenement abutting on the public highway or river Lord Atkinson states at page 371-372:

'It is well established that the presumption is applicable to cases where no grant or conveyance has to be construed: *Doe v. Pearsey* (1879 5 Ex. D. 264); ..In *Harrison v. Duke of Rutland* (1893 1 QB 142 at page 155 Kay L.J. states the rule succinctly, thus:

"The soil of a highway belongs prima facie to the owner of the land adjoining it. If the land on either side is the property of different owners, each is owner of the soil on his side ad medium filium of the highway. But this ownership is subject to the right of the public to use the highway. Any use of the soil of the highway other than the legitimate use of it for the purposes of a highway is a trespass upon that soil as against the owner to whom it still belongs. These propositions are amply established by judicial decisions."

No doubt this presumption may be rebutted, either by the provisions of a grant or conveyance or by the surrounding circumstances. In *Leigh v. Jack* [1879 5 Ex.D. 264] it was rebutted by the fact that the street upon which lands abutted was at the date of the grant not actually made, but only intended by the grantor to be made. But unless and until rebutted it must prevail. Moreover, subject to the right of way, or easement of the public, as it is sometimes called, the soil and every incident of the ownership of it remains in the owner. He can maintain an action for trespass upon it against any member of the public who uses for purposes not covered by that easement (*Harrison v Duke of Rutland* [1893] 1 QB 142.)'

Lord Shaw stated in relation to the properties bounded by a river or highway that the presumption operates not only in cases where the boundary is expressed to be by highway or street, but also in cases where the properties are delineated by plan or colour or measurement. See page 379 *ibid*.

(Therefore the plan should clearly state the right of way by including the dotted lines.)

Lord Shaw (ibid at page 380) further stated that this doctrine is not mere convenience in conveyancing and is nothing less than a presumption of ownership which is too "deeply embedded in the law to be disturbed or doubted."

[Therefore it seems that if there is doubt the presumption should apply.]

15. Therefore the position in relation to owners of road front lots of a highway is prima facie the owner of the land adjoining it. If the land on either side is the property of different owners, each is owner of the soil on his side of the highway and thus has a right of way over same.

ARTIFICIAL WATERCOURSE:

16. However it appears that a "canal" is not a "natural watercourse" but falls within the meaning of an "artificial watercourse" and is an "inland waterway".

17. In the absence of any express provisions dealing with canals, the following which applies to artificial watercourses it is submitted should apply.

18. See Halsbury's laws of England Fourth Edition Volume 14 par 188 :

"188. **Nature of easement.** Easements which relate to water and watercourses are very varied'. Their nature depends largely upon the distinction, all-important for this purpose, between water flowing in a natural channel and water flowing in an artificial watercourse."

PARA 189:

19. See Halsbury's laws of England Fourth Edition Volume 14 see para 189:

Re **Natural and artificial channels.** Easements relating to water flowing in an artificial channel depend in general upon some agreement, express or implied, which excludes all question of natural rights.

Kensit v Great Eastern Rly Co (1884) 27 ChD 122 at 133, 134, CA, per Cotton LJ : "it seems to me to be a contradiction in terms to say that any natural rights can ever be acquired in an artificial cut".

See, however, *Sutcliffe Booth* (1863) 32 LJQB 136, where it was held that although the particular watercourse might have been artificial, it might still have been originally made under circumstances, and have been so used, as to give all the rights that the riparian proprietors would have had if it had been a natural stream; *Whitmores (Edenbridge) Ltd v Stanford* [1909] 1 Ch 427."

20. See Halsbury's laws of England Fourth Edition Volume 14 para 196:

"(iv) Artificial Watercourses

196. No natural rights in artificial watercourse. There is no natural right to water in an artificial watercourse. However, a watercourse, though artificial in its nature, may have been originally made under such circumstances, and have been so used, as to give to persons through whose land it flows all the rights which they would have had as riparian owners had the stream in fact been a natural one. Where an artificial channel passes through the land of several proprietors and water flows in it to serve the purposes of a lower proprietor, the proper grant to presume in the absence of evidence is the grant of a watercourse, and prima facie every proprietor of land on the banks of the channel is entitled to that half of the bed of the channel which adjoins his land. [See eg *Watts v Kelson*(1871) 6Ch App 166.]"

21. See Halsbury's laws of England Fourth Edition Volume 14 para 197 :

"197. **Easement in artificial watercourse.** The existence of every artificial watercourse, unless constructed and used by a landowner solely upon his own land', involves the existence of an easement. Such an easement may be created by express grant, or may arise by implication of law or by prescription. It may be granted or implied in respect of an artificial watercourse constructed upon the maker's own land, or in respect of a watercourse constructed through the land of another person, and, in this case, whether the soil of the watercourse is acquired by the person making it, or the easement arises by almost necessary implication from the permission to make it given by the owner of the soil."

22. See Halsbury's laws of England Fourth Edition Volume 14 para 198:

"198. **Express grant of easement in artificial watercourse.** Where there is in existence an express grant of an easement or an express agreement relative to the construction and continuance of an artificial watercourse, the rights of all parties depend, of course, upon its terms[: See *Simmonds v Midford* [1969]2 All ER 1269]] The rights of some of the

parties may, however, be implied from the circumstances surrounding the execution of the agreement. In general, in such a case, rights in the watercourse will not readily accrue apart from those given by the agreement." [See *Mason v Shrewsbury and Hereford Rly Co.* [1871] LR6QB 578 at 587; *Staffordshire and Worcestershire Canal Navigation (Proprietors) v Birmingham Canal Navigation (Proprietors)* (1866) LR 1 HL 254.]"

23. The **Privy Council decision of Ramesh Singh v Koonj Pattuk** 1878-79 4 AC 121:

"The right to the water of a river flowing in a natural channel through a man's land, and the right to water flowing to it through an artificial watercourse constructed on his neighbour's land, do not rest on the same principle. In the former case each successive riparian proprietor is prima facie entitled to the unimpeded flow of the water in its natural course, and to its reasonable enjoyment as it passes through his land, as a natural incident to his ownership of it. In the latter any right to the flow of the water must rest on some grant or arrangement, either proved or presumed, from or with the owners of the lands from which the water is artificially brought, or on some other legal origin. *Wood v. Wand* (...3 ex. 748) approved.

Held, in this case that the plaintiff's legal right to the enjoyment of water overflowing from an artificial reservoir through an artificial watercourse on his neighbour's (the defendant's) land should be presumed from the circumstances under which the same were presumably created and actually enjoyed; subject to the Defendant's right to the use of the water for the purpose of irrigating his lands by proper and requisite channels and other proper means."

24. Further in *Bailey v Morland* [1902] 1 Ch 649 it was held that in the case of an artificial watercourse, the origin of which is unknown the proper inference from the user of the water and from other circumstances may be that all the riparian proprietors should have the same rights (including a right to use the water for manufacturing as they would have had if the stream had been a natural one.

25. **These cases suggest that the same principles should apply in relation to the enjoyment of water in relation to artificial watercourse and natural watercourses should be presumed from the circumstances under which the same were presumably created and actually enjoyed. Therefore in the absence of evidence to the contrary the same principle may apply.**

26. CONCLUSION

Owners of property adjoining a natural water course or waterway eg sea, rivers lakes have a right of way or access along the said natural waterway. Similarly owners of property along a highway enjoy the same access.

However it does not seem to be clear that there is an implied right of way or an inherent element of canal subdivision that the canal front lots will have access over the canal unless this is expressly provided for. (in the conditions of approval).

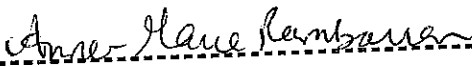
Therefore out of an abundance of caution and as a matter of policy and clarity, to ensure consistency with those owners of property adjoining the natural waterways, there should be an express provision that the adjoining landowners have access along the canal.

Planning department should not sign the revised final survey plan unless it indicates that the canal lots will have a right of way over the canal.

The following further particulars would be helpful in order that I may give more specific advice.

Namely who constructed the canal was it constructed privately or publicly. Who owned the land on which the canal was built. There would have been some agreement which may vary the usual rights of access along the canal. If the land was privately owned and the canal was constructed on part of a parcel of someone's land then that owner may have certain rights. Further the person or company that constructed the canal may have rights of access over the canal, this depend on the terms of the agreement.

I hope this is of some assistance and please feel free to request any further clarification should any further information be available.



Anne- Marie Rambarran
Crown Counsel for the Attorney General
24th July 2007