IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Claim No. HT-06-027
Royal Courts of Justice
Strand, London, WC2A 2LL
26th September 2006

B e f o r e :

HIS HONOUR JUDGE PETER COULSON QC

Between:

ALISON R PERRIN (1)
WILLIAM S RAMAGE (2) Claimants
- and -
NORTHAMPTON BOROUGH COUNCIL (1)
FREDERICK HARRY SHEPHARD (2)
SANDRA SHEPHARD (3) Defendants

Mr Robin Green (instructed by Gaston Whybrew) for the Claimants
Mr James Findlay (instructed by Sharpe Pritchard) for the First Defendant
Hearing dates: 7th and 26th September 2006

His Honour Judge Peter Coulson QC :

Introduction

1. The maintenance of existing trees, and the planting of new saplings, comprises an important feature of urban and suburban planning in the UK. Trees provide pleasure, protection and shade; they help to soften the harsher man-made environment of brick, glass and steel. But the presence of trees in our towns and cities is not entirely benign: in particular, encroachment by tree roots can cause significant and lasting damage to the foundations of the very buildings whose appearance the trees are intended to enhance.

2. A balancing act is accordingly required: on the one hand, to encourage the preservation of trees; on the other, to ensure that such trees do not constitute a danger to people or a threat to the surrounding buildings. S.198 of the Town and Country Planning Act 1990 ("the 1990 Act") seeks to provide that balance. It prevents the lopping or felling of trees which are protected by Tree Preservation Orders ("TPOs"), but it also allows a mechanism by which, in certain specific circumstances set out in s.198(6), a protected tree might be lopped or felled without any requirement for prior permission. In addition, regulations issued under the Act allow a separate application to the local authority (and, on appeal, to the Secretary of State) for permission to lop or fell a protected tree.

3. On the assumed facts in the present case, the house belonging to the claimants, Ms Perrin and Mr Ramage, has been damaged by the encroachment of the tree roots of the oak tree in the garden belonging to their neighbours, the second and third defendants, Mr and Mrs Shephard. The tree is protected by a TPO. The claimants have sought from the first defendant, the relevant local authority, permission to fell the oak tree and their application has been refused. Their appeal to the Secretary of State was also rejected. The claimants now seek a declaration that, pursuant to s.198(6)(b), they can fell the tree anyway. The first defendant maintains that it is not necessary to fell the tree, not because felling would not abate the nuisance (it obviously would), but because other engineering works, such as the underpinning of the claimants' house, could be carried out instead, thereby curing the problem and preserving the tree. Thus it is the first defendant's case that it is not necessary to fell the oak tree, and the relevant exemption under s.198(6)(b) of the 1990 Act is not triggered.

4. Accordingly, one of the main questions raised by the preliminary issue in this case is whether, as a matter of construction of s.198(6)(b), the fact that other remedial works could be carried out (which would leave the tree intact) is relevant to the claimant's alleged entitlement to fell the tree under s.198(6). I was told at the Case Management Conference in June that this was a point which affected hundreds of TPOs in the UK, and I am aware that it is common for local authorities to refuse permission to lop or fell trees which are protected by TPOs on the grounds that other works can be carried out instead. Is such an approach a legitimate interpretation of s.198(6)(b) of the 1990 Act?

5. It is also instructive to stand back from these particular provisions of the 1990 Act and to note the effect on the claimants of the first defendant's stance in this case. At common law, a house owner whose property is damaged by the encroachment of roots belonging to a neighbour's tree has a claim against that neighbour in nuisance. As we shall see, in certain circumstances, that would render the neighbour liable for the costs of underpinning the property damaged by the tree roots. In the present case, the first defendant is contending that the costs of any such underpinning work that may be necessary should be borne by the claimants themselves, the owners of the property that has been damaged. Thus it is the effect of the first defendant's position in this case that, because this tree is the subject of a particular type of TPO, the claimants' ordinary rights at common law are effectively extinguished, and they can make no claim for the costs of any necessary underpinning works. Again it is necessary for me to determine whether that is a legitimate interpretation of the 1990 Act.

The 1990 Act

6. So far as material, s.198 of the 1990 Act provides as follows:

> "s.198 Power to make tree preservation orders
>
> (1) If it appears to a local planning authority that it is expedient in the interests of amenity to make provision for the preservation of trees or woodlands in their area, they may for that purpose make an order with respect to such trees, groups of trees or woodlands as may be specified in the order.
>
> (2) An order under subsection (1) is in this Act referred to as a "tree preservation order".
>
> (3) A tree preservation order may, in particular, make provision –

> (a) for prohibiting (subject to any exemptions for which provision may be made by the order) the cutting down, lopping, uprooting, wilful damage or wilful destruction of trees except with the consent of the local planning authority, and for enabling that authority to give their consent subject to conditions;
>
> (b) for securing the replanting, in such manner as may be prescribed by or under the order, of any part of a woodland area which is felled in the course of forestry operations permitted by or under the order;
>
> (c) for applying, in relation to any consent under the order, and to applications for such consent, any of the provisions of this Act mentioned in subsection (4), subject to such adaptions and modifications as may be specified in the order …
>
> (6) Without prejudice to any other exemptions for which provision may be made by a tree preservation order, no such order shall apply –
>
> (a) to the cutting down, uprooting, topping or lopping of trees which are dying or dead or have become dangerous, or
>
> (b) to the cutting down, uprooting, topping or lopping of any trees in compliance with any obligations imposed by or under an Act of Parliament or so far as may be necessary for the prevention or abatement of a nuisance …
>
> (8) In relation to an application for consent under a tree preservation order the appropriate authority may by regulations make provision as to –
>
> (a) the form and manner in which the application must be made;
>
> (b) particulars of such matters as are to be included in the application;
>
> (c) the documents or other materials as are to accompany the application."

7. It should be noted that the exemption at s.198(6) is based on very similar provisions in the Town and Country Planning Acts of 1947, 1962 and 1971. Thus, by way of example, s.60(6) of the 1971 Act provided:

> "Without prejudice to any other exemptions for which provision may be made by a tree preservation order, no such order shall apply to the cutting down, topping or lopping of trees which are dying or dead or have become dangerous, or the cutting down, topping or lopping of any trees in compliance with any obligations imposed by or under an Act of Parliament or so far as may be necessary for the prevention or abatement of a nuisance."

8. S.199 of the 1990 Act sets out a number of provisions relating to the form of and procedure applicable to Tree Preservation Orders. Sub-section (2) provides:

"Provision may be made by regulations under this Act with respect –

(a) to the form of Tree Preservation Orders, and

(b) to the procedure to be followed in connection with the making and confirmation of such orders."

9. S.203 of the 1990 Act deals with compensation in respect of TPOs. It provides:

"A tree preservation order may make provision for the payment by the local planning authority, subject to such exceptions and conditions as may be specified in the order, for compensation in respect of loss or damage caused or incurred in consequence –

(a) of the refusal of any consent required under the order, or

(b) of the grant of any such consent subject to conditions."

It will be seen, therefore, that the Act itself provides for the possibility of - not an entitlement to - compensation; whether or not a home owner in the position of the claimants in the present case is entitled to compensation, where consent to lop or fell the tree is refused, will depend on the particular terms of the TPO.

10. In this context it is important to note that the TPO with which we are concerned was made on 21.2.75 in accordance with the provisions of the Town and Country Planning (Tree Preservation Order) Regulations 1969 (SI 1969/17). As is common, these regulations contained what was called a 'model order' to be followed. The TPO of 21.2.75 was in the terms of that model order. Article 5 of the model order in the 1969 regulations permitted the local authority to certify that the trees in question had "an outstanding or special amenity value" and the effect of such a certificate was to remove the entitlement to compensation under Article 9 of the model order. There was such a certificate in the present case, thereby denying the claimants compensation for loss and damage in consequence of the refusal of permission to fell the tree. It should also be noted that the 1969 regulations have been superseded by the Town and Country Planning (Trees) Regulations 1999 (S.I. 1999/1892). The model order set out there does not permit the issue of certificates removing the right to compensation.

11. S.210 of the 1990 Act make it an offence for a person, in contravention of a TPO, to cut down, uproot or wilfully destroy the tree or wilfully to damage, top or lop the tree in such a manner as to be likely to destroy it. On summary conviction, a person convicted of such an offence is liable to a fine not exceeding £20,000. If convicted on indictment, a person guilty of such an offence faces an unlimited fine. Accordingly, s.198(6) is of importance because, not only does it provide a mechanism by which a person affected by a tree that is the subject of a TPO can, in certain circumstances, carry out works to the tree itself, but it may also provide a defence to a person charged with what is otherwise a strict liability criminal offence under s.210 of the 1990 Act.

12. On behalf of the first defendant, Mr Findlay argued that the principal purpose of s.198 of the 1990 Act was to preserve trees through the mechanism of the TPO. I accept that submission. I also accept that, in consequence, the exemptions in s.198(6) must

be carefully construed so as to ensure that the principal purpose of the legislation is not frustrated by too wide an interpretation of the exemption provisions.

13. The 1990 Act, and the regulations made under its sections 198(8) and 199, provides two ways in which the potentially adverse consequences of a TPO might be ameliorated. The first, provided by the regulations rather than the Act itself, is the mechanism by which a person adversely affected by a tree that is the subject of a TPO can seek permission from the local authority (with an appeal to the Secretary of State) to lop or fell the tree in question. Of course, that mechanism is far from certain of bringing about a successful outcome for the person affected, particularly given the wide discretion that the local authority, and the Secretary of State, has in deciding whether or not to grant consent. Furthermore, as this case demonstrates, even if loss has been suffered (because consent to fell was refused and the tree roots have caused damage), compensation is not necessarily payable in any event.

14. The operation of this mechanism is not, in itself, an issue in these proceedings: it has been tried, without success, by the claimants, and they are not seeking any relief arising out of the decisions by the first defendant and, on appeal, the Secretary of State. It seems to me that, pursuant to that mechanism, the first defendant (and, on appeal, the Secretary of State) is plainly entitled to take into account a whole range of factors in coming to their decision. These factors are set out more fully in paragraph 51 below. The question is whether that wide range of factors has any relevance to the entirely separate exemption provided by s.198(6)(b) of the 1990 Act.

15. S.198(6) of the 1990 Act sets out the only mechanism in the Act itself by which a person, adversely affected by a tree that is the subject of a TPO, can take action by lopping or felling the tree in question, without committing an offence. In view of the refusal of permission to fell by the first defendant, upheld by the Secretary of State, it is therefore s.198(6) of the 1990 Act which lies at the heart of the present dispute.

The Agreed Facts and the Assumed Facts

16. It is agreed that:

> (a) The oak tree is owned by the second and third defendants. It is in the garden of their property at 35, Church Walk, Great Billing, Northamptonshire.
>
> (b) The oak tree was one of a pair of trees that were made the subject of TPO No. 147 confirmed by the Secretary of State on 2l.2.75.
>
> (c) In 1997, the claimants bought the adjoining house at 19, Elwes Way, Great Billing.
>
> (d) Six years later, in the summer of 2003, the claimants noted internal and external cracking to their property. They were advised that the cause of the problem was the roots of the oak tree.
>
> (e) The following year, in April 2004, the claimants sought permission from the first defendant to fell the oak tree. That application was refused on 21 June 2004. On the same day, the first defendant issued a certificate under Article 5 of the TPO, certifying that the tree was of outstanding amenity value and that therefore no compensation would be due under Article 9.

(f) The claimants appealed to the Secretary of State. On 24 January 2005 the Secretary of State dismissed the appeal. It was noted on behalf of the Secretary of State:

> "He agrees that it [the tree] merits outstanding status. Whilst the Secretary of State accepts that the criteria for suspecting tree related subsidence damage to 19 Elwes Way are satisfied and there are indications that the appeal Oak is implicated, the evidence is not sufficient to justify felling a tree of such high amenity value, particularly as there is an alternative engineering solution to the removal of the appeal Oak."

17. These proceedings were commenced on 31.1.06. The claim form seeks:

> "A declaration that for the purposes of s.198(6) of the Town and Country Planning Act 1990
>
> (i) the tree on the second defendant's land is causing subsidence by root encroachment into the claimant's land and
>
> (ii) it is necessary to cut down the tree to prevent and/or abate that nuisance …"

18. The defence, served on 17 July 2006, avers at paragraph 5 that:

> " … it is not necessary to cut down the tree to prevent or abate any such nuisance that the claimant asserts in paragraph 6 of the Particulars of Claim or at all … It is further averred that other methods would be capable of achieving the prevention or abatement of such nuisance that may exist, which methods include installation of a root barrier and/or pruning and/or cutting localised roots and/or underpinning."

From that it will be seen that, as noted above, the real issue introduced by the first defendant is concerned with the exemption of s.198(6)(b) and, in particular, how the word "necessary" is to be construed.

19. At the Case Management Conference on 29.6.06, I ordered the hearing of a Preliminary Issue to determine this dispute. For the purposes of that Preliminary Issue **only**, the parties are agreed that the following facts should be assumed:

(a) The oak tree referred to in paragraph 2 of the Particulars of Claim is causing a nuisance by root encroachment into the claimants' land;

(b) The nuisance could be prevented or abated by the cutting down, uprooting, topping or lopping of the tree;

(c) The nuisance could also be abated or prevented by works that do not fall within (b), such as the underpinning of the property or the erection of a concrete root barrier.

20. Thus, in the context of the agreed facts set out in paragraph 16 above and the assumed facts set out in paragraph 19 above, the agreed Preliminary Issue that I must decide is as follows:

> "Whether, for the purposes of s.198(6)(b) of the Town and Country Planning Act 1990, as amended, in determining whether cutting down, uprooting, topping or lopping of a tree may be necessary for the prevention or abatement of a nuisance, it is irrelevant that there are other possible works that could prevent or abate the same nuisance."

21. For completeness I should also record that, because the real dispute in the present case is not between the claimants and their neighbours, the second and third defendants, but between the claimants and the first defendant, the local authority, an agreement has been reached between the claimants and the second and third defendants pursuant to which the second and third defendants have agreed that they will arrange for the removal of the tree "as soon as they are permitted to by the first defendant". It is also agreed that the claimants' insurers will reimburse them for the costs of such work.

Case Law: Generally

22. There are a number of reported cases dealing generally with the provisions of the 1990 Act (and its predecessors) insofar as they relate to trees. In ***Barnet London Borough Council v Eastern Electricity Board and others*** *[1973] 1 WLR 430*, the Court of Appeal held that the severance and damage to the roots of six trees protected by a TPO could amount to the destruction of the trees themselves. May J said in the course of his judgment:

> *"Consequently in our judgment one must bear in mind in this case that the underlying purpose of the relevant legislation is the preservation of trees and woodlands as amenities, as living creatures providing pleasure, protection and shade; it is their use as such that is sought to be preserved, and a tree the subject of a tree preservation order is destroyed in the present context when as a result of that which is done to it, it ceases to have any use as an amenity, as something worth preserving."*

> I have already observed that, in my judgment, the principal purpose of the sections of the 1990 Act set out above is the preservation of trees as amenities.

23. More recently, in ***R (Brennon) v Bromsgrove District Council*** *[2003] EWHC 752 Admin*, Richards J was concerned with a number of attacks on the validity of a particular TPO. He rejected the suggestion that the statutory regime infringed the claimant's human rights. He said at paragraph 33:

> " … *The short answer, in my view, is that the statutory regime concerning tree preservation orders represents a fair balance between the general interest of the community and the requirements of the protection of the individual's rights …"*

> The learned Judge went on to say that, on the application for judicial review, he was not concerned with the point that arises in the present case, saying that it was "not for this court to assess the competing

evidence as to whether the trees were dangerous or liable to damage property …"

Case Law: The Exemptions at s.198(6)

24. The exemptions under s.60(6) of the 1971 Act, now s.198(6) of the 1990 Act, were considered by the Court of Appeal in the criminal context in ***R v Alath Construction Limited*** *[1990] 1 WLR 1255*. In that case, Mr Recorder Zucker QC (as he then was) held that the prosecution, who were seeking to rely on the offence created by what is now s.210, did not have to prove that the tree in question was not dying, or dead or dangerous or creating a nuisance. He held that it was for the defendant to establish one or other of the exemptions in s.198(6) in order to establish a defence to the charge. The Court of Appeal entirely agreed with that approach.

25. There are three situations in which s.198(6) operates so that the cutting down, uprooting, topping or lopping of trees can be carried out because the TPO will not apply to such works. One of these three exceptions is where such cutting down, uprooting, topping or lopping is necessitated by some other statutory obligation. That does not arise in the present case and I say no more about it.

26. The other two exceptions are where the cutting down, uprooting, topping or lopping is carried out to trees which are dead, dying or dangerous, or where such work is "necessary for the prevention or abatement of a nuisance". Although it is this latter exemption on which both parties concentrated, it is instructive to consider first the exception at 198(6)(a) (where the tree in question has to be dying or dead or has become dangerous) in order to see how this exemption has been treated by the courts.

27. In ***Smith v Oliver [1989]*** *2 PLR 1,* Farquharson J, as he then was, ruled that, again in a criminal context, it was for the magistrates to decide as a matter of fact whether the trees in question were dying, dead or had become dangerous. However, it appears from his judgment that he considered that a tree might be dangerous if it threatened the foundations of an adjoining property. He said:

> *"In my judgment, that [i.e. whether the tree was dying, dead or dangerous] must be a question of fact for the justices. The approach which they should make is the everyday sensible approach of a prudent citizen looking at the trees in question and deciding in his own mind whether he can properly say those trees are dangerous. The existence of the danger must be a present danger. He must be able to say that the existing condition is one of danger in relation to the tree or trees which he is examining. Of course that does not mean that the danger which has been threatened has actually occurred. It is not necessary to show that the tree has fallen or that its roots have disturbed the foundation of the house, fence or the pavement nearby. The justices must be in a position to say to themselves that 'having regard to the state of the tree, its size, its position and such effect as any of those factors have so far had, we can properly come to the conclusion that the tree has now become dangerous' … In deciding that question, the magistrates are entitled to look at what is likely to happen. If the tree has already shown signs of disturbing a fence or a pavement or indeed the house itself, it does not need the justices or indeed anyone concerned with the treatment of the tree to*

> *wait for those events actually to occur, namely for the fence to fall down on some passing pedestrian or the condition of the pavement to be such that somebody falls and is injured, or that the house begins to subside …"*

28. It seems to me that, in this passage in his Judgment, Farquharson J clearly had in mind that, if the tree roots posed a danger to the foundations of an adjoining house, the exemption at what is now s.198(a) is triggered. I consider that to be a natural reading of the Act and I refer to it again below, since it would provide the claimants in the present case with an alternative argument as to why, on the assumed facts, they were entitled to fell the oak tree. However, given that both parties focused their attention in the present case on the exemption concerned with nuisance at s.198(6)(b), not the exemption in relation to danger, I would not want to decide the Preliminary Issue in this case on the basis of that point alone.

29. In my judgment, the other main point to be taken from the judgments in ***Smith v Oliver*** is the proper approach to the s.198(6) exemptions generally. What the Divisional Court described there as the right approach to s.198(6)(a) is, in my judgment, also the right approach to s.198(6)(b). Thus, it seems to me that the determination of the question as to whether the lopping or felling of the tree is necessary to abate or prevent a nuisance is a question of fact, to be decided on the everyday sensible approach of a prudent citizen looking at the tree in question and deciding in his own mind whether he can properly say that lopping or felling was necessary to abate or prevent a nuisance.

30. It should also be noted that, in ***Smith v Oliver***, it was argued that the owner had not established the terms of the exemption clause (now s.198(6)(a)) because, although the justices had concluded that the trees had become dangerous, the lopping of the trees, rather than their complete removal, had not improved the position at all and the danger remained. This argument was rejected by the Divisional Court. As Farquharson J pointed out, the exemption dealing with danger did not specify that the owner was entitled only to reduce them to the extent that the danger was removed. The Judge went on to compare that with what is now s.198(6)(b):

> *"One is fortified in this construction by looking at the further words in the subsection, because when the subsection deals with the abatement of a nuisance, it uses these words: 'or the cutting down, uprooting, topping or lopping of any trees … so far as may be necessary for the prevention or abatement of a nuisance'. So the words ' so far as may be necessary' are introduced by the draughtsman when dealing with the question of nuisance, but they are not included when referring to the trees being dangerous."*

This point, with which I respectfully agree, becomes directly relevant to the issue between the parties in this case as to the proper construction of the word 'necessary' in s.198(6)(b) (see paragraphs 53 and 71 below).

31. Turning now to s.198(6)(b) itself, I note that there is no authority as to how the word "necessary" should be construed in the context of s.198(6)(b). That is a matter to which I shall return at paragraphs 47-71 below. There are, however, a number of reported cases which touch upon the proper construction of the word "nuisance" in this section. This was a matter of considerable dispute between the parties in the present case. On behalf of the claimants, Mr Green contended that the reference to nuisance in s.198(6)(b) meant nuisance at common law, which, as a matter of clear authority, encompassed simple encroachment of branches and trees, without any

resulting damage. Mr Findlay, on the other hand, submitted that the reference to nuisance in the section must be a reference to actionable nuisance, and that therefore the nuisance must have caused or be about to cause damage in order for the exemption to be triggered.

Analysis: The Proper Construction of 'Nuisance' in s.198(6)(b)

32. At common law I am in no doubt that Mr Green is right to contend that a nuisance will exist as a result of the simple encroachment of tree roots or overhanging branches. In ***Lemmon v Webb*** *[1894] 3 Ch 1*, the Court of Appeal held that simple encroachment was a nuisance. Kay LJ said:

> *"The encroachment of the boughs and roots over and within the land of the adjoining owner is not a trespass or occupation of that land which by lapse of time could become a right. It is a nuisance."*

All three judges agreed that the owner of the land who has suffered the encroachment has a right to remove the overhanging boughs or roots. Lindley LJ said that:

> *"The right of an owner of land to cut away the boughs of trees which overhang it, although those trees are not his, is too clear to be disputed."*
>
> Lopez LJ said that such a right was "beyond question".

33. The common law right to remove encroaching branches and roots was re-stated in ***Davey v Harrow Corporation*** *[1958] 1 QB 60*. Lord Goddard CJ said:

> *"Mr Russell, for the defendants, does not dispute that where a tree encroaches on a neighbour's land, whether by overhanging branches or by the penetration of roots, the adjoining owner can abate the nuisance by lopping the branches or grubbing up the roots. That the encroachment is not regarded as trespass, but as a nuisance, is well settled …"*
>
> More recently, in ***Delaware Mansions Limited v Westminster City Council*** *[2001] 3 WLR 1007*, Lord Cooke of Thorndon referred to ***Lemmon v Webb*** and noted that root encroachment into a neighbouring property was similar to bough encroachment, and that the neighbour could lop boughs or grub roots without notice "provided that he could do so without entering the owner's land" (see paragraph 12 of his speech).

34. As a result of these authorities, Mr Green, on behalf of the claimants, submitted that s.198(6)(b) was doing no more than enshrining in statute the common law right of a neighbouring land-owner to remove the branches and roots encroaching above or into his property, even if no actual damage was being caused. He submitted that, effectively, s.198(6)(b) was preserving the common law position even where the tree was covered by a TPO. In this submission he was supported by Mr Charles Mynors, the learned author of ***The Law of Trees, Forests and Hedgerows*** **(London, Sweet & Maxwell, 2002)**. At pages 463 to 470 of his helpful book, Mr Mynors argues that the nuisance identified in s.198(6)(b) does not have to be an actionable nuisance dependant upon damage, but a nuisance in the broader sense of the common law.

35. I have reached the conclusion that this argument, although persuasively put by Mr Green in the present case, is incorrect. I conclude that Mr Findlay is right to submit that the reference to 'nuisance' in s.198(6)(b) means 'actionable nuisance', where damage has been caused or, if no action is taken to prevent it, will imminently be caused. There are a number of reasons for this conclusion.

36. First, I do not accept that the works permitted by s.198(6)(b), namely "cutting down, uprooting, topping or lopping of trees" are the same as the works which a land-owner can carry out to his neighbour's tree in accordance with his common law rights. As Lord Cooke pointed out in ***Delaware Mansions***, the common law right of an owner affected by overhanging branches and encroaching tree roots is limited to works that can be carried out on his own land, namely the removal of those branches or roots that are above or within his land. The common law does not permit the owner of the property affected to enter his neighbour's land to carry out any works, and certainly does not allow the owner to go onto his neighbour's and lop or fell the tree in question. Thus I reject the suggestion that s.198(6)(b) is merely enshrining the position at common law: the works permitted by s.198(6)(b) are much wider than those permitted by the common law.

37. There is a separate reason why, in my judgment, the common law right is much more limited that the right being granted by s.198(6)(b). Pursuant to s.198(6)(b), the owner of a property can 'cut down, uproot, top or lop' the tree in order to **prevent** a nuisance from coming into existence. That is again much wider than the power at common law, which only permits the house owner to **abate** an existing nuisance by removing the overhanging branches or the encroaching roots. Prevention is not permitted by the common law; it is, however, permitted by s.198(6)(b). That is a separate reason why I reject Mr Green's submission that s.198(6)(b) is intended to mirror the position at common law.

38. More importantly still, I consider that, as a matter of construction of s.198(6)(b), the reference to nuisance must be taken to be a reference to actionable nuisance (i.e. that damage must have been caused or must be imminently like to be caused) in order to give coherence and effect to s.198(6) as a whole. The other exemptions in s.198(6) will, so it seems to me, arise relatively rarely, and will only operate in limited situations such as a dead or dying tree or a tree which has become a danger to those passing close to it. It can only be consistent with the remainder of s.198(6) to read the reference to nuisance in s.198(6)(b) in that context, as a situation which will not arise on a regular basis. It is common for the tree roots in one garden to encroach onto or into the neighbouring garden, but, fortunately, much rarer for those tree roots to cause damage to the foundations of the neighbouring property. It therefore seems to me to be consistent with s.198(6) as a whole for the reference to 'nuisance' to be a reference to 'actionable nuisance' (requiring actual or imminent damage), which will arise relatively rarely, and not just 'pure encroachment', which will be much more common.

39. It also seems to me that reading this as a reference to actionable nuisance, requiring actual or imminent damage, is also consistent with the reference to "dangerous" in the preceding sub-section. I have already observed (paragraph 28 above) that I can see no reason why, as a matter of construction, danger or the threat of danger could not be created by, for instance, tree roots threatening to damage the foundations of the neighbour's property. That appears to be the view of Farquharson J in ***Smith v Oliver***. Even if that were wrong, and 'danger' in s.198(6)(a) is confined to danger to people rather than buildings, it would be entirely consistent with that interpretation for the reference to 'nuisance' at s.198(6)(b) to encompass an equivalent danger to buildings. That is another reason why it seems to me that the reference to nuisance in s198(6)(b) should be construed as a reference to actionable nuisance.

40. Any other interpretation of the word 'nuisance' would, so it seems to me, lead to absurd results. It would be completely contrary to the purpose and scheme of these

parts of the 1990 Act, if a man could fell his neighbour's tree, despite its protection by a TPO, because one of its branches overhung part of his garden or because some of the roots of the tree ran under his lawn. It would be contrary to the principal purpose of the Act if TPOs were to be of no application in any case of overhanging branches or encroaching roots. Something more must be required in order for the TPO not to apply, something significant and relatively rare, which balances the primary purpose of tree protection with the right of an individual to live in a safe and unthreatened home. Accordingly, for all these reasons, I have concluded that the reference to 'nuisance' in s.198(6)(b) must be a reference to 'actionable nuisance'.

41. I am fortified in this view by the existence of two cases in which similar views to my own have apparently been expressed. As I make plain below, the conclusion in one of these authorities is not entirely clear, and the other is not binding on me; despite that, I consider that they are of assistance, in that they demonstrate an approach which is very similar to the one that I have outlined in paragraphs 35-40 above.

42. In ***Edgebrough Building Co v Woking UDC*** *[1966] 198 EG 581*, the proper construction of the word 'nuisance' in an earlier version of s.198(6)(b) was apparently in issue. But it seems that, as a result of a concession made, the point did not arise for determination. In the rather compressed report of the judgment of Lord Parker CJ, it states:

> *"[Counsel] said that a danger of damage to property, namely damage to the house through the shrinkage of soil underneath the house caused by the roots of the tree, would amount to such a nuisance. It was argued before the justices, and would have been argued for the respondents in the present hearing, if necessary, that there was no reason for departing from the ordinary meaning of nuisance in the legal sense. He (his Lordship) considered that there was much to be said for that view but there was no need to decide the matter since Mr Reece [Counsel] had conceded that 'nuisance' at any rate meant something more than inconvenience, and in this context meant at least a risk of damage to property which seriously interfered with the enjoyment of that property.*

> It should also be noted that the report went on to conclude that the magistrates were fully justified in coming to the conclusion that there was no immediate risk of damage and that therefore the appellants were properly convicted.

43. There was some debate before me about what Lord Parker CJ meant by "the ordinary meaning of nuisance in the legal sense". It is not entirely clear from the report. However, it seems to me that, given that he concluded that the magistrates were justified in coming to the conclusion that there was no immediate risk of damage, he must have had in mind that the nuisance under the sub-section had to be actionable; otherwise, any question of risk of damage was irrelevant. Furthermore, the concession that was made to the effect that nuisance meant more than inconvenience appears to be at least part way towards an acceptance that the nuisance in question had to be actionable.

44. The other case on this point is referred to in the Guidance Notes on this part of the 1990 Act provided by the Department of the Environment. Due to the diligence of Mr Findlay's solicitor, I was helpfully provided with a typed copy of the judgment given by Mrs Recorder Norrie at Leeds Crown Court in the case of ***Ayres and Sun Timber Company Limited v Leeds City Council***. The judgment was delivered on 17 July

1980. It was concerned with the proper construction of the word 'nuisance' in this context and the debate between the parties was precisely the same as the one before me. The learned Recorder came to the view that nuisance meant "actionable nuisance". The primary reason for this conclusion was stated to be as follows:

> *"If the expression were to mean anything less than actionable nuisance it would seem to us to render the whole effect of ss.60 and 61 nugatory. Consider the context of sub-section 6. Exemptions are made for trees which are dying or dead or have become dangerous. These are all extreme cases and circumstances.*
>
> *The intention of ss.60 and 61 is to preserve trees which are valuable in the sense of their amenity value. Old trees, by their very nature, have widely outspreading branches, and if it were to be possible for anyone affected by the branches to cut them down at will, so altering the shape of the tree and possibly causing irretrievable harm to the tree, then the whole effect of a TPO would be negated."*

I respectfully agree with that: it is precisely the same conclusion as the one that I have reached in paragraphs 35-40 above.

45. Finally, I should also note that my construction of 'nuisance' to mean 'actionable nuisance' is in line with the decision of the Divisional Court in ***NCB v Neath Borough Council*** [1976] 2 All ER 478. There 'nuisance' in s.92(1)(a) of the Public Health Act 1936 was held to mean either a public or a private nuisance (i.e. one that was actionable) and it could not therefore be said to arise if what had already taken place on particular premises only affected the person or persons occupying those premises.

46. For all these reasons, therefore, I conclude that, for s.198(6)(b) to be triggered, it can only be for lopping or felling to prevent or abate an actionable nuisance. That conclusion is in line with the submissions made by Mr Findlay, on behalf of the first defendant. However, it is worth noting the wider consequences of this conclusion in the present case. If a tree is not protected by a TPO, and its roots cause damage to the foundations of a neighbouring property, then the owners of that property have a cause of action in nuisance: see ***Davey v Harrow*** and ***Delaware Mansions***. Accordingly, at common law, the owner of the house that is damaged will be entitled to the costs of remedial work including, if necessary, underpinning. That was precisely what happened in ***Delaware Mansions***. Yet on the first defendant's case in the present dispute, Ms Perrin and Mr Ramage have no such entitlement: indeed, on their case, if the claimants' property requires underpinning, then it will be for Ms Perrin and Mr Ramage (or their insurers) to pay for it. Thus the effect of their submission is that the existence here of the TPO and the Article 5 certificate entirely reverses the usual common law position. Is there anything in s.198(6)(b) that would permit such a result? That turns on the construction of the provision generally and in particular the word "necessary". It is to that dispute, therefore, that I now turn.

Case Law: 'Necessary'

47. In the absence of any reported authority on the meaning of the word 'necessary' in s.198(6)(b) (or its predecessors), I was referred to a number of cases in which the words 'necessary' or 'necessarily' have been considered. These included the contempt of court case ***MGN PensionTrustees v Bank of America*** *[1995] 2 All ER 355*. However, in general terms, it is difficult to take too much from these decisions, because the proper construction of a word like 'necessary' must always depend on the statute and section in which it appears, and the context in which it is used. Having

said that, however, I derived some considerable assistance from the discussion of the proper construction of the word 'necessarily' by the Court of Appeal in ***Pabari v Secretary of State for Work and Pensions*** *[2004] EWCA Civ 1480; [2005] 1 All ER 287*.

48. In that case, the Court of Appeal was concerned with para. 4(1)(a) of Schedule 3 to the Child Support (Maintenance, Assessments and Special Cases) Regulations 1992 which provided that housing costs fell to be taken into account only where "they are necessarily incurred for the purpose of purchasing, renting or otherwise securing possession of the home for the parent and his family or for the purposes of carrying out repairs and improvements to that home …" The question was whether the father's mortgage payments based on a 12 year mortgage, rather than a mortgage for a longer term (for which the monthly payments would have been lower) were payments that were 'necessarily' incurred.

49. In his Judgment in ***Pabari***, when dealing with the word 'necessarily' Holman J said:

> *"37. In my view 'necessarily' … is a linguistically irreducible word. We should be very careful not to replace it with a synonym in this case …*
>
> *38. It is also a word which accommodates a range of meanings, although it is far less potent or wide than the word 'substantial' which Lord Mustill was considering [in* ***South Yorkshire Transport Limited v Monopolies and Mergers Commission*** *[1993] 1 All E R 289].*
>
> *39. In my view it is possible and permissible to say where on the spectrum of exigency the word 'necessarily' is placed and to say what it does not mean. It does not mean merely reasonably, or sensibly, or justifiably. It is higher on the spectrum than that. Nor does it mean 'reasonably necessarily'… but nor does the word 'necessarily' convey an absolute meaning, such as absolutely, essentially or inescapably. The context is, as Mr Castle accepts, too subjective for that; and I agree with the submission of Miss Demetriou that the regulation cannot sensibly require that minute scrutiny is given not only to all possible mortgage options at the time of commencement, but to continuing possible re-mortgage options …*
>
> *40. So 'necessarily' must be given its proper force, but not a strained force. I agree with paragraphs 39 and 40 of the decision of Mr Commissioner Jacobs where he said that paragraph 4(1)(a) set a 'high threshold' but also that 'it must be interpreted and applied sensibly, with appropriate regard to the realities of property acquisition and of the mortgage market'."*

50. In his concurring Judgment, Dyson LJ said:

> *"53. 'Necessary' is a somewhat protean word whose meaning depends on the context in which it is used.*

In some contexts it means 'indispensable' or 'essential' …

54. In ***R v Shayler*** *[2002] UKHL 11 at 23; [2002] 2 All ER 477, Lord Bingham of Cornhill said of the word 'necessary' where it appears in the phrase 'necessary in a democratic society' in Article 10(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Schedule 1 to the Human Rights Act 1998):*

> *'It is plain from the language of Article 10(2), and the European Court has repeatedly held, that any national restriction on freedom of expression can be consistent with Article 10(2) only if it is prescribed by law, is directed to one or more of the objectives specified in the Article and is shown by the State concerned to be necessary in a democratic society. 'Necessary' has been strongly interpreted. It is not synonymous with 'indispensable', neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable' …*

55. In some contexts the word 'necessary' has a weaker meaning. But it will usually bear the connotation of some degree of compulsion or exigency. The context will determine where on the spectrum of compulsion or exigency the word 'necessary' is placed …

56. It could be argued in the present context (costs incurred in securing possession by means of a mortgage) that, to the extent that costs are incurred in excess of the ***minimum necessary*** *to secure possession of the house, they are not necessarily incurred; or putting it another way, the costs are 'necessarily incurred' only if they are unavoidably or indispensably incurred. But Mr Castle does not so contend and he is right not to do so. Such an approach is unrealistic and would in any event be difficult to apply in practice …*

58. …In my judgment in deciding whether costs are necessarily incurred, account can also be taken of the absent parent's circumstances. That is not to introduce a test of reasonableness. But it recognises that it may not be possible to say whether a person has necessarily incurred costs without having regard to his or her circumstances."

Analysis: The Proper Construction of 'Necessary' in s.198(6)(b)

51. On behalf of the first defendant, Mr Findlay submitted that there was a whole host of factors that had to be considered before it could be concluded that "cutting down, uprooting, topping or lopping" was necessary. Assuming an actionable nuisance, he submitted that lopping/felling works to the tree would only be 'necessary' following a consideration of all other alternative engineering schemes, such as the underpinning of the foundations and the installation of a concrete root barrier; the practical implications of the implementation of either the works to the tree or the engineering works in the ground (such as underpinning or the installation of the root barrier); the cost of the works to the tree and the comparative costs of any alternative engineering scheme; the financial position of the individuals concerned, including the owners of the property affected and the owners of the tree; whether or not the individuals concerned had effective and valid insurance; the nature, scope and extent of the amenity provided by the tree that is the subject of the TPO; and the extent of the actionable nuisance that had been established. It was Mr Findlay's submission that all of these factors had to be considered before it could be said that the cutting down, uprooting, topping or lopping of the tree that was the subject of the TPO was "necessary".

52. On behalf of the claimants, Mr Green submitted that all of these matters were irrelevant to a consideration of what was 'necessary' under s.198(6)(b). He submitted that, as a matter of construction of the section, none of these factors fell to be considered at all. Moreover he said that the exemption at s.198(6)(b) would be rendered entirely nugatory, and/or impossible to apply sensibly and coherently, if such a wide range of matters had to be taken into account. I have concluded, for the detailed reasons set out below, that Mr Green's submissions on this issue are to be preferred.

53. The first and obvious point to make is that the word 'necessary' in s.198(6)(b) provides a simple link between a range of possible works to the tree itself and the prevention or abatement of a nuisance: if any of those lopping/felling works to the tree are necessary to prevent or abate an actionable nuisance, then such works are permissible because 'no TPO shall apply'. The section does not say that cutting down or lopping must be "reasonably necessary in all the circumstances" or that lopping or felling must be necessary "having regard to the nature of the tree, the other available methods of preventing or abating the nuisance, the financial implications of the works, the financial standing of those involved, the nature of the amenity and the degree of the nuisance". In other words, as a simple matter of construction, the section is concerned only with allowing such cutting down or lopping works as may be necessary to prevent or abate an actionable nuisance. Accordingly, I accept Mr Green's principal submission that 'necessary' here refers to the extent of the cutting down, uprooting, topping or lopping required to abate or prevent the nuisance, and nothing more.

54. For that reason, it seems to me that the long list of factors relied on by the first defendant does not arise for consideration in the proper operation of s.198(6)(b). As the Court of Appeal made plain in ***Pabari***, the Court must not qualify the word 'necessary' by reference to what might be regarded as reasonable. The word 'necessary' instead requires a high degree of exigency. The link in s.198(6)(b) is between the nuisance and the works to the tree itself. I can therefore find no reason why, as a matter of construction, the matters listed by Mr Findlay can be relevant. In many ways, the lengthy list of matters which Mr Findlay relied on is akin to the minute scrutiny of all the mortgage options and continuing remortgage options which, in ***Pabari***, the Court of Appeal expressly ruled was not encompassed by the word 'necessarily'. The same point can be made in answer to Mr Findlay's argument that, under certain provisions of the Trades Descriptions Act 1968 and the Health and Safety at Work Act 1974 to which he referred, the court is obliged to consider a whole range of matters when looking at what is practicable or diligent. But each of the provisions that he relied on from these statutes was expressly qualified in a way that made such an approach entirely understandable: 'reasonable precautions', 'all due diligence', 'reasonably practicable', and so on. There is no such qualification here.

Those other statutory provisions, therefore, did not assist the first defendant; their qualified language only served to confirm my view that a consideration of a wide range of other factors is not appropriate under s.198(6)(b), which contains no such qualifications.

55. At the core of Mr Findlay's submissions was the argument that alternative engineering schemes, such as the underpinning of the house affected by the tree roots, or the installation of a concrete root barrier below the ground, must be considered before it is concluded that any works to the tree itself are necessary. But it seems to me that that argument ignores the fact that s.198(6)(b) only identifies works to the tree: it makes no reference to the possibility of any other works, that do not involve the tree, that might prevent or abate the nuisance. It is a rule of statutory construction that where a statutory proposition might have covered a number of matters, but in fact mentions only some of them then, unless those mentioned are merely examples, the rest are to be taken as having been excluded from the proposition: see Bennion's ***Statutory Interpretation*** (**Butterworth's, 2002)** Part XXVIII, Section 390, page 1072. Cutting down, uprooting, topping or lopping of trees are all referred to in s.198(6)(b); no mention is made of engineering works in the ground or to the foundations of building affected. It is therefore reasonable to conclude that they have been excluded from the working of the section.

56. I am confirmed in that view by a consideration of what s.198(6)(b) is intended to achieve. It is allowing a person to carry out works to the tree itself which, if the exemption at 198(6)(b) did not apply, would be a criminal offence pursuant to s.210. It is permitting the uprooting or lopping of an otherwise protected tree; it is making something lawful that would otherwise be unlawful. Compare that with the underpinning of the foundations or the installation of a concrete root barrier, on which the first defendant seeks to rely here. Ms Perrin and Mr Ramage were always entitled, provided that they could afford it, to underpin their house or install a concrete root barrier. That would be engineering work that would be carried out on their own land, without directly affecting their neighbour's tree. There is therefore no need for s.198(6)(b) to make mention of the possibility of such work, because it would always be lawful for such work to be carried out. It would make a nonsense of s.198(6)(b) to argue that the works which it was permitting (lopping, felling, etc) could only be carried out following a detailed analysis of the possibility of carrying out other works, which are not mentioned in the Act, which would not directly affect the tree and which were never at any time rendered unlawful by the Act in any event.

57. In addition, I accept Mr Green's submission that it would be impossible for a member of the public, who wanted to avail themselves of the protection provided by s.198(6)(b), to decide whether or not uprooting or lopping was necessary if such a decision turned on the myriad factors outlined by Mr Findlay and summarised in paragraph 51 above. Mr Green made the telling point that, unlike, say, the provision under review in ***Pabari***, which would be decided by a member of the Child Support Agency (and, on appeal, by a child support appeal tribunal, then a Commissioner and, on a further appeal, by the Court), s.198(6) involves no such decision-making structure. It is an exemption provided to members of the public to allow them, in certain limited circumstances, to take steps to deal with a tree otherwise protected by a TPO. In my judgment, the section would be unworkable if a member of the public had to weigh up all of the factors listed by Mr Findlay before coming to a clear view as to whether or not the works to the tree were necessary. Indeed, I consider that some of the matters that have been identified by Mr Findlay would be quite incapable of sensible evaluation by a member of the public, no matter how well informed. For example, it would simply not be open to them to say with any conviction that the tree in question either had or had not a particularly high amenity value. Accordingly, given the injunction in ***Pabari*** that the word 'necessary' has to be interpreted sensibly and practically, and that what is necessary to abate or prevent the nuisance is a matter of fact to be determined by 'the everyday sensible approach of a prudent citizen' (***Smith v Oliver***), I conclude that the section could not be sensibly applied by those whom it is seeking to help if Mr Findlay's long list of factors all had to be taken into account in

determining whether lopping or felling the tree was necessary to abate or prevent a nuisance.

58. The point about the unworkability of s.198(6)(b) in such circumstances is further confirmed when it is remembered that s.198(6), amongst other things, provides a defence to the statutory offence of damaging a tree under s.210. As is made clear in Part XVII, section 271, pages 705-709 of ***Statutory Interpretation***, a person cannot be guilty of an offence except under clear law. It would, I think, be impossible to operate s.198(6)(b) in a clear and coherent way if it was to be suggested that a man was guilty of an offence if he cut down a tree protected by a TPO in circumstances where the nuisance which he was anxious to prevent or abate might have been dealt with by the carrying out of expensive underpinning work instead. The section does not say that, and I do not believe that it can be interpreted as such.

59. Those are the reasons why I consider that, as a group, the factors identified by Mr Findlay, and summarised in paragraph 51 above, are not matters which are relevant for the proper operation and application of s.198(6)(b). In addition, I also consider that the individual factors there identified are not, and were not intended to be, matters relevant to a consideration of whether the works to the tree were necessary to prevent or abate a nuisance. I deal briefly with each of these individual factors below.

(a) The Amenity Provided By The Tree

60. I do not consider that the particular value of or amenity level provided by the tree in question have any bearing on, or relevance to, the operation of s.198(6)(b). In this particular case, much was made by the Secretary of State in his rejection of the appeal against the refusal of consent, of the "outstanding" nature of the oak tree which, on the assumed facts, is the cause of the actionable nuisance. I can well understand that that may be a factor which it is right for the Secretary of State to take into account when considering the appeal against the refusal of consent allowed by the regulations. But it seems to me that there has been here (and I understand in other similar cases) a blurring of the appropriate approach under the consent procedure, and the proper operation of the entirely separate exemption provided by s.198(6)(b).

61. Whatever might be appropriate under the consent procedure, there is nothing in s.198(6)(b) which permits any sort of consideration of the amenity level provided by the tree. I do not consider that a sort of sliding scale, which I understand is sometimes used by local authorities when considering applications to fell, and which considers the particular amenity value of the tree in question, is permissible or relevant under s.198(6)(b). After all, s.198(6) only applies to a tree that is the subject of a TPO. The section therefore assumes that the tree is of sufficient importance and amenity value to be the subject of a protection order in the first place. But that is all. If the necessary exemption is made out under s.198(6) then the tree can be cut down, uprooted, topped or lopped, no matter what amenity value it is said to supply.

62. Further, and for the avoidance of doubt, I repeat the point made above that, in my judgment, it would be quite impossible for, say, a home owner worried about a serious crack in the side wall of his house and the actionable nuisance being created by a tree in his neighbour's garden, to endeavour to work out a sliding scale in which the level of amenity provided by the tree is balanced against the imminent danger of the collapse of part of his house.

(b) **The Existence Of Alternative Schemes**

63. I am confident that the mere fact that the actionable nuisance could be prevented or abated by the carrying out of engineering works in the ground or to the affected

property does not automatically mean that cutting down, uprooting, topping or lopping will not be necessary under s.198(6)(b). There are a number of reasons for this view.

64. First, as I have already pointed out, that is not what the section says. The section provides a simple link between works to the tree and the prevention or abatement of a nuisance. It makes no reference to the need for a consideration of any other alternative schemes or ways in which the nuisance might otherwise be prevented or abated.

65. Secondly, I believe that it would make a nonsense of the whole exemption at s.198(6)(b) if lopping or felling could always be avoided if alternative schemes could be shown to exist. The vast majority of cases of tree root damage could be dealt with by the expensive underpinning of the foundations of the property concerned, or the installation, often deep into the ground, of a concrete root barrier. Thus, if the mere existence of an alternative solution is enough to determine that lopping or felling will not be necessary under s.198(6)(b), the exemption would, as a matter of practicality, never apply. It would therefore be rendered of no effect at all.

66. Alternative solutions, such as underpinning or the installation of concrete root barriers, will almost always exist. They are, however, not relevant to s.198(6)(b). Permission is not necessary for such engineering works to be carried out; neither is a criminal offence committed if such works are carried out. What the section is concerned with is the works to the tree itself for which, but for the exemption, the person carrying out the work would be committing a statutory offence.

(c) Financial Considerations

67. Inevitably linked to the question of alternative schemes is the question of their cost. Under s.198(6)(b), the person suffering the nuisance should be in a position to uproot, cut down or lop the tree in order to prevent or abate the nuisance. In the hands of a competent tree surgeon, such work would cost a relatively modest amount. But complex engineering works to foundations, and even the installation of a concrete root barrier in the ground, will always cost considerably more. It would, I think, be wrong for the owner of a house affected by an actionable nuisance to be deprived of his statutory remedy under s.198(6)(b) because there is the possibility that he could carry out other, much more expensive work to abate or prevent the nuisance.

68. In addition, as Mr Findlay accepted, if the question of the costs of the various putative schemes are relevant, then it is inevitable that consideration also has to be given to the financial standing of the owner of the tree and, on the other hand, the owner of the property that is affected by the tree. Such matters are extremely variable. Again, one asks rhetorically: How can a person who wants to avail himself of the remedy provided by s.198(6)(b) possibly work out what is necessary by reference to his and/or his neighbour's financial standing? It could mean that works which are 'necessary' one day would, as a result of a lottery win over a weekend, be rendered 'unnecessary' the following Monday. Again, it seems to me that this approach would make the section unworkable.

69. The financial standing of those with an interest in the works to the tree or some other alternative scheme is inevitably going to be linked to their insurance position. Again, therefore, if Mr Findlay was right, work which, taking one view of the insurance position, was necessary might, because of a change in the insurance position, be rendered unnecessary. Again, it seems to me that these considerations are far removed from the clear and simple position set out in s.198(6)(b).

(d) Extent of Nuisance

70. Mr Findlay's last variable factor was the extent of the nuisance. Again, as a matter of the construction of the section, I do not think that this is a relevant consideration. Whilst I again accept that this may have some relevance to the exercise of the discretion under the consent procedure provided for in the regulations, it seems to me that it has nothing whatsoever to do with the separate operation of s.198(6)(b). All that is required is an actionable nuisance in order to trigger the works to the tree.

71. However, I do accept that the extent of the nuisance is highly relevant to the precise nature of the cutting down, uprooting, topping or lopping work that it is necessary to carry out to the tree. Mr Green submitted that, on a proper construction of the section, the cutting down, uprooting, topping or lopping had to be the minimum necessary to prevent or abate the nuisance. I agree with that submission. It reflects the views of Farquharson J in ***Smith v Oliver*** (paragraph 30 above); it reflects too my finding on the basic construction of 'necessary' set out in paragraph 53 above. Accordingly, if the actionable nuisance could have been prevented or abated by some topping or lopping of the branches of the tree, but instead the house owner uprooted the entire tree, then he would have gone outside the exemption provided by s.198(6)(b) and would have committed an offence under s.210.

Conclusions

72. As set out in paragraph 12 above, I consider that the principal purpose of s.198 of the 1990 Act is to preserve trees through the mechanism of the TPO, and that the exemptions in s.198(6) must be carefully construed so as to ensure that the principal purpose of the legislation is not frustrated by too wide an interpretation of the exemption provisions.

73. For the reasons set out in paragraphs 27 and 29 above, I conclude that, pursuant to s.198(6)(b), the determination of the question as to whether the lopping or felling of the tree is necessary to abate or prevent a nuisance is a question of fact, to be decided on 'the everyday sensible approach of a prudent citizen looking at the tree in question and deciding in his own mind whether he can properly say' that lopping or felling is necessary to abate or prevent a nuisance.

74. For the reasons set out at paragraphs 32-46 above, I conclude that, in order to trigger the exemption at s.198(6)(b), the nuisance in question must be actionable in law. There must be actual or imminent damage, not just the 'pure encroachment' of roots or branches into or over the adjoining land.

75. For the reasons set out in paragraphs 51-70 above, I conclude that the word 'necessary' in s.198(6)(b) provides a simple link between the cutting down, uprooting, topping or lopping of the tree and the prevention or abatement of the nuisance. It governs the extent of the work to the tree, and nothing more. I reject the submission that, in order for, say, the claimants to work out whether work to the tree (lopping, felling or the like) is necessary under s.198(6)(b), it is appropriate or even possible for them to consider the lengthy list of variable factors (set out at paragraph 51 above) which the first defendant alleges are relevant to that exercise.

76. In particular, for the reasons set out in paragraphs 55-59 and 63-66 above, I reject the suggestion that the mere fact that alternative engineering solutions may be available to abate or prevent the nuisance is or can be relevant to the proper operation of s.198(6)(b).

77. As set out in paragraph 71 above, I conclude that the cutting down, uprooting, topping or lopping of the tree must be the minimum necessary to abate or prevent the nuisance. That conclusion reflects my construction of the word 'necessary'. In other words, if the actionable nuisance could be abated or prevented by, say, lopping, then

the uprooting of the tree would not be covered by the s.198(6)(b) exemption and would be an offence under s.210 of the 1990 Act.

78. For all those reasons, it seems to me that in the present case, and on the assumed facts, I must answer the Preliminary Issue in the affirmative: the possibility that other engineering works could be carried out is irrelevant to the proper operation of s.198(6)(b). Whilst it would, I think, be wrong for me to express the view that, in every conceivable case that might arise under s.198(6)(b), the existence of possible engineering works will always be irrelevant, for the reasons which I have set out above, I consider that, in the vast majority of cases, the fact that alternative engineering schemes are available would indeed be irrelevant to the proper operation of the exemption.

79. I also consider that this is not only a workable solution to the problem posed, but it is also fair. There is not, and should not be, any significant difference between the position of a householder whose property is undermined and damaged by tree root encroachment from a tree that is not the subject of a TPO, and a householder whose property is undermined and damaged by roots from a tree that is protected by a TPO. The whole point of s.198(6)(b) is that, where there is actionable nuisance, the TPO will not apply to whatever cutting down, uprooting, topping or lopping of the tree is necessary to abate or prevent that nuisance. One of the difficulties for the first defendant in the present case is that it was the inevitable consequence of their construction of s.198(6)(b) that, despite the existence of actionable nuisance, the claimants here would have had to pay for the costs of underpinning the foundations of their house. This was, on the first defendant's case, the direct result of the TPO and the certificate. That seemed to me not only unfair but, much more importantly, unsupported by any provision of the 1990 Act, and, for the reasons which I have given, contrary to s.198(6)(b).

80. I should express my thanks to the solicitors and counsel on both sides for their co-operation before the hearing of the Preliminary Issue, and the clarity of their written and oral submissions.