[2002] EWHC 1568 (TCC)

Case No: 1996 L No. 1582

IN THE HIGH COURT OF JUSTICE
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
11th March 2002

B e f o r e :

HIS HONOUR JUDGE RICHARD HAVERY Q.C.

L.E. JONES (INSURANCE BROKERS) LIMITED **Claimant**

- and -

PORTSMOUTH CITY COUNCIL **Defendant**

Daniel Crowley (instructed by Plexus Law for the Claimant)
G. M. Bebb (instructed by P. C. B. Robertson for the Defendant)

HTML VERSION OF JUDGMENT

JUDGMENT

Introduction

1. This is a claim for damages for nuisance and negligence. The claimant carries on business as insurance brokers at a property originally built as a terrace house at number 208, London Road, Portsmouth**.** The defendant is the local authority. It is responsible to the highway

authority, the Hampshire County Council, by agreement with that authority, for maintenance of the trees on highways in Portsmouth. Those trees include plane trees in London Road, one or two of which, situated outside the claimant's premises, are said to have caused subsidence and consequential damage to the claimant's property in 1990, 1991 and 1992. It is common ground that the roots of those trees had encroached on the property, and the claimant claims that the consequential abstraction of moisture from the ground caused the subsidence.

2. Mr. Alfred Garland is a director of the claimant. He gave evidence that in the spring of 1990 he first became aware of cracks developing in the property. They progressed, and in consequence in the summer of 1990 he instructed the Pearson Ellis Partnership, consulting engineers. They visited the property and informed him of their opinion that the damage was the result of subsidence. He submitted an insurance claim on 31st October 1990. In late 1990 and the early part of 1991 the engineers and the loss adjusters kept an eye on matters. The loss adjusters then instructed the engineers to prepare a report. The Pearson Ellis Partnership inspected the property on 17th June 1991 and reported in July 1991. On their recommendation, trial pits were excavated and a closed-circuit television drain survey was carried out. In May 1992 the Pearson Ellis Partnership reported again. They said that a number of new cracks had appeared in the centre of the building over the previous eight months. They concluded that the front of the building had continued to subside, despite some pruning to the plane trees by the local authority. They recommended underpinning and the carrying out of repairs to the cracks.

3. I accept Mr. Garland's narrative, but at this point I make no comment on the accuracy of hearsay statements that he mentions or on the validity of the opinions expressed.

4. In a report of December 1994, Mr. George Ellis of the Pearson Ellis Partnership stated in his conclusions:

> Taking account of the size and maturity of the tree, it was concluded that there was no possibility of providing future stability to the property by removal or control of the tree. The only other remedy available was to strengthen the foundations of the property by underpinning down to stable strata. This work was carried out in early 1993.

Mr. Ellis did not give evidence before me.

5. Mr. Ellis's opinion is in issue, and I disregard his statement of opinion. But I accept the foregoing extract from Mr. Ellis's conclusions in so far as it constitutes a statement of fact.

6. The claimant's claim includes the cost of underpinning. The defendant denies that any subsidence of the claimant's property was caused by the trees. It denies that any such subsidence was foreseeable. It denies that it is a proper defendant, not being the owner or occupier of the land on which the trees grew. It denies that it was given a proper opportunity to abate any nuisance. It denies that underpinning was necessary. At this hearing I have not been concerned with the quantum of any damages.

Causation

7. I have heard expert evidence of Mr. Keith Rushforth, an arboriculturist who gave evidence on behalf of the claimant. Mr. Frank Joyce, an arboriculturist acting for the defendant, was unable to give evidence, but I have had the benefit of a joint statement of those two gentlemen. I have heard expert evidence of two engineers, Mr. Peter Kelsey on behalf of the claimant and Mr. Timothy Freeman on behalf of the defendant. They, too, produced a joint statement.

8. There is a row of plane trees in London Road. From the joint statement of Mr. Rushforth and Mr. Joyce, I make the following findings. One of the trees, growing outside number 206, is two metres south of the boundary with number 208. Another, growing outside number 210, is

0.5 metres north of the boundary with number 208. The former is a replacement of a tree felled on or about 18th November 1994. It is six metres from both the front bay and the right-hand front corner of the dwelling on number 208. The latter is a mature tree planted about 1900 and is an original street tree planted shortly after the houses were built. Its dimensions when it was viewed in May 2001 were: height, 14 to 16 metres; diameter of bole 0.55 metres; radius of crown spread, 4.5 metres. It is 4.5 metres from the closest part of the bay of number 208 and 5.5 metres from the front aspect of the terrace. Mr. Rushforth and Mr. Joyce were agreed that the original tree outside number 206 was as relevant to the matter as the tree outside number 210. They were agreed that a convenient measure of the radius of spread of the root system of any tree is that it is roughly equal to the height of the tree.

9. As to past management of the trees, Mr. Rushforth and Mr. Joyce relied in part on a letter dated 11th December 1991 from Hampshire County Council. That letter stated that the trees in question (with specific reference to other houses in London Road) were regularly thinned, the last occasion having been during the winter of 1988/89, and were reduced in size every twelve years, further work to reduce them being planned for the winter of 1991/92. With reference to seven of the trees, being those outside houses from number 196 to number 214, the experts considered the past management of the tree outside number 210 in particular, using evidence presented by the bole. Their opinion was that the tree had been pollarded in the past at circa 6m, probably over many years, then probably pollarded once at 7m and more recently once at circa 10m, with a reduction in 1998 at 13 to 14m. They agreed that the other trees would have been treated in similar manner until three of the seven were felled in 1994. They found dating the various operations difficult because plane trees shed their outer bark quickly. From photographic evidence, they concluded that the reduction to circa 10m was carried out in November 1994. Using the letter mentioned above, they deduced that the previous reduction was probably carried out at 7m in 1979/80.

10. Mr. Rushforth said that while the trees were regularly pollarded at circa 6 m, their size and therefore their water demand would have been restricted. However, once they were released from the regular pollarding their water demand should have been expected to soar.

11. Mr. Gary Scammell gave evidence before me. He is the arboricultural officer of the defendant. From 1983 until about 1994, when he was appointed assistant arboricultural officer of the defendant, Mr. Scammell was engaged on tree maintenance for the defendant. Among his activities was reduction in the crowns of plane trees to reduce their water uptake. The planned system is to work on a cycle of four years. Since 1994 the defendant has carried out a more in-depth and structured regular tree maintenance cycle. As to the degree of maintenance carried out, Mr. Bebb invited me to prefer the evidence of Mr. Scammell to the conclusion of the experts, based as it was, in part, on the hearsay evidence of the letter from Hampshire County Council. I do not find it necessary to make any finding as to the precise degree of maintenance carried out; but I do not find Mr. Scammell's evidence to be inconsistent with the opinion of the experts. I accept the experts' joint opinion, as the best evidence available, that no reduction in the size of the crown took place between 1979/80 and at least 1993. That conclusion is, moreover, consistent with a memorandum of the defendant dated 15th October 1992, which states the height of the trees as 16 metres (see paragraph 40, below).

12. Mr. Kelsey and Mr. Freeman were agreed that the investigations carried out by the Pearson Ellis Partnership had some deficiencies. In particular, there was no adequate record of the damage, no formal monitoring, and insufficient soil data; and there was no factual record to support their statement that there was an escalation of damage between 1991 and 1992.

13. Subsequently, further tests were carried out. Gryphon Surveys, a company of which Mr. Kelsey is Managing Director, carried out a survey of levels and verticality in the property in July 2001. Mr. Kelsey visited the site and was responsible for the survey. The CET Group carried out a comprehensive soil investigation of soil taken from three boreholes on the property in September 2001, and produced a report of that investigation. Those surveys supplied the necessary information not available from the Pearson Ellis Partnership reports, save that the opportunity for contemporaneous monitoring of movement of the building had been lost.

14. The Gryphon survey showed that the brick coursing of the building dipped downwards from about half way back in the building to the foremost part of the front by 53 mm. As to the soil, the engineering experts were agreed that the subsoil conditions were consistent with a seam of Brickearth approximately 2 metres thick overlying Reading Beds. The Brickearth was described as a silty clay or clayey silt. It was in the low to medium shrinkage potential categories.

15. Mr. Kelsey and Mr. Freeman could not reach agreement on one particular point, and felt it was desirable to refer the question to a single expert appointed jointly by the parties. That was done. On 5th November 2001 Professor R. J. Chandler of Imperial College was instructed "Specifically to determine whether shrinkage in this stratum [the Brickearth] could account for the 50mm (approx) of downward movement recorded by the distortion survey carried out by Gryphon Surveys in July of this year". Professor Chandler reported on 15th November 2001. He was not called to give oral evidence, but his report was put before me as that of an independent jointly-instructed expert. I attach considerable weight to his evidence. A brief summary of his conclusion is set out as point 7 of the expert witnesses' joint statement. That statement followed a meeting between Mr. Kelsey and Mr. Freeman held on 16th November 2001, and is dated 6th December 2001. Point 7 reads:

> An interpretative report of the more recent investigations has been prepared by Prof Chandler of Imperial College and is included as an appendix. In his report, Prof Chandler states that the pavement trees were capable of causing 50 mm of compression in the Brickearth and this was therefore the most likely explanation of the apparent subsidence recorded in the distortion survey.

16. I summarize Professor Chandler's conclusions rather more fully as follows:

> …..the Brickearth in front of the property is desiccated, presumably by the roots of the adjacent plane trees…..All the clays involved would, provided they are overconsolidated, usually be regarded as being unlikely to shrink significantly as a consequence of desiccation. However, the strongly compressible behaviour of the Brickearth on being loaded beyond its yield stress is an exception to the usual rule (as it is then normally consolidated) and provides the likely explanation of the cause of the building distortion. In the light of the independent indications of desiccation listed above for the Brickearth in the region of BH 1, combined with its significant compressibility, the balance of probabilities supports tree-root desiccation as the cause of the distortion of the building. If this is accepted, then the higher water contents shown by BH 2 and the PCC borehole indicate an increase in water content since desiccation. Such an increase could occur in the absence of significant heave if desiccation resulted in partial saturation, as observed in BH 1…..However, if further desiccation beyond previous suction values were to occur the Brickearth would compress further.

17. In his expert report dated October 2000, Mr. Freeman stated that he had been asked to comment on the causation of the damage. He concluded:

> In summary, I found no evidence in the information supplied to support the conclusion that the reported damage to No. 208 London Road had been caused by subsidence and, in particular, no evidence to indicate that the highway trees to the front of the property were responsible for the damage. Other possible causes of the damage (in particular, weathering of mortar) appear more likely but were not considered.

In a further report dated 16th November 2001, he said this:

> No evidence has been presented to confirm that the reported damage did in fact appear in the dry summers of 1989 and 1990, or to support the assertion that this damage was caused by subsidence. On balance of probabilities it is more likely that the damage was the legacy of the distortions associated with the historic subsidence…..

18. Paragraph 10 of the joint statement signed by Mr. Freeman and Mr. Kelsey on 6th December 2001 states:

> It was agreed that the roots from the highway plane trees had encroached into the soil under 208 prior to the discovery of the damage in Spring 90. It was not agreed, however, that the presence of the roots contributed to the appearance of the damage:
>
> - PJK is of the opinion that a seasonal increase in the compression of the Brickearth is the only logical explanation for the appearance of structural damage during 1990 when the damage was reported. The weather in this year was particularly dry.
> - TJF believes that any compression in the Brickearth would have been largely, if not totally, irreversible. It is probable therefore that the soil would have been compressed by previous trees growing on the site over the last 10,000 years. However, any compression associated with the highway trees would have occurred progressively as the tree grew to maturity and not in 1990. Any seasonal volume changes in a soil with an average plasticity index of 18% would be extremely small.

19. Professor Chandler had used the CET report as a source of information. That report gave numerous figures of plasticity index, including three figures for the soil in borehole 1 at depths down to 2 metres. Those three figures average approximately 18 per cent., and I take them to be the figures mentioned by Mr. Freeman in the second bullet point of paragraph 10 of the joint statement. Be that as it may, it is evident that Mr. Freeman continued to disagree with the conclusion reached by Professor Chandler on a matter which he had thought it desirable to refer to him. Mr. Freeman very fairly said in evidence that he did not know whether trees had grown on the site during the 10,000 years before 1900. But he said that compression would only ever happen once. There had been dry summers in the 1940s and in 1976.

20. It was evident that previous repairs had been carried out to the bay of number 208. There was also a wide (25 mm) old crack at the top of the house at the back. That crack was consistent with subsidence having occurred. Mr. Kelsey accepted that part of the subsidence revealed by the Gryphon survey must have occurred before 1990. Mr. Freeman said that on the evidence he had seen, it was only an educated guess but he believed that all the subsidence had taken place before 1989/90. He could say that no significant subsidence took place in 1989/90, or there would have been structural damage to the property, of which he had seen no evidence.

21. Mr. Kelsey considered that there had been further significant subsidence since the earlier repairs had been carried out. The Gryphon survey showed that the very part that had been repaired, the front bay, showed a fall of approximately 10 mm from back to front of the bay. It would not have been repaired in that way. The bricks would have been laid horizontally. Mr. Freeman said that Mr. Kelsey was clutching at straws. He, Mr. Freeman, did not think that the whole bay had been rebuilt. There was still original brickwork around the cheek to the bay, above the window sill. “Somewhere you have to put a slope into your brick course work”, he said. I find Mr. Kelsey’s evidence on this point the more convincing.

22. Mr. Freeman said that where there was minor damage to a building, it was difficult to be categoric as to the cause. A movement of a few millimetres in brickwork could be caused by changes in temperature or humidity, by deterioration of materials or small amounts of foundation movement. Classical subsidence cracks were diagonal tapered cracks visible from

both sides of the wall. He could not see anything with those characteristics in this case. There is undoubtedly force in that point.

23. Mr. Freeman did not agree with Professor Chandler as to the mechanism causing the 53 mm of subsidence. As Mr. Freemen put it in his oral evidence, "Professor Chandler and I disagree. Professor Chandler says that tree-root desiccation is the most likely cause. I say it is a possible cause". Mr. Freeman is a highly-qualified expert; but I prefer the evidence of Professor Chandler.

24. On the totality of the evidence, I find that there was further significant subsidence to the property in 1990 which caused the damage observed. I find that that subsidence was caused by desiccation of the soil caused by the roots of the plane trees outside the property, which had encroached on to the property. In particular, I reject the view of Mr. Freeman expressed in the second bullet point of paragraph 10 of the engineering experts' joint statement.

Wrong defendant?

25. At the material time, the defendant was acting as agent of the highway authority, Hampshire County Council, in relation to maintenance of the trees. Its duties to the highway authority are set out in an agreement the material part of which reads as follows:-

> 4.1 The City Council shall act as the agent of the County Council in the management of the highways….."Management" for this purpose shall comprise…..The control, ordering and supervision of routine maintenance as defined in the Second Schedule in accordance with such policies and standards as may from time to time be established by the County Council…..
>
> SECOND SCHEDULE
>
> Routine maintenance shall mean…..maintenance of trees…..

26. Mr. Bebb submitted that the proper defendant was the highway authority, not its agent Portsmouth City Council. It was the highway authority that was the occupier of the land where the trees were situated. Mr. Crowley submitted that the person liable for a nuisance is the actual wrongdoer, whether or not he is in occupation of the land. In support of that proposition he relied on *Clerk and Lindsell on Torts*, 18th edition, 2000, paragraph 19-49 at p. 999. But all the examples given are torts of commission, or at least permission, and not of omission. Mr. Crowley submitted that the liability of the defendant was akin to that of an occupier but non-owner. Such an occupier was under a duty not merely to refrain from positive acts of misfeasance which caused harm to his neighbours, but also to take care that such harm was not caused by his omission or by third parties or by nature: see *Salmond and Heuston on the Law of Torts*, 20th edition, 1992, p 68; 21st edition, 1996, p. 64. Although the defendant was not actually the highway authority, it had control over the trees by reason of its agency and thereby assumed responsibility for the trees. Thus it was liable in nuisance and negligence to the claimant. He relied on *Russell* ***v.*** *London Borough of Barnet* (1985) 83 LGR 152 and *Low* ***v.*** *R.J.Haddock Ltd and the Royal County of Berkshire* (1985) EGLR 247. In *Russell* at p. 171 Tudor Evans J. agreed with Stocker J. in *Solloway* ***v.*** *Hants. County Council* at first instance (unreported) that highway authorities have sufficient interest in and control over a highway tree to make them liable for a nuisance created thereby, bearing in mind that they alone have the power to maintain the tree. In *Low* at p. 251 Judge John Newey Q.C. remarked *obiter* that if the tree in question had not, contrary to his holding, been dedicated as part of the highway, in view of the county's assumption of powers by pruning and the like, he would have followed Tudor Evans J. in *Russell* and held that they could still be liable in nuisance. (Judge Newey had held (p. 250) that the tree was vested in the county by reason of the dedication). Mr. Bebb submitted that *Russell* and *Low* did not go so far as to support the proposition that an agent has sufficient control to found liability. Those cases were concerned with whether a highway authority could be liable. The tree was vested in the highway

authority. The agency contract afforded the defendant an insufficient interest in the tree to render it liable in nuisance to the claimant. Likewise, the defendant could not be said to be assuming the statutory duty or duty of care to the public that rests with the highway authority.

27. In my judgment, the lawful exercise of control over the tree, in the absence of ownership, is sufficient to make the defendant capable of liability in nuisance to the claimant. And the potential liability of the defendant in negligence is not dependent on ownership or occupation of the relevant land. Nor is it excluded by potential liability of the highway authority for the same negligence.

Foreseeability

28. Mr. Kelsey said that there had been several very dry summers during the first half of the twentieth century. 1976 was not the first year in which there was a very dry summer since the trees in London Road had been planted. But one of the reasons why there was such a prevalence of subsidence in the 1970s was a general change in policy by local authorities in tree management. Before the 1960s plane trees were cut back every year or two until they hardly looked like trees. But that policy changed and in consequence many subsidence claims arose. Insurance against subsidence was introduced only in 1971. Specifically on the question of foreseeability, Mr. Kelsey said this in his report:

> The soil types beneath the foundation of no. 208, London Road, Portsmouth, comprise a combination of low, medium and high shrinkability soils forming the Brickearth and Reading Beds geological strata.
>
> During the hot, dry summers that occur in southern England, on average every five years, damage to buildings due to soil shrinkage beneath foundations standing on these strata was common.
>
> My own experience on these soils is confined largely to Essex, and here there were many cases of damage to houses in Brickearth during the dry summer of 1976.

29. Mr. Freeman, as I have said, was of the opinion that the damage was not caused by subsidence or, in particular, by the highway trees. On the question of foreseeability, he said that the soil conditions depicted on the geological map (and confirmed to an extent by the soil tests) did not make London Road a high-risk area for tree-related subsidence; but he accepted that it was a risk area.

30. Mr. Bebb quite correctly invited me to look at the matter without the benefit of hindsight. Plane trees were extremely common in towns. They fell within the medium water category, and were shallow-rooted. Thus they would not abstract particularly large quantities of water from the ground. The geological structure of the ground was brickearth to a depth of about 2 metres, overlying Reading beds. It was a misconception to say, as the claimant did, that brickearth was a shrinkable clay. Shrinkable clays were Weald clay, London clay and suchlike. Those clays would give rise to foreseeable risk. But brickearth was a silt and might or might not have a clay constituent: it depended on location. It was true that after the event, Mr. Rushforth had found a reference in a library to shrinkable brickearth. But the low plasticity of brickearth rendered it unlikely to shrink. After the event, tests showed that the particular brickearth in question had low to medium plasticity. It was unreasonable (as I accept) to expect the defendant to test the brickearth under every property. The case was analogous to that of *Solloway* ***v.*** *Hants. County Council (1981) 258 EG 859.*

31. *Solloway* involved a claim arising out of subsidence of a house caused by abstraction of water from a small pocket of clay under the house by a chestnut tree near by. Such pockets of clay were known to be few and far between. There were passages in the evidence of all the experts to the effect that pockets of clay might be found under any house in the relevant street and that that was a risk that ought to be considered. But all the experts were agreed that it was unlikely

that clay would be found under any particular house. To eliminate the risk would have been expensive and likely to cause more problems than it solved. The three judges in the Court of Appeal were unanimous in finding the defendant not liable. They approached the matter in similar, though not identical, ways.

32. In my judgment, their approach can be summarized as follows. Given the existence of a risk, the first question is whether the risk is so slight that it can reasonably be disregarded. Dunn LJ and Sir David Cairns answered that question in the affirmative. John Stephenson LJ was willing to assume that the expert evidence entitled the judge to find that the risk was more than a mere possibility which would never occur to the mind of a reasonable man. The second question is, if the risk is not so slight that it can reasonably be disregarded, are the steps that would be required to guard against it proportionate to the risk. All the judges answered the second question in the negative. They thus found the defendant not liable in nuisance. I have analysed the case in that way since it was the approach of the judges to the facts of the case that Mr. Bebb was drawing to my attention. But the law on the point can be succinctly summarized as it was by Dunn LJ: 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 minimize the damage and its consequences.

33. There is no evidence of any earlier claims against the defendant on the ground of subsidence. At the material time, however, four similar claims were made in relation to properties in London Road. That is a small proportion of all the properties in that road. How strong those claims were, I cannot say.

34. One of the defendant's reasons for carrying out tree maintenance involving reduction of the crown was to reduce the amount of growth the roots put on and the water uptake by the tree. I conclude that it seems that the defendant was aware of a risk of damage to buildings by subsidence. But however that may be, on the evidence of Mr. Kelsey and Mr. Freemen that I have quoted above, I find that there was a foreseeable risk of subsidence of the property if the trees were allowed to desiccate the soil under it.

35. I do not accept that this case is closely analogous to *Solloway*. In that case the rarity of the small patches of clay was such that the probability that a patch of clay would lie under a structural part of a particular house was remote. Here, the presence of the overlying brickearth was well known. Its particular qualities in the relevant location were not. Thus the risk, though not quantifiable, could not reasonably have been regarded as negligible if perceived.

36. As to negligence, I find that there was a foreseeable risk that the trees in question, when allowed, as they were, to grow well over 10 metres in height, would desiccate the soil under the property during hot summers of prolonged dry weather.

Opportunity to abate the nuisance.

37. Mr. Bebb submitted that the defendant was entitled to be given an opportunity to abate the nuisance, and was deprived of that opportunity. He relied on *Delaware Mansions Ltd. **v**. Westminster City Council* [2001] 3 WLR 1007, HL. In that case Lord Cooke of Thorndon, with whom Lord Steyn, Lord Browne-Wilkinson, Lord Clyde and Lord Hutton agreed, said at p. 1019:

> …..I am disposed to think that a reasonable landowner would notify the controlling local authority or neighbour as soon as tree root damage was suspected…..
>
> 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…..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.

38. Mr. Bebb submitted that the claimant had in effect presented a *fait accompli* to the defendant when it first notified the defendant of the damage and of what he described as the claimant's irrevocable decision to underpin the property. The defendant had not been given a reasonable opportunity to propose abatement of the nuisance by removal or management of the tree.

39. The facts are these. On 2nd September 1992 the claimant's insurers' loss adjusters wrote to the City Solicitor's department of the defendant council a letter in the following terms:

> We act on behalf of the Building Insurers of [208, London Road, North End, Portsmouth] with regard to a claim which has been submitted following the development of damage which has been demonstrated as arising from subsidence of the site.
>
> In the course of the investigation, roots from Plane trees growing on the public pavement were found beneath the foundations and it has been demonstrated that these roots have resulted in desiccation of the clay soil. We have pleasure in enclosing a root analysis report and would be pleased if you would immediately advise your Public Liability Insurers of our Principals' expressed intention to seek recovery of their outlay from you, in view of the damage caused by the trees.
>
> We can advise you that it has been agreed that the front part of the building will require to be underpinned in order to stabilize it and under these circumstances our principals' outlay will be substantial, estimated at at least £40,000. We await hearing from your insurers as soon as practicable.

That letter is stamped as having been received on 4th September 1992. A copy appears to have been received by the defendant's arboricultural officer on 17th September. There is no evidence of any reply to the letter of 2nd September.

40. There is an internal memorandum dated 15th October 1992 from the arboricultural officer, Nick Ditchburn, addressed to the city solicitor's department. In that memorandum, Mr. Ditchburn acknowledges a memorandum from the addressee of 17th September 1992, which is not in evidence, regarding alleged tree root damage to 208 London Road. The memorandum of 15th October continues:

> I inspected the site on 14th October 1992. There are 2 Plane trees outside No. 208, one on each boundary. The dimensions of both trees are: 16 m high, 12 m spread and 0.6 m diameter at breast height.
>
> The base of the trees are approximately 4 m from the bay and 5 m from the main structure.
>
> I could not establish whether or not any trial pits had been dug at the front of the property. There were cracks in the bay window.
>
> I would refer you to reports on trees outside 366 London Road dated 10th February 1992 – the same type of trees in the same road.

The last-mentioned reports are not in evidence. On 3rd November 1992 the loss adjusters again wrote to the defendant's solicitor's department concerning the property as follows:-

> We refer to our recent letter and your subsequent telephone call and confirm as advised that we are quite happy to meet with you at the risk address to consider the matter but consider that an appropriate stage would be when tenders are available for remedial works which will be in the middle of November and we shall contact you further nearer the time so that appropriate appointments can be made.

That letter is stamped as having been received on 9th November. No evidence has been given about the telephone call mentioned in the letter. There is no evidence whether the proposed meeting took place.

41. The contract for the underpinning work was made on 21st December 1992. By letter of 22nd December the loss adjusters advised the defendant that the works were to commence on 25th January 1993. The letter continued:

> We are currently arranging a pre-start meeting and will liaise with you regarding this meeting so that we may meet at that time to discuss the question of your trees.

That meeting appears to have taken place on 13th January 1993. Originally, the defendant intended to dig a trial hole, but it changed its mind. There were put before me some internal memoranda of the defendant as relating to the property. It was not possible to identify the writers or their departments. Those memoranda read as follows. The first is dated 7th January 1993:

> Spoke with [the loss adjusters] about Trial Hole. I confirmed that our engineers will wish to dig their own trial holes when they go on site to investigate.
>
> Contacted Tony Newham in Engineers and confirmed all the arrangements for the site visit on 13th Jan 1993.

The next memorandum is dated 11th January 1992, no doubt in error for 11th January 1993. It reads:

> Tony Newham contacted me and said that they would now not have to dig a trial hole after all. I explained the consequences of this (i.e. that we were totally accepting their reports without doing our own trial holes to rebut what they say). But he said that trial holes would not need to be dug.

There is another undated memorandum which says:

> Nick Ditchburn called and I explained the problem about Engineers accepting what the other side say.

> Apparently, we are going to get another chance to have a look at the property when remedial works take place, and photographs will be taken.
>
> I said fine.

A letter dated 15th February 1993 from the defendant's Head of Leisure Service to a councillor relating to another property includes the statement, with reference to Mr. Ditchburn:

> Nick informs me that there is a current, ongoing claim at 208 London Road. To date investigations show there has been no trespass due to tree roots.

There is another defendant's internal memorandum from an unidentified department relating to the property. It is dated 24th March 1993. It says, so far as material:

> Pierre Allison and Tony Newman from [Civil Engineers] came down about this. They want to take an auger test of the soil and I agreed it was worth doing…..
>
> I asked them what their view was on the work proposed (i.e. was there an alternative?) They say that the advice from the Building Research Council is that pruning of trees can improve the position to avoid under-pinning which they believe is recommended too readily…..

Another internal memorandum dated 2nd April 1993 from Mr. Ditchburn is headed "Alleged tree root trespass 208 London Road". It is evidently a report of a visit he had made to the property. The report concludes:

> In my opinion, whilst there has been root encroachment, the number of roots found are not responsible for the damage found.
>
> It is likely that settlement is due to the variation in moisture content in the soil. Comment was made that drains to the rear of the property were faulty which would exacerbate the problems.

42. The impression I gain from the foregoing correspondence and memoranda is that the defendants were concerned primarily with the question whether the damage to the property was caused by the trees. The memorandum following that of 11th January shows contentment with the opportunity to look at the property when the remedial works were in progress. The first mention of disquiet about the nature of the remedial works is in the memorandum of 24th March 1993. It is fair to say that during the twelve years that have elapsed since the damage occurred the defendants have apparently lost or destroyed many of their records. It can also be said that if the defendants had had more time between being notified of the claim and the commitment of the claimant to the underpinning contract they might have come round to questioning the suitability of the remedy. Nevertheless, whether my impression is correct or not, the fact is that the defendant was notified of the claim before the claimant was committed by contract to the underpinning. There is no evidence that the defendant suggested that an alternative remedy should be considered or even asked the claimant for time to consider the matter. In my judgment, the defendant did have an opportunity at least to ask for an opportunity to abate the nuisance.

43. Mr. Bebb submitted that it would have made no difference if the defendant had asked for such an opportunity. It would have been refused. It is true that Mr. Richard Vallance, a chartered surveyor employed by the loss adjusters, who gave evidence before me, said that by the time

in September 1992 that they were writing to the defendant they had decided to underpin the property. They were notifying the defendant. But he also said that he could not say what would have happened thereafter if the defendant had responded to the letter. Nor can I. It was, I think, incumbent on the defendant at least to ask for time to consider the matter, if it wished to do so.

44. The members of the House of Lords who decided *Delaware Mansions* were disposed to think that a reasonable landowner would have notified the defendant as soon as damage from tree roots was suspected. The claimant did not do that. Nevertheless, in my judgment, the defendant was not deprived of a reasonable opportunity to abate the nuisance.

Was the underpinning necessary?

45. Mr. Freeman considered that underpinning was not necessary. He reached that conclusion partly on the ground that no evidence had been presented to confirm that the reported damage did in fact appear in the dry summers of 1989 and 1990, or to support the assertion that that damage had been caused by subsidence. He also considered that the damage was not sufficiently significant in structural terms to justify underpinning. In his opinion, most engineers would reserve underpinning for situations where the damage was significant in structural terms and there was no obvious means of mitigating or eliminating the cause of the subsidence. And he said that no evidence had been presented to indicate that further subsidence would have occurred to the property if it had not been underpinned. No consideration appeared to have been given to tree management as an alternative to underpinning.

46. In his supplementary expert witness statement of 15th January 2001, Mr. Freeman said that tree removal normally provides a preferable alternative to underpinning as a method of stabilizing a property affected by seasonal ground movements. In a further report dated 16th November 2001, he said this:

> In most cases of tree-related subsidence, further damage can be avoided by either removing or radically reducing the size of the implicated tree or trees. If it is accepted (which it is not) that the surface soil underlying 208 London Road is a shrinkable clay, then tree management would have provided an effective and economical way of preventing further movement.

And, said Mr. Freeman, there was a drawback in adopting underpinning: the scheme would have made the junction with the adjoining property more, not less, susceptible to future damage as a result of ground movements.

47. In his report of November 2001, Mr. Kelsey said:

> Clearly No. 208 London Road prior to being underpinned could not co-exist in proximity to the Council's pavement plane trees without risk of structural damage during a dry summer condition. The remedies available were to remove or severely reduce the trees or to increase the depth of the foundations.

I accept that evidence of Mr. Kelsey. And it is clear from Professor Chandler's report that future subsidence cannot by any means be ruled out if further desiccation of the soil occurs.

48. I conclude that it was not necessary to underpin the property provided, but only provided, that sufficiently effective management of the trees could be assured. No attempt was made on behalf of the claimant to obtain such assurance.

49. In *Delaware Mansions*, Lord Cooke of Thorndon, ib., 1019, said

> …..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.

I have already indicated that in my judgment the defendant did have a reasonable opportunity of abatement before the claimant committed itself to underpinning works. There was a continuing nuisance. The question whether the underpinning works were necessary bears upon quantum, not liability. As I have said, the underpinning works were necessary unless the trees were to be properly managed. Both parties failed to raise the question of management of the trees. The claimants may have so failed because of the advice received from their engineers. The defendants may have so failed because they were concentrating on questions of causation. However that may be, given that there was no assurance of management of the trees, underpinning was necessary. The only way in which I think it could be said that the costs of underpinning are not recoverable by the claimant would be on the basis that the claimant had unreasonably failed to mitigate its loss by failing to ask the defendant to manage the trees. No such argument was put before me; nor do I think that the point is a good one.

Conclusion

50. I conclude that the defendant is liable to the claimant in negligence and nuisance for damage consequent upon the subsidence of the claimant's property at number 208, London Road.