THE PROBLEM WITH TREES

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About trees

1. Trees can be planted or they can be self-sown and of course grow naturally. Is the owner of land who plants trees under a greater burden of responsibility than those which are self sown and are present merely as an operation of nature?

2. Trees will be on the land of a person who either owns or controls the land. In some cases where the trees are on boundary lines such as hedges there can be a dispute as whose land the tree is on and who may be responsible and liable for the tree. Underneath the land a tree's roots can encroach from one owner's land under the land of his neighbour. Encroaching tree roots can cause direct damage, e.g. by lifting or causing direct damage to a wall. But even where roots do not encroach under a neighbour's land damage can be caused. The mechanism is that trees need water and water from the soil is drawn up through the roots. Tree roots can desiccate the soil causing it to shrink and thereby undermine a building's foundations and leading to subsidence. Factors affecting this mechanism include:

   (a) The size and type of tree and therefore extent of the roots beneath the soil;

   (b) The type of soil, generally clay soils are liable to shrinkage upon desiccation whereas gravel soils will not be so affected;

   (c) The weather, periods of drought will contribute to soil desiccation;

   (d) The construction of the building and in particular the depth and adequacy of its foundations.

3. The above are all potentially contributory factors to the cause of subsidence. As well as there being a number of different contributory types of cause of subsidence, consider also that there could be a number of different trees in the vicinity and under different ownership each contributing to soil desiccation.

4. Finally, trees can cause personal injury and damage to property by parts or the whole of the tree falling down, e.g. falling onto highways and into the path of vehicles or onto neighbouring buildings. Factors affecting this include:

   (a) the age of the tree;

   (b) previous injury or disease to the tree;

   (c) unusual weather such as storm or gales.

Causes of action

5. The following potential causes of action need to be considered:

   (a) Nuisance, where the owner or controller of land on which the tree is situated causes damage to the land of his neighbouring property;

   (b) Breach of statutory duty, particularly under the Highways Act where the Highway Authority has the power to plant and maintain trees on the highway as well as keep the highway reasonably safe for users;

   (c) Negligence and Occupiers Liability Act, which may come into play where persons are injured on the land where the tree is situated so there is no room for nuisance, which governs the use and enjoyment of adjoining land owners and users.

   Note however that courts may not get too hung up on whether nuisance and/or negligence is pleaded because the underlying facts of the claim will be the same and in many cases the test is similar.

Solloway v Hampshire County Council 1981 CA

6. Tree planted 1874 and grew to 60'; C's house built 1922 with only 2' foundations 8.3m from the tree, but the tree was immediately beyond the boundary such that roots encroached; land was predominantly gravel but with pockets of clay, including under C's house; 1976 a second year in a row of hot dry summer weather; subsidence noted 1976 requiring underpinning. The law as originally understood from *Davey v Harrow Corporation* (1958) was that if tree roots encroach and cause damage an action in nuisance must lie, irrespective of fault or foreseeability, but

since then the HL had decided *Leakey v National Trust* regarding damage from landslip. The CA decided in relation to tree roots and nuisance:

(a) There is no difference between planted trees and self sown trees;

(b) Encroachment, cause and effect was not enough, D must either know or ought to have known of the encroachment in order to give rise to a reasonably foreseeable risk that it will cause damage.

7. Although there was encroachment from the highway under C's land, this is not the legal test for nuisance, it is not a test akin to trespass, but if there is no encroachment then it is difficult to prove that the tree has desiccated the soil under C's land to the extent that damage is foreseeable. What is required is:

(a) Proof that roots from D's tree has caused the damage complained of by C, i.e. causation;

(b) Foreseeability, that D knew or ought to have known that the tree roots were likely to cause damage if nothing was done to prevent it;

(c) Failure to exercise reasonable care by failing to take reasonable steps to limit the growth and incursion of the trees e.g. by felling, lopping, crowning or pollarding.

8. In *Solloway* itself although it was foreseeable that C's house may be on a pocket of clay and thereby susceptible to damage. The CA did not agree that D was reasonably required to lop all trees to avoid this risk. It could only be established if the tree was on a clay pocket by sinking boreholes and it was not reasonable to expect D to sink boreholes next to all trees in an area where the soil map showed gravel soil.

The responsibility of Highways Authorities.

9. At common law the subsoil beneath the highway still belonged to the original owner. S.96 of Highways Act 1980 gives the Highway Authority (HA) the power to plant trees and shrubs and maintain them. Various cases held that statutes did not transfer ownership of pre-adoption trees to the HA, but simply because there may be another owner, is the HA absolved from responsibility for trees on the highway?

10. In *Russell v Barnet LBC* (1984) C claimed for subsidence cause by a tree on the highway, which had been planted before the highway's adoption. The HA argued that since the tree was on C's side of the road it was presumed that the subsoil belonged to C and it was C's tree for which it was not responsible nor in control. Held that it could be presumed that the subsoil of the highway on which the tree stood belonged to C but this was no bar to C's claim; HA was in control of the tree under the Highways Act and could be liable in nuisance and on the facts the damage was foreseeable and preventable by reasonable steps by the HA.

11. *Low v Haddock Ltd and Royal County of Berkshire* (1985). C was owner of a house built on an estate by D on which there was a self sown oak tree, but after completion of the estate the land on which the tree stood was dedicated as highway under the control of the HA. Some 20 years later subsidence was caused to C's house by the tree roots extracting moisture. Held that not only was the HA liable in nuisance to C, but that D as owner of the subsoil was entitled to expect the HA to take whatever action was necessary to prevent the tree from growing so large as to become a nuisance.

12. *Jones v Portsmouth City Council* (2002) CA. C claimed for subsidence damage, but the HA had contracted with D (the City Council) to provide arboricultural services including maintenance of trees on the highway. The CA held that D's control was sufficient for D to be liable to C both in nuisance and negligence despite not being owner nor charged under the Highways Act.

13. *Hurst v Hampshire CC* (1998) CA confirmed at CA level that the HA is potentially liable in nuisance for trees on the highway, irrespective of when the tree was planted or whether it is self sown.

Nuisance as a continuing act.

14. Tree roots extracting moisture from the soil is an ongoing mechanism, depending upon seasons and weather, but the damage caused to the adjacent building may only become apparent later. How does this impact upon rights to claim?

15. *Delaware Mansions v Westminster CC* (2002) HL. C1 was a company providing maintenance to a block of leasehold flats; in 1989 cracks appeared in several flats following dry weather and engineers reported that unless a tree on the adjoining highway was removed underpinning would be necessary. C2 (a subsidiary of C1) then acquired the freehold from the Church Commissioners and gave the report to the HA and asked it to remove the tree. The HA refused but did some pruning. Acting on the engineers advice Cs undertook underpinning work and claimed the cost from HA. The judge found that the tree had caused a nuisance and damage the building, but the claim was dismissed because C1 as a maintenance company did not have a sufficient interest in the land to bring a claim, it was a mere licensee and contractor; further the damage occurred prior to C2 acquiring the freehold, which it did without an assignment of any existing rights of action. The HL held that:

    (a) the obligations between adjoining owners fell to be determined by the concepts of reasonableness between neighbours and reasonable foreseeability;

    (b) where there was a continuing nuisance which D ought to have known of, reasonable remedial expenditure could be recovered by the owner;

    (c) the failure to remove the tree responsible for damage constituted a continuing nuisance;

    (d) the new owner could recover reasonable remedial works, notwithstanding that elements of such works may cover unsatisfied pre-proprietorship damage.

    C2 therefore succeeded in its claim for damages.

16. This is not a bounty for claimants. The following points should be noted:

    (a) The normal measure of damages in nuisance cases leading to damage to the land is the diminution in the value of the land. In subsidence cases this is often equivalent to the costs of repairs. But where C purchases land on the

open market it is likely that the open market price will reflect the actual condition the land is in at the date of purchase, thus reflecting its damaged state, so there may be no loss to C.

(b) *34 It is at this point that I see* Solloway v Hampshire County Council 79 LGR 449 *as important as a salutary warning against imposing unreasonable and unacceptable burdens on local authorities or other tree owners. If reasonableness between neighbours is the key to the solution of problems in this field, it cannot be right to visit the authority or owner responsible for a tree with a large bill for underpinning without giving them notice of the damage and the opportunity of avoiding further damage by removal of the tree. Should they elect to preserve the tree for environmental reasons, they may fairly be expected to bear the cost of underpinning or other reasonably necessary remedial works; and the party on whom the cost has fallen may recover it, even though there may be elements of hitherto unsatisfied pre-proprietorship damage or protection for the future. But, as a general proposition, I think that the defendant is entitled to notice and a reasonable opportunity of abatement before liability for remedial expenditure can arise. In this case Westminster had ample notice and time before the underpinning and piling, and is in my opinion liable.*

17. The other effect of moisture extraction from tree root encroachment being a continuing nuisance is that the 6 year time limit for claims in tort will not begin to run until remedial works are started. Once remedial works are started then time will begin to run for that damage. A fresh cause of action would arise if later damage occurs.

Causation

18. *Rupert St John Loftus-Brigham v London Borough of Ealing* (2003) CA. C claimed damages for subsidence caused by soil desiccation, which C claimed was caused by trees on the adjoining highway. The claim was dismissed on the basis that C had failed to prove that the trees were the "dominant" cause of the damage, as opposed to other trees or causes. On appeal the CA confirmed that whether the claim is brought in nuisance or negligence the test on causation was the same: C had to prove that the trees were "an effective cause" of the damage or that the HA's trees

had “materially contributed” to the damage. This imports the same considerations of material contribution and indivisible injuries and damage found in personal injury practice.

19. D or the HA cannot draw any comfort from the fact that C’s foundations may have been shallow, or that the weather was exceptionally dry, save to the extent that these factors make the damage unforeseeable. If there are other trees, which contribute to the damage then D may seek an apportionment of liability under the Civil Liability (Contributions) Act 1978.

Foreseeability.

20. Actual knowledge that tree roots may cause damage may shown from the service of a report as occurred in *Delaware Mansions*. That aside, the courts will now expect ordinary landowners to have some knowledge of the risk that trees close to buildings can cause subsidence through moisture extraction. The test of foreseeability is an objective one of what the owner knew, or ought to have known and what in that knowledge is reasonable foreseeable. The courts will expect a HA to be more aware of the risks of trees causing subsidence. The risk of falling trees causing injury and damage raises different considerations discussed below.

Reasonable care and steps

21. There is a correlation between the foreseeability of the risk of damage and the extent of the damage that may foreseeably result and the steps that may be considered reasonable to address that 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 (see Tomlinson LJ in *The Wagon Mound*).

22. In *Solloway* it was not reasonable to expect the HA to warn householders of the dangers of highway trees and seek to raise contributions for boreholes to investigate whether there were pockets of clay.

23. In *Berent v Family Mosaic Housing* (2012) CA, which was a fact sensitive case, the CA appeared to hold that for removal of trees it was not sufficient for there to be a general foreseeable risk that trees may cause damage to nearby properties. Other considerations as to social amenity and maintenance of the environment apply. The position is different where it is shown that particular trees have or are likely to cause damage, because then action may be expected, including removal. C failed in her claim for damage to property for failing to remove trees before damage occurred, but obtained a token sum for distress and loss of amenity for a period after damage occurred during which HA delayed in removing the offending trees.

24. *Robbins v Bexley LBC* (2013) CA. Again, another fact sensitive case, from which it does appear that a HA in response to a foreseeable risk of property damage from moisture extraction may be expected to put in place a cyclical programme of reduction by crowning and pollarding and had breached that duty by in some periods doing nothing.

Falling trees

25. The position is rather different in relation to trees, which present a danger of injury. Quite obviously in view of the more serious consequences more may be expected of the HA or owner to remove the danger. The issue in such cases is usually one of foreseeability because the particular weakness of the tree to exceptional winds may not be either known or reasonably discoverable. Cases such as *Chapman v Barking LBC* (1998) CA have established that a HA should have a systematic regime of inspections. The level of inspection varies:

    (a) an inspection by an owner or employee with no specialist knowledge;

    (b) an inspection by a person with training to identify hazards and assess risks;

    (c) an inspection by a qualified arbourist;

    (d) a climbing inspection rather than a ground up inspection.

26. In cases of public bodies the inspections should be carried out by persons trained to identify hazards, but not by a qualified abourist or a climbing inspection unless point

on notice of particular potential danger. In *Micklewright v Surrey CC* (2011) CA the duty to carry out systematic inspections was breached, but the claim failed on causation. The trial judge accepted evidence from HA's expert the kind of routine inspection would not have revealed or put the HA on enquiry so as to instruct an arbourist to inspect and reveal the internal disease of the tree which led to collapse of a 1 ton branch.

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