Claim No. C20CL016

In the County Court at Central London

TCC List

His Honour Judge Parfitt

(1) VICTOR PATTICHIS
(2) MARIA PATTICHIS

Claimants

- and -

LONDON BOROUGH OF ENFIELD

Defendant

JUDGMENT

Dates: 16 to 17 November 2016

David Thomas instructed by **Lyons Davidson** for the Claimants

James Sharpe instructed by **Clyde & Co LLP** for the Defendant

1. The Claimants are the owners and occupiers of a property known as 12 Riverway, London, N13 5LJ ("12 Riverway"). They claim damages because of the nuisance or negligence of the Defendant which allowed tree roots to damage 12 Riverway in late 2009.

2. The Defendant is the local authority for 12 Riverway. Until its removal as a result of the subsidence which is the subject of this claim, in the pavement outside 12 Riverway was a Norway Maple tree ("the Tree").

3. The Defendant admits that the Tree caused the subsidence and has agreed the majority of the damage claimed in the sum of £12,853.25. There are two smaller quantum issues: £1500 for distress and inconvenience between 2009 and late 2014 when the various items of decoration were completed and £1,550.40 of decoration works which were not covered by the Claimants' insurance policy.

4. The substantive issue which was the subject of the trial was whether or not the Defendant was in breach of its duty to the Claimants. This was formulated in various ways by the parties but the key question is whether or not the law obliged the Defendant to do anything which would have prevented the subsidence from occurring.

5. The Claimants were represented by Mr Thomas, the Defendant by Mr Sharpe. Both Counsel deserve praise for the quality of their submissions and the efficiency with which they managed the case.

6. The Claimants' case is that given the state of knowledge in the years running up to 2009 the Defendant should have had a pro-active management plan in respect of the risk of subsidence that could be caused by trees such as the Tree. If such a plan had been in existence then the Tree would have been identified as a suitable subject of substantial crown reduction which, on the balance of probabilities, was likely to have prevented the subsidence from occurring.

7. The Defendant's case is that the risk of subsidence being caused by the Tree was not sufficiently serious to mean it had any relevant duty to take preventative steps and in any event any such steps as are suggested by the Claimants would not on the balance of probabilities have prevented the damage to 12 Riverway.

The Law

8. Both Counsel took me to the case of *Berent v LB Islington* [2012] EWCA Civ 961 in which between paragraphs 19 and 24 Tomlinson LJ summarises the material law. The Court of Appeal upheld the decision that there was no duty to take steps premised on the particular trees the subject of that case causing subsidence damage until such a risk had become apparent at the site in question. At first instance the judge had found that the only realistic way of reducing any risk would have been the removal of all trees of a similar risk profile in the Borough and that would not be reasonable given the extent of the subsidence risk.

9. Mr Thomas, for the Claimant, took the court to *The Wagon Mound (No. 2)* [1967] 1 AC 617 at 643G. The purpose of this was to suggest a two stage approach: (1) would a reasonable person identify a real risk in the circumstances; and (2) what action would be required to eliminate that risk. It seems to me that although such an approach might

be useful, it is not a requirement of the law and overly parses Lord Reid's discussion. The approach the law requires is as summarised by Tomlinson LJ in *Berent* at paragraph 20 (by reference to Lord Reid but also to Lord Hoffman in *Tomlinson v Congleton BC* [2004] 1 AC 46): Tomlinson LJ said*…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.*

10. Tomlinson LJ illustrates this matrix by referring to the facts of *The Wagon Mound (No.2)* and *Bolton v Stone* [1951] AC 850. In both cases the damage that occurred was a relatively low risk but in *The Wagon Mound* discharging oil in the harbour was a bad thing to do but in *Bolton v Stone* playing cricket was a good thing. Consequently, a reasonable person would act in the former but not in the latter.

The Risk Factors

11. Mr Sharpe accepted that the Tree presented a number of what he well described as "bare risk factors". These were agreed between the parties' experts: Mr Hart for the Claimant and Dr O'Callaghan for the Defendant. They were: 12 Riverway was a relatively old property so unlikely to have foundations built by reference to any potential tree risk; 12 Riverway was built on London clay, a soil type that was particularly susceptible to subsidence caused by tree roots; the Tree was located a distance of about 6 metres away from 12 Riverway which was at the edge of the zone of influence where 50% of subsidence cases caused by this genus of tree had occurred.

12. There was a dispute as to whether or not there was an additional risk factor because of the general location in which the Tree was situated. It may have been, as suggested by Mr Sharpe, that the reason for the focus on this aspect were some comments in *Berent* about it being possible to locate particular *hotspots* which would enable a focused risk management strategy.

13. The attempt to place 12 Riverway within such a hotspot was based not on any disclosure from the Defendant but from material that Mr Hart had access to as a result of a freedom of information request from his previous employment. With this information as a starting point and with further analysis by the experts prior to their joint report, the experts agreed in their joint statement that the Defendant had been notified of 17 subsidence claims within a 2-mile radius of 12 Riverway.

14. Mr Hart had plotted a number of potential claims on to a map but his plotting was not refined to identify which were the 17 claims referred to in the joint statement. Moreover, in his oral evidence he accepted that it must at least be uncertain as to whether it would be valid to draw an inference from the level of claims identified and that any proper risk reduction strategy would need to zoom out and look at more data in order to give a better basis for conclusions.

15. I recognise that Mr Hart expressed his opinion that the number of claims was relatively high even for a London Borough and that the claims against the Defendant were likely to be only 10 per cent of the total subsidence claims. Mr Hart accepted his opinions were not based on any empirical study – or as Dr O'Callaghan put it, was not something that had been peer reviewed, and in my judgment Mr Hart's views, of themselves, are not sufficient to establish that Riverway was in any meaningful sense within a hot-spot.

16. It seems to me that to be meaningful a potential hot-spot would have to be identified by looking at claims which do or do not fit a particular materiality profile within and without the hotspot area and for there to be a likely explanation for the within claims to be grouped together so as to give rise to an inference that there was a definable geographical area which might require special consideration (an example given by Dr O'Callaghan was housing within a particular estate). None of that level of serious analysis was done in this case on the evidence or anything similar that might enable a "hot-spot" conclusion to be reached on the balance of probabilities.

17. I conclude that the Tree was no more of a risk than any of the other Norway Maple trees in the Defendant's borough that were situated up to 6 meters away from pre-war housing stock built on London clay.

The Likely Damage if the Risk Occurs.

18. There was little evidence about the consequences of subsidence. Plainly, it causes material and significant damage to property but at least one of the articles I was invited to read referred to the damage being largely cosmetic. At the same time the facts of the present case, where the bulk of the quantum case is agreed at over £12,500 show that even cosmetic damage can result in a significant financial loss for homeowners / insurers. The figures from Mr Hart's previous employer's freedom of information request present a large number of relatively small value claims (in the hundreds of pounds) with a handful of claims in the tens of thousands. I conclude that the consequences of subsidence are such that it is not of itself *de minimis* but not so catastrophic that a no risk policy would be appropriate (a typical example of such a thing being failure of a system within an aeroplane required to enable it to fly). This conclusion means nothing more than the risk of damage is such that it would be reasonable to do something about it, if something reasonable could be done.

The Utility of Trees

19. It was not contended that trees were not a valuable feature of the urban landscape. Their utility is well summarised in a paper that both experts referred to positively and which I was invited to read, *Pruning Trees to Reduce Water Use*, BRE IP 7/06 published in May 2006 ("IP 7/06"):

> *Trees are an integral part of urban landscapes and provide important aesthetic and environmental contributions to making towns and cities more pleasant, safer and healthier to live in. Trees can give shelter from noise and wind, reduce chemical and particulate air pollution, provide shade and add value to nearby properties. Trees also benefit urban ecosystems, by sustaining biodiversity, and they reduce storm water run-off and prevent erosion.*

20. There is no doubt that trees fall within the categories of potential risk creators that can be described as a public benefit.

What Steps Might Be Taken About the Risk

21. It was common ground between the experts that it was not reasonably possible to identify that the Tree would cause subsidence to 12 Riverway - an easy example of this

was to point to the number of other Norway Maples along Riverway which were established and not the cause of any subsidence to nearby properties.

22. It was at this point in the analysis that the claimants lost in the *Berent* case: the court found on the evidence that as it was not possible until a particular point in time to identify the 3 plane trees as more likely than not to cause subsidence damage so any steps taken would have to apply to all plane trees that shared similar risk factors and the only way to mitigate the risk was to remove the trees.

23. It is the Claimants' case that the reasonable state of knowledge about tree root subsidence risk mitigation within the time frame relevant for the present claim was that there were mitigation steps that could be taken. In particular, based on IP 7/06 and extracts from a paper entitled *Risk Limitation Strategy for Tree Root Claims*, 3rd ed, revised May 2008 by the London Tree Officers Association ("LTOA May 2008"), Mr Hart stated that a biannual 70-90% pruning strategy identifying and applying to trees within the base risk factors would have more likely than not meant that the Tree would not have caused the damage the subject of this claim.

24. In his cross-examination Dr O'Callaghan accepted the evidential basis for this statement: IP 7/06 carried out research that supported the conclusions of a 2004 paper which was much referred to by both experts and Counsel during the trial but not produced to the court – Horticulture Link (Hortlink) 212 Project ("Hortlink").

25. It is clear from IP 7/06 and the evidence of both experts that this 70-90% is very different from what IP 7/06 describes as the industry standard prune aimed at reducing canopy leaf area by 30%. The evidence was that such industry standard pruning would likely have no impact on subsidence risk. The issue here is whether the Defendant was obliged to do more.

26. Mr Hart said, towards the end of his cross-examination, that in his opinion on the balance of probabilities the subsidence was less likely to have occurred if a 70-90% reduction was carried out. I assumed that the gist of this evidence was that on a balance of probability basis the Claimant could make out its causation case. I cannot consider this without some qualifications:

    (a) Mr Hart accepted that it was not possible to say or predict whether or not the Tree would cause subsidence;

    (b) He recognised that he was not a statistician. However, I note that the assertion that it would be more likely than not that subsidence would not have occurred is a probability based conclusion;

    (c) The evidence in LTOA May 2008 was that proactive cyclical pruning programmes of the type it recommended were demonstrating an 18% reduction in claims[1]. If that was right then, presumably, and I accept this wasn't explored in evidence, the 18% reduction would happen across the range of trees included within the programme. Assuming random distribution of those subsidence non-events then any particular tree is only about 20% less likely to cause subsidence.

[1] LTOA May 2008 is not specific as to what type of pruning programme is under consideration here.

It would be difficult to conclude from LTOA May 2008 that any particular tree was more likely than not to be subsidence free if such a chance was only 20%.

(d) More significantly, Mr Hart's opinion did not address when in the cycle the pruning would occur. The graph in IP 7/06 suggested a 30% reduction in soil drying in the first summer after an April 2003 pruning but the analysis stopped in January 2004. There was no evidence as to what the consequences would be for summer 2005. The Hortlink suggestion of a 2-year cycle suggests that the effects would be less in the second year. If the Defendant had carried out 70-90% reduction in 2007 then whether not such reduction would have been sufficient to prevent the damage first noticed in June 2009 might well depend on the efficacy of the treatment in the second year. The IP 7/06 graphs show an initial dramatic lessening of soil drying at both the 2 metre and 6 metre points, common sense suggests that change to the starting point is less likely to occur in the second year.

(e) I recognise the force in Dr O'Callaghan's position which is the various factors that cause any particular tree to bring about subsidence are too many and varied to be capable of accurate prediction even allowing for Hortlink type reduction.

27. In any event, the substantial question for determination in this case is whether the Defendant was in breach of duty for not following a biannual 70-90% pruning regime that should have included the Tree.

What the Defendant did

28. There was a lack of detailed information in the Defendant's disclosure and witness evidence about its subsidence related tree policies.

29. The experts were able to agree at paragraph 8.16 of the joint report that the Defendant's disclosed inspection records made no reference to a proactive assessment regime of subsidence risk. There was little or no such information in the witness statement of the Defendant's senior arboricultural officer, Mr Andy Robinson, dated 27 May 2016 which addressed general maintenance but with barely a nod towards subsidence risk management.

30. The Defendant sought permission for an additional witness statement from Mr Robinson served a few days before trial but this was refused on standard *Denton* grounds. The Defendant was able to produce a more relevant risk management document and this was allowed in to evidence. When he gave oral evidence, Mr Robinson spoke to this document during his cross-examination. The gist of his evidence about the Tree and the Defendant's relevant tree management was as follows:

(a) At the material time the Defendant kept a structured database within which a list of particular roads held details of the trees on that road. Entries would be made attached to the particular tree when a cost event took place with reference to that tree.

(b) The screen shot available in the court documents was dated 22 May 2014. It contained three entries for the Tree. On 29 May 2003 an instruction was given that the Tree was a small specimen and its crown should be reduced by 30%, cut

back, balanced and lifted. The next two entries relate to the inspection and removal of the Tree as a consequence of the subsidence the subject of this claim.

(c) In his written evidence (and the same assumption was reflected in the expert reports to some extent) it was said that the Tree was planted as a young specimen in April 2003. In oral evidence (and again the experts agreed with this analysis), Mr Robinson accepted that if the Tree was being cut back as described in the database then it was very unlikely that it had only just been planted in 2003.

(d) Mr Robinson explained the Tree would have been on a 4-year inspection cycle and consequently would have been inspected in 2007 but that the lack of an entry for 2007 in the database indicated that it was not considered necessary for any work to be undertaken. There was support for the 2003 & the 2007 inspection cycle because another screen shot from the database showed costs incurred per tree per event and this showed a high proportion of maples on Riverway causing costs in 2003 & 2007 supporting Mr Robinson's evidence.

(e) Mr Robinson explained that the no works decision would have been consistent with the Tree being relatively young and its existing crown not needing work to prevent it from interfering with boundaries or the use of the road & pavement. There would be no particular assessment for the Tree as a subsidence risk but the officer who carried out the inspection would have been generally aware of subsidence risk as a factor. I am satisfied that an inspection was carried out in 2007 and a reasonable decision taken that no works were required.

(f) Mr Robinson was taken through the Highways Tree Management Strategy document dated 13 October 2004. It was put to him that the Tree would better fit into a category of tree that would require a 2-year maintenance cycle under the strategy. In Mr Robinson's view the 4-year cycle was appropriate for the Tree. He explained that limes, plane trees and silver maples were typically placed on 2 year cycles.

(g) Mr Robinson was cross-examined about this allocation between 2-year and 4-year cycles. Although I agree with the points made to Mr Robinson as a matter of construction of the policy, namely that the Tree was of a forest type and was in close proximity to a road and consequently would appear to fall within the 2-year cycle, I bear in mind that the strategy document is not a contract but guidance and it is necessary that it be implemented by informed individuals such as Mr Robinson with an awareness of practicalities such as how particular trees behave and the cost implications of particular decisions. Mr Robinson explained that in his experience the Norway Maple was not a tree that needed to be on a 2-year cycle and indeed that he would have a concern that a 2-year cycle would be inappropriate because Norway Maples were intolerant of pollarding (he cited an example from Waltham Forest as evidence of this). I accept Mr Robinson's explanations.

(h) In his re-examination, Mr Robinson described the rough extent of the Defendant's tree stock. There were approximately 25,000 public highway trees. Of those about 5,600 fell within the 2-year cycle type. One of the reasons for those particular types of tree being on a 2-year cycle because those trees are more associated with subsidence claims. The Defendant managed its trees on limited

resources and any potential change to a policy had to be managed. I gave an opportunity for Mr Robinson to be cross-examined again on that material and he was asked if the Waltham Forest pollarding programme was because of a subsidence risk and he did not know.

31. There was an apparent dispute about what a Hortlink reduced tree might look like. Mr Hart's initial evidence was that a picture he had taken in the vicinity of Riverway showed "a complete canopy removal" of an *acer* tree. Mr Hart also titled this picture in his report as being within the Hortlink guidance (i.e. 70-90% reduction). Mr Robinson disagreed with this and described the reduction as more akin to 30%[2]. Once IP 7/06 had been shown to me (it was not in the trial bundles), I saw illustrative pictures comparing a London place tree being reduced by 30% and 90%. It seemed to me that the comparative pictures supported Mr Robinson's conclusions over Mr Hart's.

32. Mr Hart was recalled and once the photographs in IP 7/06 were put to him, he agreed that his picture looked more like a 30% reduction than a 90% one. I agree with that evidence and Mr Robinson's. The relevance of this is that I agree with Mr Robinson that 70-90% reduction is a very substantial reduction to a tree's size and utility. The good detailed point made by Counsel for the Claimant that the London plane tree hadn't been lifted (had its lower branches removed) so that 90% reduction reduced its height more substantially than a tree whose crown started higher anyway does not impact this overall conclusion.

Should the Defendant have followed a IP 7/06 Strategy covering Norway Maples?

33. The context of both IP 7/06 and LTOA May 2008 included addressing a standard industry practice of a cyclical 30 per cent reduction. The conclusion of both documents is that such a strategy is unlikely to assist in dealing with subsidence claims but that a more aggressive biannual 70-90% strategy was more likely to reduce subsidence claims (as I have said above LTOA May 2008 suggests a claims received reduction by 18.5%).

34. On the findings I have made above regarding Mr Robinson's evidence, the Defendant already had in place a biannual strategy. I do not know whether it necessarily also involved 70-90% reduction but I find that it was being done, at least in part, to manage the subsidence risk associated with the 5500 trees that were covered. One species of Maple was covered, Silver Maple, but not Norway Maple.

35. I do not consider that the Defendant had a duty of care to the Claimants to include Norway Maple within the biannual strategy or otherwise (if there is a difference) to employ Hortlink reduction techniques to the Tree. There is insufficient evidence to establish that the risk presented by Norway Maples having the bare risk factors set out above was such as to make such a decision reasonable in all the circumstances. This is for a variety of different reasons:

    (a) The Claimant has the burden of proof and although it has shown that there is research that places the *acer* genus amongst the trees that are most often implicated in subsidence claims, there has been no attempt to break that research

[2] On seeing a draft of this judgment Mr Thomas pointed to Mr Robinson also accepting that this pruning was within Hortlink 212. I agree that Mr Robinson did that. However, for present purposes what matters is whether the picture is best described as a 30% reduction or a 79-90% reduction. On this, for the reasons given, the oral evidence was clear: 30%.

down into types of maple or consideration of whether that would be an irrelevant exercise. On such material is as available to me I accept Mr Robinson's evidence and conclude that it was *prima facie* reasonable to treat the Norway Maple in a different way from the Silver Maple.

(b) I also accept Mr Robinson's evidence that it is likely to be damaging to a Norway Maple to put it on a 2 year Hortlink style pruning cycle. In his evidential responses Mr Robinson treated such a reduction as equivalent to pollarding and on the evidence I have no reason to disagree with that conclusion and his concern, supported by reference to the experience of Waltham Forest, that such treatment of Norway Maples could well cause tree death or serious damage.

(c) Moreover, so far as concerns the potential amenity value of trees placed in the pavement it seems to me that a more substantial canopy than that which is likely to be provided by a 70-90% biannually reduced tree is preferable both on aesthetic and practical grounds. There is no practical shade or cover from a tree reduced to that extent.

(d) I also accept Mr Robinson's evidence, albeit only given in re-examination and then in necessarily quite general terms that there would be a substantial cost associated with changing the Defendant's 2-year / 4-year tree classification. Both Counsel in submissions illustrated this in different ways: for Mr Sharpe it was the millions that might be caused by bringing 25000 trees into a 2-year cycle, for Mr Thomas it was the few hundreds that would be caused by bringing the Riverway Maples into a 2-year cycle. The illustrations were good advocacy but do not add to the argument.

(e) On the evidence I find that the Tree was no more a risk than any other of many such trees in the Defendant's borough which would have shared the base risk factors – the Tree was not located within a hot-spot.

(f) Above all I find considerable assistance in the material conclusions of IP 7/06 which Mr Hart accepted he agreed with. These are in the first two paragraphs under a heading: *Tree Management Implications*. The gist of which is as follows:

(i) If severe crown reduction is the answer then you need to identify the trees that should be subject to that treatment.

(ii) The number of cases of subsidence even in a bad year means that any particular tree might only have a less than 1% chance of causing subsidence.

(iii) Attempts to develop a methodology for subsidence risk assessment have been unsuccessful so it has not been possible to identify those 1% with any reasonable accuracy.

(iv) One alternative, therefore, is to treat all trees regardless of risk but the environmental consequences of that would be highly undesirable. Even pruning 1% would have a massive cost implication. It follows that widespread pruning is unlikely to be a viable method of alleviating subsidence risk.

36. There is nothing in the evidence before me that leads me to conclude that the decision taken by the Defendant not to include Norway Maples within its 2-year programme or alternatively not to manage their Norway Maple stock by using aggressive biannual Hortlink style pruning techniques showed a failure to take reasonable care of the Claimants' property at 12 Riverway. It follows that the claim fails.

Had the Defendant done what the Claimants say they should would it have made any difference?

37. This is not relevant given my first finding but I address it briefly.

38. I would not have been satisfied on the evidence that the Claimant had proven on the balance of probabilities that even had it included the Tree in a Hortlink style programme then that would more likely than not have meant no subsidence. For the reasons summarised above and in agreement with the evidence of the Defendant's expert Dr O'Callaghan I would have held that on the evidence available it is not proven that such would have been the case. The number of unpredictable factors are just too great to make out a more likely than not test.

39. I have addressed it on the basis of balance of probabilities because that it how it was argued but I add that I can see an argument that given the complexities involved in the risk issue that this might not necessarily be the correct approach rather than a contribution to risk type approach but any such arguments were not made before me and would in any event have been irrelevant because of my first finding.

Quantum

40. If the Claimants had made out their case on liability, then they would have succeeded on the disputed quantum items:

    (a) £1500 for both of them is well within the range of appropriate awards for the inconvenience caused between June 2009 and the end of 2014 by the cracks and need for redecoration works even taking into account the period extending longer than might normally be the case;

    (b) Mr Pattichis' evidence satisfies me that it was reasonable to have additional decorating works carried out to a value of £1,550.40 to bring 12 Riverway back to how it looked before the subsidence took place.

Conclusion

41. The claim is dismissed.

Nick Parfitt

Thomas More Building

Royal Courts of Justice