Neutral Citation Number: [2012] EWCA Civ 961

Case No: A1/2011/1575

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION, TECHNOLOGY AND CONSTRUCTION COURT
His Honour Judge David Wilcox
[2011] EWHC 1353 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/07/2012

Before :

LORD JUSTICE MUMMERY

LORD JUSTICE TOMLINSON
and
LORD JUSTICE KITCHIN

- -

Between :

Berent	**Appellant**
- and -	
(1) Family Mosaic Housing (incorporating Mosaic Housing Association) **(2) London Borough of Islington**	**Respondents**

Howard Palmer QC and Daniel Crowley (instructed by **Plexus Law**) for the **Appellant**
Rebecca Taylor for **Respondent (1)** (instructed by **Weightmans LLP**) and
Andrew Bartlett QC and Muhammed Haque for **Respondent (2)** (instructed by **Clyde & Co**)

Hearing dates : 20, 21 March 2012

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Approved Judgment

Lord Justice Tomlinson :

1. The Claimant and Appellant Mrs Berent is and was at all material times the freehold owner of a house and garden, front and rear, at No 18 Highbury New Park in the Borough of Islington. The Borough of Islington was the Second Defendant below and is the Second Respondent on this appeal and cross-appeal. I shall refer to it hereafter simply as "the Borough" or "Islington". Highbury New Park is a tree-lined road – indeed it has been described as an avenue of London plane trees. There are 276 plane trees along its length, on either side. There are over 300 properties on Highbury New Park. Roads lined with plane trees are not typical of Islington. In 2002, according to its then published "Policy for Trees in Islington" the Borough's tree stock was approximately 9,875 trees consisting mainly of smaller ornamental trees. Only a small number of roads were planted with larger trees, predominantly London planes and lime trees. That was a trend started in the Victorian era. Mrs Berent, or rather her subrogated insurers, allege that two of Islington's plane trees were responsible for causing damage to her property in 2003/2004.

2. Those two trees, mature London planes, at the relevant time stood in the pavement at the front of No 18. T5, as it was identified in evidence at the trial, was to the front and left of the house, as one looks at the house from the road. It was approximately 12 metres from the front elevation and in 2008 was approximately 10 metres high. T7 was to the front right, again approximately 12 metres from the front elevation and in 2008 approximately 15 metres high.

3. No 20 Highbury New Park, next door to No 18, was at all material times owned by a housing association, to which I will refer hereafter as "Mosaic". At the relevant time there was a mature London plane tree in the front garden of No 20, identified at trial as T4. It was 12.2 metres from the closest part of No 18, which was the front left of that building, again looking at it from the front of No 18. In 2008 T4 was approximately 17 metres high. That tree too was alleged to be responsible for damaging No 18 during 2003/2004. Mosaic was First Defendant at trial and is likewise a Respondent on this appeal and cross appeal.

4. No 18 was at relevant times surrounded by many other mature trees. One was in the front garden, a mature Tree of Heaven, five metres from the house, approximately 10 metres high in 2005 when it was cut down. As at May 2004 there were in the back garden also a mature false acacia, elder, Indian bean tree and a black locust, the latter two 15 and 22 metres from the house respectively.

5. No 18 is a four storey house of traditional construction. It has shallow "foundations" at the left rear approximately 6cm in depth. The property sits in deep made ground, mainly of clay, but containing also silt, sand, ash and bricks, to a depth of between 2.1 metres and 2.4 metres below ground level at the front and between 2.5 metres and 2.8 metres at the rear overlying the London clay. At the front of the property the original foundations were proved at 2.4 metres below ground level coinciding with the base of the London clay. The made ground is significantly more permeable than the London

clay and with substantial granular content at shallow depths. Those parts of the building founding on made ground rather than natural clay are more susceptible to ground movement due to water ingress. This uncontroversial description I take from the judge's judgment.

6. It is well known that shrinkage subsidence may occur where trees extract moisture from the soil causing it to shrink – clay based soils are particularly prone to moisture-related shrinkage. Shrinkage compromises the load bearing capacity of the soil. Foundations move downwards sufficient to cause cracking. The clay soil will in any event "shrink and swell" through natural desiccation and re-hydration. Trees can contribute significantly to the problem by the extraction of water through their roots. Trees can both dehydrate the soil and inhibit re-hydration.

7. Tree roots are not however the only potential cause of subsidence damage. In 2003 and 2004 No 18 faced two additional threats.

8. Firstly, the combined foul and storm drainage system of No 18 was badly blocked and leaking. Significant leakages during 2003 and 2004 are likely to have affected the weight-bearing capacity of the underlying made up soil above the London clay. This source of damage was not eliminated until the end of 2005.

9. Secondly, the back garden of No 18 borders onto a deep railway cutting. To the rear of the railway cutting and below it run two tunnels, the up and down Channel Tunnel link railway lines or HS1 connecting St Pancras and the Channel Tunnel. These were constructed in September and October of 2003. The tunnelling gave rise to vibration damage to both the foundations and the drains. Moreover, whilst constructing the "up line" the tunnelling machine broke down in the vicinity of No 18 and for some days its engines were left running.

10. There is no doubt that No 18 suffered sudden and extensive structural damage between September 2003 and the spring of 2004. It took the form of cracks in both the external and internal walls. It was to both the front and left hand side and to the rear and right hand side. The judge found that Mrs Berent's claim in respect thereof was investigated on her behalf in a dilatory manner between 2003 and 2011.

11. On 9 July 2009 she issued proceedings against both defendants, followed up on 6 November 2009 by service of Particulars of Claim. Both damages and an injunction were sought, the latter requiring the Defendants to remove T4, T5 and T7 forthwith. The trial took place between 14 and 17 March 2011. In February 2011 the Defendants gave notice that they would remove the trees and they were in fact removed in March. The Claimant nonetheless pursued a modest claim for damages for distress, inconvenience and loss of amenity on the footing that the trees should have been removed earlier. The fact that this claim raised issues distinct from liability for the physical damage occurring in 2003/2004 has I think contributed to the difficulty in understanding some of the judge's reasoning in his judgment, which perhaps elides the two enquiries.

12. The judge found unequivocally that the major damage to the structure of the house in respect of which the action was brought began to occur in September 2003 and was complete by the spring of 2004 – judgment paragraphs 52, 53 and 114. The Particulars of Claim allege that the Defendants are liable for that damage in nuisance and/or negligence, and for present purposes nothing turns on the distinction between the two causes of action. In *Delaware Mansions Limited v Westminster City Council* 2002 1 AC 321, Lord Cooke of Thorndon observed at page 333 that, in this field, "the label nuisance or negligence is treated as of no real significance" and that in this context, "the concern of the common law lies in working out the fair and just content and incidents of a neighbour's duty rather than affixing a label and inferring the extent of the duty from it." The allegation in the Particulars of Claim is that Mosaic and Islington "wrongfully caused or permitted or continued the roots of the said trees [T4, T5 and T7] to encroach upon the Claimant's premises or extend under the Claimant's said premises. From about summer 2003, and thereafter continuing on a daily basis, the said roots undermined the foundations of the Claimant's said premises and/or withdrew the moisture from the soil under the said foundations thereby causing progressive subsidence of the premises." The subsidence and subsequent damage is said to have been caused by a nuisance constituted by the encroachment or extension of the tree roots and/or to have been caused by negligence. Paragraph 7 of the Particulars of Claim pleads that "the said subsidence and the resultant damage [to the premises] was caused by the negligence of the Defendants, their servants or agents. By reason of the facts and matters aforesaid the Defendants owed to the Claimants a common law duty of care to take such steps as may be necessary to prevent and/or minimise the damage that might occur to the premises by reason of the said trees being in such close proximity to the Claimant's premises. The Defendants are in breach of such duty." Particulars are given of the alleged breach of duty as follows:-

> "(1) Failing adequately or at all to consider or heed the risk of damage to the Claimant's property being caused by the roots of the said trees.
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> (2) Failing to pollard, crown or otherwise manage or control the growth of the said trees adequately or at all;
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> (3) Failing to prevent the roots of the said trees encroaching upon the said premises and/or extending under the said premises and/or causing or permitting the same to encroach upon the said premises and/or extend under the said premises as aforesaid;
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> (4) Failing as aforesaid when they knew or ought to have known as a prudent landowner and/or as a local authority that the presence of such a tree on their property and/or on the highway in proximity to the Claimant's premises might cause subsidence damage to the Claimant's premises."

13. At paragraph 8 of the Particulars of Claim reasonable foreseeability of the damage is pleaded on the basis of the well-known ability of trees of this size and nature to extract moisture and the consequent shrinkage of clay-based soils.

14. The Defendants deny the reasonable foreseeability of this damage, Mosaic by reference to its lack of knowledge of the nature of the ground underlying No 18 or of the nature of its foundations or underpinning, Islington more generally. Paragraphs 14 and 15 of Islington's Defence encapsulates the debate in this regard:-

> "14. Properties do not necessarily subside only because roots extend beneath them. Whether a property is susceptible to subsidence by the action of trees is dependent on many factors including the type of tree, the size and age of the tree, the distance of the tree to the property, when the property was built, the type of soil, the historical rainfall, the prevalent temperatures, whether there is neighbouring vegetation, the depth of foundations and whether any other works such as underpinning have been done. These cannot always be known, so it is very difficult to predict when subsidence will or may occur.
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> 15. Moreover, whilst it is accepted that as a local authority the Defendant does have some arboricultural knowledge, it simply does not have the resources to, nor would it be reasonable to expect it to, individually inspect every tree near every property and assess each factor listed above. The Defendant avers that it is not necessarily enough to establish reasonable foreseeability just by assessing the type of tree, the type of soil and the distance from any property. It agrees however that this is the starting point."

15. The judge, His Honour Judge David Wilcox, sitting in the Technology and Construction Court, dismissed the claim in respect of the damage to No 18. It had been accepted during the course of the trial that the damage to the rear and right-hand side of the property was not related to tree root induced subsidence but was rather caused by the defective drains and by the vibration caused by the tunnelling work – judgment paragraph 58. It is unclear from his judgment whether the judge concluded that the Defendants' trees made a material contribution to the damage at the front and left of the house. However he concluded that, at the relevant time, i.e. in the period before that damage was caused, there was no basis upon which either Mosaic or Islington should have appreciated that there was a "real risk" that their trees would cause damage to No 18, either alone or in conjunction with other factors. He also concluded, insofar as it amounts to an independent conclusion, that there had been no breach of duty. He concluded that removal of the trees would have been the only reliable way of eliminating the possible risk that they might cause damage – judgment paragraph 103. Because of the state of the Defendants' knowledge as to the damage caused to the house, the extent to which the trees were implicated and the availability of alternative remedial measures, there was no breach in failing to remove the trees before autumn 2010. So far as concerns the pleaded allegations of failure to pollard, crown or otherwise manage or control the growth of the trees, the judge seems to have concluded that "pruning and crown reduction is and was not the solution, it serves to stimulate growth in fact" – judgment paragraph 102. The judge upheld the claim for distress, inconvenience and loss of amenity on the footing that the trees ought to have

been removed in the autumn of 2010. He awarded £5000 under this head in respect of the period from the autumn of 2010 until the delivery of judgment, 25 May 2011.

16. Mrs Berent appeals against the dismissal of her claim. Mosaic and Islington cross-appeal against the award of £5000, accepting liability in principle but contending that the award should have been of a much lower amount. They also contend that, if and insofar as the judge found that their trees materially contributed to the damage to the property in 2003/2004, he was wrong so to do.

17. It is apparent from the judgment, and Mr Howard Palmer QC for the Appellant confirmed, that causation of damage was the main issue at trial. It is therefore doubly unfortunate that the judge's finding thereon is unclear. Between paragraphs 67 and 83 of his judgment he appears to come to a clear and considered conclusion, firmly based upon the factual and expert evidence, to the effect that tree root subsidence was not the cause of the damage to the front and left of the house. The judge had correctly directed himself at paragraph 51 of his judgment that in order to found liability the trees needed only to be an effective and substantial cause of the damage, not the sole or predominant cause. Nonetheless at paragraph 93 of his judgment the judge made a finding as to the predominant cause of desiccation "in 2004" by which he meant to refer, I think, to a period after the occurrence of the major damage in 2003/2004 which was complete by the spring of 2004. It is possible that he considered that it was necessary to make a finding of predominant cause as a precursor to his conclusion when at the earliest the Defendants came under an obligation to remove the trees. However at paragraphs 95 and 96 of his judgment he said this:-

> "95. I am driven to the conclusion that the Defendants' London plane tree roots effectively contributed to such desiccation at the front of the house and left hand side allied to the effect of drain water leakage that enabled the trigger of the tunnelling operations to have a sudden effect upon the vulnerable foundations and damaged load bearing of the underlying sub soils.
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> 96. Whilst the contribution to the damage to the soil structure from each of the Defendants' trees was both effective and material. In 2003 it is likely that it was not the predominant cause."

These passages appear to express a conclusion that the Defendants' tree roots were an effective and material cause of the 2003/2004 damage. Some support for this reading of the judge's judgment is provided by the extempore judgment on costs which he delivered on handing down his reserved judgment on 25 May. At paragraph 15 of this second judgment he said this:-

> "My finding was that the Defendants' trees, both of them, made a material contribution and all likelihood pre-2003, not the main or predominate (sic) cause but a material and effective cause."

18. It is unnecessary to resolve the conundrum presented by this aspect of the judge's judgment unless the Appellant can overcome the judge's conclusion on reasonable foreseeability and breach of duty. Mr Palmer, who did not appear at the trial, strove valiantly so to do. However he recognised that the judge's findings at paragraphs 102 and 103 of his judgment, to which I have referred at paragraph 15 above, presented him with a real difficulty. If those findings cannot successfully be challenged, the Appellant could only succeed by establishing that the Defendants' duty required them to cut down any tree which could foreseeably cause damage to the property of others. By the end of his submission Mr Palmer had I think come close to embracing this position, although his preferred route home was to assert that the risk of damage would have been minimised by frequent and severe crown pruning and that the Defendants were in breach of duty in having failed to implement such a policy. Recognising that this latter argument faced the difficulty that the evidence does not show that frequent and severe pruning would in fact have eliminated the risk of damage which might in any event have occurred, Mr Palmer submitted that where the duty involved is a duty to minimise a foreseeable risk, the court is entitled to infer that the breach of duty caused the loss and that the onus is on the Defendants to show the contrary. In support of this proposition he relied upon the decision of this court in *Drake v Harbour* [2008] EWCA Civ 25. I note that that was a case where there was no credible cause of fire alternative to the inference that it had been caused by an electrician's admitted negligence, but I need not discuss this further since the Appellant's case on foreseeability of damage and breach of duty in my view fails on the simple ground that the Appellant failed to make good her case at trial under either (related) head. In order to demonstrate why this is so I must first deal briefly with the law and then with the evidence adduced at trial.

The Law

19. Although we were not unnaturally referred to several cases involving damage allegedly caused by tree roots, such disputes call for the application of the general law of negligence and nuisance. There is not some specific set of principles applicable to cases of this type alone. The starting point is therefore the seminal decision of the Judicial Committee of the Privy Council in *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty, "the Wagon Mound (2)"* [1967] 1 AC 617. The appellant was the demise charterer, and therefore to all intents and purposes the owner, of the vessel "*Wagon Mound*". Whilst taking on bunker fuel at a wharf in Sydney Harbour, as a result of carelessness by the ship's engineers, a large quantity of bunker oil overflowed from the vessel on to the surface of the water. It drifted to and accumulated around a wharf at which two vessels owned by the respondents were berthed and at which oxy-acetylene welding and cutting work was taking place. The oil on the surface of the water was ignited and a fire rapidly spread, causing extensive damage both to the wharf and to the Respondents' vessels berthed there. The trial judge found that the officers of the *Wagon Mound* would regard bunker fuel as very difficult to ignite upon water but not that they would regard this as impossible; that their experience would probably have been "that this had very rarely happened" – not that they would never have heard of a case where it had happened, and that they would have regarded it as a "possibility, but one which could become an actuality only in very exceptional circumstances – not . . . that they could not reasonably be expected to have known that this oil was capable of being set afire when spread on

water." One of the questions on appeal was as to the extent of the risk which should reasonably have been foreseen as arising in consequence of the oil spill and the extent to which it was the duty of the engineers to take steps to eliminate it. Lord Reid, delivering the judgment of the Board, said this, at pages 641-644:-

> ". . . here the findings show that some risk of fire would have been present to the mind of a reasonable man in the shoes of the ship's chief engineer. So the first question must be what is the precise meaning to be attached in this context to the words "foreseeable" and "reasonably foreseeable",
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> Before *Bolton v. Stone* [1951] AC 850 the cases had fallen into two classes: (1) those where, before the event, the risk of its happening would have been regarded as unreal either because the event would have been thought to be physically impossible or because the possibility of its happening would have been regarded as so fantastic or farfetched that no reasonable man would have paid any attention to it -"a mere possibility which would never occur to the mind of a reasonable man" (per Lord Dunedin in *Fardon v. Harcourt-Rivington* [1932] 146 LT 391) - or (2) those where there was a real and substantial risk or chance that something like the event which happens might occur, and then the reasonable man would have taken the steps necessary to eliminate the risk.
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> *Bolton v. Stone* posed a new problem. There a member of a visiting team drove a cricket ball out of the ground onto an unfrequented adjacent public road and it struck and severely injured a lady who happened to be standing in the road. That it might happen that a ball would be driven on to this road could not have been said to be a fantastic or far-fetched possibility: according to the evidence it had happened about six times in 28 years. And it could not have been said to be a far-fetched or fantastic possibility that such a ball would strike someone in the road: people did pass along the road from time to time. So it could not have been said that, on any ordinary meaning of the words, the fact that a ball might strike a person in the road was not foreseeable or reasonably foreseeable - it was plainly foreseeable. But the chance of its happening in the foreseeable future was infinitesimal. A mathematician given the data could have worked out that it was only likely to happen once in so many thousand years. The House of Lords held that the risk was so small that in the circumstances a reasonable man would have been justified in disregarding it and taking no steps to eliminate it.
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> But it does not follow that, no matter what the circumstances may be, it is justifiable to neglect a risk of such a small magnitude, A reasonable man would only neglect such a risk if he had some valid reason for doing so: *e.g.,* that it would involve considerable expense to eliminate the risk. He would

> weigh the risk against the difficulty of eliminating it. If the activity which caused the injury to Miss Stone had been an unlawful activity there can be little doubt but that *Bolton v. Stone* would have been decided differently. In their Lordships' judgment *Bolton* v. *Stone* did not alter the general principle that a person must be regarded as negligent if he does not take steps to eliminate a risk which he knows or ought to know is a real risk and not a mere possibility which would never influence the mind of a reasonable man. What that decision did was to recognise and give effect to the qualification that it is justifiable not to take steps to eliminate a real risk if it is small and if the circumstances are such that a reasonable man, careful of the safety of his neighbour, would think it right to neglect it.
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> In the present case there was no justification whatever for discharging the oil into Sydney Harbour. Not only was it an offence to do so but it involved considerable loss financially. If the ship's engineer had thought about the matter there could have been no question of balancing the advantages and disadvantages. From every point of view it was both his duty and his interest to stop the discharge immediately.
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> . . .
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> In their Lordships' view a properly qualified and alert chief engineer would have realised there was a real risk here and they do not understand Walsh J. to deny that. But he appears to have held that if a real risk can properly be described as remote it must then be held to be not reasonably foreseeable. That is a possible interpretation of some of the authorities. But this is still an open question and on principle their Lordships cannot accept this view. If a real risk is one which would occur to the mind of a reasonable man in the position of the defendant's servant and which he would not brush aside as far-fetched and if the criterion is to be what that reasonable man would have done in the circumstances, then surely he would not neglect such a risk if action to eliminate it presented no difficulty, involved no disadvantage, and required no expense."

20. There are at least two points to note about this important passage. First Lord Reid uses the expression "a real risk", which was the expression used by the judge in this case. Secondly one cannot in this context separate the enquiry as to reasonable foreseeability of damage from the related enquiry what is it reasonable to do in the light of the reasonably foreseeable risk. It may be reasonable to take no steps to eliminate a risk which is unlikely to eventuate and which will be of small consequence if it does. The social utility of the activity which gives rise to the risk falls to be considered. Carelessly leaking oil into a harbour is an activity of no value from which it is obvious that anyone should desist if it gives rise to only a very small risk of a disastrous fire. Playing cricket on the other hand is a socially useful activity – players should not be expected to desist unless at the location at which the game

takes place it poses a risk the nature and extent of which outweigh the undesirability and/or inconvenience and/or difficulty and/or expense of eliminating the risk by stopping play at that ground and/or finding another more suitable location.

21. The latter point emerges clearly from Lord Hoffmann's speech in *Tomlinson v Congleton Borough Council* [2004] 1 AC 46. On a hot day the eighteen year old claimant dived into a lake from a standing position in shallow water. He suffered catastrophic injuries. The question arose whether the defendant owners of the country park where the lake had formed in a disused quarry should have taken steps other and more effective than they did in order to ensure that the claimant did not suffer injury by reason of the danger from diving into the lake, in which swimming was in any event prohibited as was proclaimed on prominently displayed notices. At pages 82-83 under the rubric "The balance of risk, gravity of injury, cost and social value", Lord Hoffmann said this:-

> " 34. My Lords, the majority of the Court of Appeal appear to have proceeded on the basis that if there was a foreseeable risk of serious injury, the Council was under a duty to do what was necessary to prevent it. But this in my opinion is an oversimplification. Even in the case of the duty owed to a lawful visitor under section 2(2) of the 1957 Act and even if the risk had been attributable to the state of the premises rather than the acts of Mr Tomlinson, the question of what amounts to "such care as in all the circumstances of the case is reasonable" depends upon assessing, as in the case of common law negligence, not only the likelihood that someone may be injured and the seriousness of the injury which may occur, but also the social value of the activity which gives rise to the risk and the cost of preventative measures. These factors have to be balanced against each other.
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> 35. For example, in *Overseas Tankship (UK) Ltd v Miller Steamship Pty Ltd (The Wagon Mound (No. 2))* [1967] 1 AC 617 , there was no social value or cost saving in the defendant's activity. Lord Reid said (at p 643):
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> "In the present case there was no justification whatever for discharging the oil into Sydney Harbour. Not only was it an offence to do so, but it involved considerable loss financially. If the ship's engineer had thought about the matter, there could have been no question of balancing the advantages and disadvantages. From every point of view it was both his duty and his interest to stop the discharge immediately."
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> 36. So the defendants were held liable for damage which was only a very remote possibility. Similarly in *Jolley v Sutton London B.C.* [2000] 1 WLR 1082 there was no social value or cost saving to the Council in creating a risk by leaving a derelict boat lying about. It was something which they ought to have removed whether it created a risk of injury or not. So they

> were held liable for an injury which, though foreseeable, was not particularly likely. On the other hand, in *The Wagon Mound (No. 2)* Lord Reid (at p. 642) drew a contrast with *Bolton v Stone* [1951] AC 850 in which the House of Lords held that it was not negligent for a cricket club to do nothing about the risk of someone being injured by a cricket ball hit out of the ground. The difference was that the cricket club were carrying on a lawful and socially useful activity and would have had to stop playing cricket at that ground.
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> 37. This is the kind of balance which has to be struck even in a situation in which it is clearly fair, just and reasonable that there should in principle be a duty of care or in which Parliament, as in the 1957 Act, has decreed that there should be. And it may lead to the conclusion that even though injury is foreseeable, as it was in *Bolton v Stone*, it is still in all the circumstances reasonable to do nothing about it."

22. We can see this balance being struck in the cases concerned with tree roots or allied matters. I need mention only two. *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] 1 QB 485 was concerned with falls of earth and rubble from a mound onto adjacent land and buildings. The falls were due to natural weathering and the nature of the soil. The Defendant owners of the land on which the mound stood knew that the instability of their land was a threat to the adjoining properties. The question arose as to the scope of their duty to their neighbours. Having noted, at page 518, that "the mere fact that there is a duty does not necessarily mean that inaction constitutes a breach of the duty", Megaw LJ giving the leading judgment in this court, said at page 524:-

> "The duty is a duty to do that which is reasonable in all the circumstances, and no more than what, if anything, is reasonable, to prevent or minimise the known risk of damage or injury to one's neighbour or to his property. The considerations with which the law is familiar are all to be taken into account in deciding whether there has been a breach of duty and, if so, what that breach is, and whether it is causative of the damage in respect of which the claim is made. Thus, there will fall to be considered the extent of the risk; what, so far as reasonably can be foreseen, are the chances that anything untoward will happen or that any damage will be caused. What is to be foreseen as to the possible extent of the damage if the risk becomes a reality? Is it practicable to prevent, or to minimise, the happening of any damage? If it is practicable, how simple or how difficult are the measures which could be taken, how much and how lengthy work they involve, and what is the possible cost of such works? Was there sufficient time for preventive action to have been taken, by persons acting reasonably in relation to the known risk, between the time when it became know to, or should have been realised by, the Defendant, and at the time when the damage occurred? Factors

> such as these, so far as they apply in a particular case, fall to be weighed in deciding whether the Defendant's duty of care requires, or required, him to do anything and, if so, what."

23. *Solloway v Hampshire County Council* [1981] 79 LGR 449 was a tree roots case. Amongst other issues, an issue arose as to the foreseeability of there being pockets of clay in the gravel upon which the damaged houses predominantly sat. Another issue concerned the question whether any operation on the trees, short of felling them, would have eliminated the risk posed by the roots if there were exceptionally dry weather and if those roots were passing through clay. Amongst many helpful passages in the judgments of this court I particularly note the following. In the judgment of Dunn LJ:-

> "The judge dealt with the question of foreseeability in two parts, by dealing first with what he called "the nature of the duty" and then with its scope. In reality the scope of the duty depends upon the extent of the risk of damage and the two should be considered together.
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> In considering whether there is a breach of duty, the extent of the risk and the foreseeable consequences of it have to be balanced against the practicable measures to be taken to minimise the damage and its consequences. (page 457)
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> . . .
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> I think that the possibility of an intrusion of clay under No 72, which is the real question, was unlikely. I would hold that it was no more than a vague possibility, not a real risk in the words of Lord Reid in [*The Wagon Mound No 2*], but, assuming that there was a real risk or chance, I would say that it was an outside chance and that outside chance has to be balanced against the practical steps which could reasonably have been taken by the Defendants to minimise the damage. (page 458)
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> . . .
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> Felling and lopping of trees, as suggested by the judge, might give rise to all sorts of complaints and difficulties, quite apart from its interference with public amenities, and in the end such action might well not be appropriate because the evidence was that the only effective method of locating the pockets of clay would be by sinking bore holes at every house adjacent to a tree.
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> . . .

> Balancing the risk of pockets of clay under No 72 with the steps necessary to deal with that risk, in my judgment there was no breach of duty by the Defendant in this case and so no nuisance." (page 459)

At page 460 Sir David Cairns said this:-

> "To say that a risk of damage is reasonably foreseeable means that it is foreseeable not merely as a theoretical possibility but as something, the chance of which occurring, is such that a reasonable man would consider it necessary to take account of it. The risk of being struck by lightening when one goes for a walk is not a reasonably foreseeable risk. I should be prepared to hold that the risk in this case was not a reasonably foreseeable risk.
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> If, however, it could be said to be a reasonably foreseeable risk, I am satisfied that it was a risk such that the cost and inconvenience of taking any effective steps to remove it or reduce it would be quite out of proportion to that risk. There is nothing in the evidence to show that No 72 Shirley Avenue was any more at risk than any other house in the avenue. Nor is there anything to show that any operation on the trees, short of felling, would have made the roots safe if there were exceptionally dry weather and if the roots of any particular tree were passing through clay.
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> Clearly it would have been unreasonable for the council to remove all the trees in the avenue and it is unlikely that Shirley Avenue was the only road in the area where there were trees in proximity to houses."

24. The approach in these cases was discussed by the House of Lords in *Delaware Mansions* to which I referred at paragraph 12 above. That case was essentially concerned with the recoverability of the cost of abating a nuisance, but in delivering the leading speech Lord Cooke of Thorndon discussed the authorities bearing on the broader questions with which this appeal is concerned and impliedly approved their application to a case such as the present.

25. The judge here directed himself by reference to some of these authorities. The question is whether he correctly applied their guidance.

The Grounds of Appeal

26. The three principal grounds of appeal are that:

(1) The judge erred in holding that the damage to the Claimant's property was not reasonably foreseeable;

(2) The judge was wrong in holding that Islington had followed a prudent regime of tree management by pruning;

(3) The judge was wrong in holding that the Defendants were not liable for the September 2003/Spring 2004 damage until they were given notice of that damage and/or information in respect of that damage.

27. Ground 3 makes little sense. The judge's finding was simply that the Defendants were not liable for the 2003/2004 damage. Ground 3 elides the enquiry into foreseeability of that damage with the question at what point in time the Defendants came under a duty to remove the trees in the light of the damage which they were known to have caused. But Ground 3 nonetheless points up the question raised by Ground 1, which is essentially whether the judge was justified in concluding that before 2003/2004 the Defendants could not reasonably have foreseen a real risk of damage, in the sense of a risk of which they needed to take account by considering whether there were reasonable steps which could have been taken with a view to eliminating or minimising that risk. However, as I have endeavoured to point out, Ground 1 cannot be looked at in isolation since one cannot separate the question of foreseeability of the nature and extent of the risk from the enquiry as to the reasonableness of the steps needed to eliminate or minimise it – the balancing exercise to which Lord Hoffmann referred in *Tomlinson v Congleton*.

28. Against the background of this discussion one can identify the real essence of the judge's conclusion as contained in the following paragraphs of his judgment:-

> "99. The Claimant's case is since the affected property was on London clay and the London plane trees were large, and not situated far away from the Claimant's property which was likely to have shallow foundations this gives rise to a foreseeable risk of damage.
>
> 100. Clearly it gives rise to the possibility of damage. Both Mr Kelly, the Claimant's arboriculturist and Dr Hope, the Defendants, agreed that prior to damage occurring both the First and Second Defendants would or ought to have known of the potential for trees to cause damage to nearby buildings on clay soils and that there was no reliable methodology for predicting precisely which trees would cause damage to buildings.
>
> 101. An attempt by the Arboriculturist Association to develop a computerised model capable of assessing the future risk of subsequent damage to buildings was abandoned because it was demonstrated as being impossible to predict. The study

involved eminent mathematicians, computer experts and arboriculturists.

102. Mr Kelly's view was that pruning and crown reduction is and was not the solution, it serves to stimulate growth in fact.

103. Removal of the trees it seems is the only reliable way of removing the risk of damage.

The Second Defendant, Local Authority

104. In an area like Highbury New Park with established gardens with mature vegetation and Victorian houses, roads lined with London plane trees a responsible local authority mindful of its obligation under Town and Country Planning Acts and the preservation of such amenities as an established treed environment could not reasonably contemplate the desertification of such a neighbourhood by wholesale tree felling to avoid a possible risk of damage. Such an approach it seems commended by the Claimant almost gives rise to strict liability.

105. Pre 2003 a reasonable local authority in administering a conservation area such as that containing Highbury New Park would have been fixed with the knowledge of a possible risk of damage from its street trees. As to No. 18 it was not until the 3 June 2005 that the status of protected trees namely the Second Defendant's [sic – First must be intended] London plane T1 [T4], and the Claimant's own Tree of Heaven T6 became the subject of inquiry. The Claimant gave notice that the Tree of Heaven was to be removed and permission for felling was given."

106. The Second Defendant's own street trees were not implicated at that stage. There is no evidence to suggest that they were uncooperative or were possessed of information that made a possible risk of damage a real risk.

. . .

114. The major consequential damage to the structure of the house was complete by the Spring of 2004.

115. There is no basis, in my judgment, to infer that the Second Defendant's knew or should have known that there was a real risk that its street trees and their root system had caused or would cause damage to the Claimant's property and building either alone, or in conjunction with other tree systems.

116. After the letter of 2 March 2010 as a reasonable local authority they would have been aware that there was a real risk

> that their trees and that of the First Defendant would continue to cause damage to the Claimant's property namely by varying its load bearing capacity by desiccation and heave and further consequential damage to the structure and fabric of the building.
>
> **The First Defendant, The Housing Association**
>
> 117. They came into the picture earlier than the local authority. As a housing association with an estate comprising period properties such as No. 20 Highbury New Park and others, and more modern dwellings they would as prudent public landlords have been in a similar position to the local authority so far as knowledge is concerned and access to expert arboriculture advice."

29. Ground 2 of the grounds of appeal refers to paragraph 126 of the judgment, where the judge purported to set out his conclusions concerning the liability of the Second Defendant, Islington. It reads as follows:-

> "Conclusions – Liability, Second Defendant"
>
> The local authority I am satisfied had followed a prudent regime of tree management by pruning. By April 2009 after notification it was clear that its trees were implicated and that felling was the only way in which the nuisance could be abated."

30. It is plain from a comparison with paragraphs 112 and 116 of the judgment that the date of April 2009 appearing in paragraph 126 is an error and that March 2010 must have been intended. Nothing however turns on this. More relevantly, on reflection I doubt if the judge's reference to a prudent regime of tree management by pruning relates to the period prior to 2004. This paragraph follows several in which the judge had been considering the position post-2004 and, as I have already remarked, the judge did not I think always bear clearly in mind the distinction between the enquiry as to the 2003/2004 damage and the enquiry as to the date on which the Defendants should first have removed the trees. Islington deployed no evidence at trial concerning their policies or tree management regime prior to 2004. Indeed Islington's pleaded case as to its system of regular maintenance of trees, whilst responding to an allegation of a failure to manage which was relevant only if it was an allegation relating to the period before, and indeed substantially before, 2003/2004, particularised only pruning in and after June 2004. It was said at trial that direct evidence of the management regime before that date was no longer available. The judge was not asked to draw an inference that the pre-2004 regime would have been the same as that which prevailed thereafter. At trial the Claimant advanced no evidence in support of the allegation that, prior to the damage in 2003/4, the Defendants had failed to pollard, crown or otherwise manage or control the growth of the trees. It was no part of the case advanced by the Claimant at trial that pruning of the trees prior to 2003/4 would have eliminated or even reduced or minimised the risk

of damage. The Claimant's case was advanced upon the basis of the report of her expert arboriculturalist, Mr Oisin Kelly. So far as I can see the topic of pruning is not mentioned in the body of his report. In his professional profile appended to his report Mr Kelly mentioned that he had co-authored a paper entitled "Tree-related subsidence: Pruning is not the Answer". This was referred to in cross-examination of Mr Kelly by Miss Taylor for Mosaic, although the paper was not before the court and its content was not put to the witness. I shall return to Mr Kelly's oral evidence in just a moment.

31. Perhaps unwisely, Islington contended in its first skeleton argument in opposition to the appeal that the judge was entitled to infer from the evidence as to the pruning regime which obtained after 2004 that the regime in place prior to that date was similar. As I have already remarked this was I think in all likelihood a misunderstanding of the judge's finding. However it led to a curious turn of events as the Claimant's solicitors subsequently came across evidence not hitherto deployed in the action which demonstrated that Islington did not prior to 2004 have in place a regime of tree management by pruning. This evidence demonstrated that prior to 2003/4 whilst all highway trees were inspected on a yearly basis, Islington had managed its tree stock on a predominantly responsive basis, with trees being pruned in response to complaints and requests. The 2002 document "A Policy for Trees in Islington" to which I have already referred above announced an intention to introduce for the future a proactive cyclical pruning regime for highway trees. In the same document it was also said:-

> "It is widely accepted that this type of management system
>
> - Greatly reduces the number of complaints in relation to street trees,
> - Directly improved customer satisfaction,
> - Is more cost efficient in the long term – lower pruning costs per tree,
> - Protects the Council from negligence claims,
> - Means that the Council will be acting reasonably and prudently,
> - Reduces the chances of accidents/subsidence occurring in the first place,
> - Has been shown over a period of years to reduce significantly the cost of subsidence claims in relation to trees.
>
> This type of management regime is recommended in the document 'A Risk Limitation Strategy for Tree Root Claims'. This was produced by the London Tree Officers Association in association with the Countryside

> Commission. The document was written by a working group that included Zurich Municipal and as number of Loss Adjusters including Ufton Associates and Ellis and Buckle. It has been adopted by most of London Boroughs and is widely considered to be the best way to maintain trees close to buildings on shrinkable clay soils.
>
> This form of management has been demonstrated by other London Boroughs to help reduce overall costs over a period of years. Though initially such a strategy may be considered expensive, overall long-term savings to the Council will be realised through a reduction of overall payments made to third party claims.
>
> Zurich Municipal has identified that Islington has the highest overall costs for subsidence claims out of all the local authorities that they insure. This is felt to be largely due to the lack of a cyclical pruning programme."

32. The policy was updated in 2009 and the 2009 policy document makes reference to the earlier version. The later policy was apparently not formally adopted as a result of a change of administration, but nothing turns on this. Both policies were located on the internet in March 2012 by the Claimant's solicitor using a Google search to carry out research in relation to local authorities' tree maintenance policies. It transpires that the policies could have been accessed by various links, not least a Google search with the search term "Islington tree policy". The documents were available for download from Islington's website. Neither policy had been disclosed in the action by Islington. On the appeal the Claimant sought to adduce this fresh evidence. It was said in the application to be relevant to two issues:

i) The judge's apparent finding that Islington had before 2003/4 had in place a prudent regime of pruning and

ii) The argument developed in the Claimant's skeleton arguments for the appeal to the effect that Islington ought to have had a cyclical pruning policy and that this would have prevented or minimised the risk of damage from tree roots, thereby demonstrating that there was available an alternative response to actual or constructive knowledge that a tree posed a risk of causing damage to that of simply removing all trees posing a similar risk.

At the hearing before us Mr Palmer placed emphasis on the first of these issues rather than the second, no doubt recognising that so far as concerned the second issue the Claimant could not hope to use this material to supplement the expert evidence upon which she had relied at trial. It was only very faintly suggested that admission of the further evidence should lead to a wholesale re-evaluation of the expert evidence given at trial, a route which if permissible might have led in turn to a debate as to whether

the interests of justice rendered a re-trial imperative – see *Transview Properties v City Site Properties* [2009] EWCA Civ 1255.

33. It is remarkable that these documents were not disclosed by Islington and it accepts that they should have been. There was apparently an accidental oversight. On the other hand it is an almost equally remarkable feature of the litigation that the nominal claimant, Mrs Berent, was herself aware of the existence of these policies, or at any rate the later one. Mrs Berent was an Islington councillor between 2002 and 2010, being elected Mayor in 2009. She sat on the Sustainability Review Committee which scrutinised the draft 2009 policy and she was for that purpose provided with a copy thereof.

34. In these circumstances Islington was able to pursue the unattractive but cogent argument that this evidence which it should undoubtedly have disclosed could, with reasonable diligence, have been obtained by the Claimant for use at the trial. It is only half an answer to that point, and an unprincipled one at that, that the claim is a subrogated claim and that Mrs Berent is of relatively advanced years – we were not actually told her age and I merely reflect a submission, I hope without inaccuracy or disrespect. Fortunately it is I think unnecessary to resolve this somewhat intractable point. It is well-established that fresh evidence will only be admitted on appeal where, if given, it would probably have an important influence on the result of the appeal. It is at this point that I must return to the evidence deployed at trial.

35. I have already referred at paragraph 28 above to the written expert evidence given by Mr Kelly at trial in support of the Claimant's case. In short it did not support the Claimant's pleaded case insofar as that alleged a failure properly to manage the trees by pruning prior to 2003/2004. The manner in which the battle lines were drawn emerges most clearly from the joint statement of the arboricultural expert, Mr Kelly, and his opposite number, Dr Hope. Under the rubric "foreseeability" paragraph 8 of their joint statement reads as follows:-

> "8.1 It is agreed that prior to damage occurring, both the First and Second Defendants would, or ought to, have known of the potential for trees to cause damage to nearby buildings on shrinkable clay soils.
>
> 8.2 It is agreed that there is no reliable methodology for predicting precisely which trees will cause damage to which buildings. However, in Mr Kelly's opinion this is not the same as identifying which trees pose a foreseeable risk of damage.
>
> 8.3 In Mr Kelly's view, prior to the damage occurring, it was or ought to have been apparent to the First and Second Defendants that the trees under their respective control were growing on a shrinkable clay soil within rooting distance of the Claimant's property. Mr Kelly notes that "Trees Roots and Buildings" (2nd Edition, 1989) Cutler & Richardson report cases of London Planes causing tree related subsidence damage

> at distances of up to 15m. That is not to say that London Planes cannot cause damage at distances in excess of 15m, but in this instance both the First and Second Defendant's Plane trees were at around 12m distant. As such, in the absence such steps to ensure encroachment of roots did not occur there was a real and foreseeable risk of damage to the Claimant's property. Mr Kelly notes Dr Hope's views that this position is unrealistic and untenable but respectfully disagrees. In Mr Kelly's view, it is inevitable that for any land owner maintaining hundreds or thousands of trees on clay soils close to low rise buildings, some of those trees will cause damage some of the time. However, it would be disproportionate on this basis to fell all the trees. Rather there are practical risk avoidance and risk limitation steps available to the land owners. For instance, Mr Kelly is aware that the Second Defendant undertakes pruning of street trees precisely for the purpose of reducing subsidence risk. In Mr Kelly's opinion, it would also be reasonable for a landowner to identify and remove those trees which by virtue of their size, type, location were likely to pose the greatest risk. Further, once a tree has caused subsidence, early and effective action to prevent the ongoing nuisance is generally effective in limiting repair costs and any associated claim.
>
> 8.4 In Dr Hope's opinion the damage was not foreseeable to the First or Second Defendants. Dr Hope accepts that the First Defendant manages thousands of trees, and that they would know that trees can cause subsidence damage. However, it would be impossible for them to know which trees, if any, would actually cause subsidence, and to negate any possible risk of damage they would need to remove all trees growing within the borough that are close to buildings. For example, in practice, this would mean that all Plane trees within 15.0 metres of buildings would have to be removed. Dr Hope is of the opinion that if Mr Kelly's assertion is correct, every tree growing close to any house on a plastic clay soil would be a real risk, and they would therefore have to be removed. Dr Hope considers this position to be unrealistic and untenable."

36. There is in paragraph 8.3 of the joint statement passing reference to pruning, although there is no assertion that in this case the relevant trees should have been identified as posing a greater risk than others, or that they should have been subjected to a regime of pruning other than that which was in fact adopted, whatever that may have been, still less that pruning would in this case have been effective either to eliminate or to minimise the risk. Mr Kelly was asked about this in cross-examination by Miss Taylor for Mosaic. There was some debate before us as to the context in which some of his evidence should be read. I have read and re-read that evidence with care. The closest that Mr Kelly came to supporting the Claimant's pleaded case as to failure by the Defendants prior to 2003/4 appropriately to manage or control the growth of the

trees by pollarding, crowning or, presumably though not specifically pleaded, pruning, was in the following passage:-

> "Q. The problem is, isn't it, knowing that you have a tree and it is near a house is one thing, knowing that it is going to cause damage or having to take steps to remove it might lead to an overly defensive practice in having to remove all the trees, mightn't it?
>
> A. I don't think I would go that far. It is a difficult situation. You have to forgive me, my Lord, because I find it difficult to separate the technical from the legal issues and I don't pretend to understand foreseeability in its full legal sense.
>
> Absolutely - - I think the area of disagreement between myself and Dr Hope is not actually in terms of foreseeability, I think it is in terms of what you do once you foresee the risk. I think we both agree that both defendants would or ought to have known that the trees could cause damage. It is then what you do with that knowledge after that fact that I think we disagree on. It will be for Dr Hope to say, but I believe that's our area of disagreement.
>
> My view is that yes, but just because you can't predict it on an individual level doesn't mean that you can't take a risk management approach across your whole population of trees and there are things that you can do in respect of the population as a whole. You can try and identify those trees which you believe pose the most risk based on claim history, based on geology, based on proximity and the building type and a lot of that will come out from claim history and you tend to get hot spots of claims.
>
> So you can remove those trees which you think provide the greatest risk. Once you are notified of a claim you can respond quickly to try and minimise further damage and prevent the claim becoming protracted and in the middle there is an area where certain trees you may choose to prune. The only difficulty with pruning is that in order for it to be effective it has to be very severe and very often but there is a range of things that you can do.
>
> My position, where I differ from Dr Hope I believe, is that I do not believe that just because you can't predict which individual trees will cause damage that means that you can't foresee. I think you can foresee and I think it is what you do with that foreseeability that counts."

Miss Taylor followed up with this question:-

> "Q. Can I ask you about pruning because you say in some trees it may be possible to prune but it would have to be very serious and it would have to be very often. Would it be fair to say that your general view is that pruning isn't normally the solution to tree root induced subsidence?"

to which the answer was:-

> "Generally speaking, yes. I think there are very large significant difficulties with pruning.
>
> Q. We can see for example on page 173 where you have put your profession profile that you have co-authored an article - -
>
> A. Yes, "Pruning is not the answer".
>
> Q. "Pruning is not the answer". So your view is normally you have to get rid of the tree?
>
> A. Where it has been shown to be a cause, yes."

Mr Palmer submitted that Miss Taylor's first question in this last sequence beginning with the words "Can I ask you about pruning . . ." related to, or will reasonably have been understood by Mr Kelly to relate to, a case where a tree had already been implicated in causing actual subsidence. I think that Mr Palmer might be right about this, and that the subsequent answers of Mr Kelly tend to suggest that he is. The earlier answer about pruning is not however similarly limited. It seems to proceed upon the premise that risk management will first identify hotspots or problem areas and that thereafter a middle course short of removal may be pruning, with the qualification that in order to be effective it must be both very severe and very frequent. The reason for this qualification in fact emerges from Mr Kelly's paper "Pruning is not the Answer" – pruning promotes growth and if not very severe and very frequent may actually lead to increased water extraction. Mr Kelly did not say this in evidence but the judge records at paragraph 102 that pruning serves to stimulate growth, as is of course well known to any gardener. This passage lends no support to the notion that there was in this case a breach of duty in failing properly to control growth by pruning prior to 2003/4.

37. Mr Kelly was asked more about risk management. He recognised clearly that there was a balance to be struck between "the various different constraints on the action you can take", particularly environmental impact. Mr Kelly was asked whether the implications of his risk assessment profile was that all trees in a road such as Highbury New Park would have to be removed. That was not his approach. He said this:-

> "No. I don't believe they would. I believe that once I had been provided with - - for the same reason we talked about earlier in terms of the fact that you can't predict which individual trees will cause damage to which properties, the very point that is

> making is that you can go into a road with similar trees and similar properties and similar distances and you don't know which ones in advance will cause damage to which properties. So my response to damage occurring to 18 Highbury New Park would not be to remove all the trees. It would be to remove the trees that are causing damage to 18 Highbury New Park.
>
> Q. So you wait for the notification of damage then you remove the tree?
>
> A. Yes."

An earlier answer of Mr Kelly on the same topic was to the following effect:-

> "I do actually undertake subsidence risk management for housing associations and we go round and we try and find the trees that are closest to the properties and once we have plotted the trees and determined how far they are and look at the claims history, we look at the impacts of different decisions in terms of so what would happen if we removed all trees within X metres? Then we consider what impact would be in terms of environmental impact because there are various stakeholders such as the council who may wish to make tree preservation orders and things like that, and of course the cost in relation to the actual cost of claims that are occurring, and we try and find a balance that balances those various different constraints on the action you can take.
>
> So we take those trees out and in addition to that, where we have a reasonable expectation that a tree is actually causing damage we act quickly to remove that tree and we find that that massively reduces the costs of claims against the housing associations we act for."

38. I appreciate that in looking at this evidence one must be careful to distinguish answers which relate to what should be done once a tree has been positively implicated in causing damage to property as opposed to what should be done at the earlier stage where the prospect of the tree causing damage remains merely a risk. But Mr Kelly said nothing to suggest that either Highbury New Park as a whole or the trees outside No 18 should have been identified as a hotspot or problem area. Looking at his evidence as a whole, Mr Kelly in my view came nowhere near suggesting that Islington or Mosaic should in the years before 2003/2004 have identified the three relevant trees as posing a risk to No 18 of a nature and extent which imposed upon them a duty to take some preventative or remedial action over and above whatever regime of tree management was already in place. On this short ground it is plain that the appeal must fail. The judge's conclusion represents the outcome of the balancing exercise which is required. On the basis of the evidence given in this case, the exercise could yield only one answer. It must again be remembered that the focus at trial was on the cause of the damage to No 18 and furthermore that much of the trial

was taken up with the debate whether Islington and Mosaic should have responded to the occurrence of damage to No 18 by removing the trees earlier than they did. It may be that the Claimant hoped to establish that the nature and extent of the foreseeable risk to No 18 was such that Islington and Mosaic should long before 2003 have removed the trees. Perhaps that is why no single question was put to the Defendants' expert, Dr Hope, regarding management by pruning. However that may be, the evidence in my view came nowhere close to establishing the liability of Islington and Mosaic for the damage caused to No 18 in 2003/4, whether on the basis that they should have long before removed the trees or on the basis that in the earlier years they should have carried out more pruning or other risk prevention measures. The judge was in my view right to dismiss the claim in respect of that damage and I would dismiss the appeal.

The Cross-appeal

39. The judge's award of £5000 was in respect of the period "from the autumn of 2010 to judgment, 25 May 2011". Even if that can reasonably be regarded as a period of nine months, that implies an award for distress, inconvenience, loss of amenity etc, calculated at £6,666 per annum. Mr Palmer accepted that in the light of other similar awards this was excessive and could not be sustained. He argued for an award of £500 in respect of nine months, saying that in a recent similar case a claim for compensation on the same basis at the rate of £1800 per annum had been put forward and awarded at first instance. However the claim in this case was pleaded on a less ambitious basis. It was alleged that the Claimant "had had to live with the constant poor state of her properties since 2003" and that pursuant to the decision in *Eiles v London Borough of Southwark* [2006] ALL ER (D) 237 she should be awarded general damages for distress and inconvenience at £200 per year from 2003 to date (2011) i.e. £1400 and provisionally a further £1600 to compensate her for the disruption likely to be caused during remedial works, including the requirement to vacate all or part of the property. The judge was only prepared to allow damages on the first basis and for the period stated and there is no appeal against his decision not to award damages on a wider basis. The Respondents accordingly submitted that the appropriate figure would be £133, on the footing presumably that the relevant period should be regarded as eight months rather than nine.

40. I can see no basis upon which we should depart from the pleaded case, which claims damages calculated at £200 per annum. I would substitute for the judge's award an award of £150, treating "the autumn of 2010" to 25 May 2011 perhaps generously as a period of nine months. I agree with the observation of Ramsey J in *Eiles* that damages awarded under this head are intended to provide modest, not generous compensation. In order that litigants may properly be advised, it is important that there is consistency in such awards and *Eiles* seems to me to establish a benchmark from which it would be unwise to depart in a case where the Claimant has formulated her claim by reference thereto. I would therefore allow the cross-appeal to this extent.

Lord Justice Kitchin :

41. I agree.

Lord Justice Mummery :

42. I also agree.