

(1) SIDDIQUI (2) SOHANPAL v  
LONDON BOROUGH OF HILLINGDON

15th April 2003

High Court considers reasonable foreseeability and abatement of damage

Summary

In a judgment dated 15th April 2003, Judge Richard Seymour QC considered two key issues relevant to establishing liability in tree related subsidence claims. Firstly, as to whether the risk of damage was reasonably foreseeable until the damage occurred bearing in mind the date and nature of the construction of the claimant's property. Secondly, whether the giving of notice of the damage to the defendant tree owner and, consequently, the opportunity to abate, was a condition precedent to the recovery of the costs of repair.

Background

This action concerned structural damage to two residential properties constructed in 1979 on a previously wooden site adjacent to Ruislip Wood, in which a number of Oak trees were still growing. A number of trees had been removed prior to or in order to facilitate the construction process. Having considered the soil investigation undertaken prior to construction, the Judge held that the clay subsoil was desiccated in 1979.

Mr Siddiqui first noticed cracking to his property in 1988, which damage was considered to have been caused by tree related clay shrinkage, i.e. subsidence. Site investigations identified roots beneath the foundations and in August 1998 the loss adjusters wrote to the Defendant notifying it of the damage. A partial underpinning scheme to a depth of 3.9 metres was implemented in 1989. Further damage occurred in 1991. Unfortunately, yet further damage appeared in 1997 and, again, Oak roots were identified in the site investigation. A full piled raft underpinning scheme was therefore installed.

Mr Sohanpal was not aware of the cracking to his property until the winter of 1995/96, the significance of which was remarked upon by the Judge. As with his neighbour's property, Oak roots were discovered beneath the foundations. The loss adjusters wrote to the Defendant in April 1997 notifying it of the damage and that underpinning works were to be carried out. A full piled raft scheme was subsequently installed.

The Claimants brought proceedings against the Defendant on the basis that the damage had been caused by subsidence of the clay subsoil due to the encroachment of roots from the Oak trees in Ruislip Wood. The Defendant denied liability on the grounds that the damage was due to heave movement following the removal of the trees from the site at the time of construction of the development.

Relevant issues

After hearing the parties' respective experts, the Judge accepted the Defendant's contention that the damage to both properties had been caused by heave rather than subsidence movements. Both claims were therefore dismissed. However, in his obiter comments, the Judge considered it appropriate to deal with the vexed issues of foreseeability and opportunity to abate in any event.

Foreseeability

The Defendant submitted that, bearing in mind the relatively recent construction of these properties and the fact that the foundations complied with NHBC guidance, the Defendant had no reason to foresee the risk of damage being caused by the trees in Ruislip Wood until such damage in fact occurred. In direct contradiction of *Russell v London Borough of Barnet* [1984] in which the Court of Appeal held that the risk of damage was foreseeable when a tree is situated next to a house built on London clay, the Judge accepted the Defendant's submission, holding that "...modern standards of construction can be expected to take account of obvious hazards in the vicinity of the structure to be built...". The Defendant had also submitted that, bearing in mind the fact of the partial underpinning works in 1989, the Defendant had no reason to foresee the risk of further damage. However, the Judge was not persuaded by this argument, holding that the Defendant was not entitled to rely upon what it would have discovered had it enquired as to the nature of the 1989 works: this did not serve to 'negative' foreseeability.

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Abatement

The issue considered whether the giving of notice of the damage and the opportunity to abate, as set out by the House of Lords in *Delaware Mansions Ltd v Westminster City Council* [2001], were a condition precedent to the recovery of damages. The Judge held that it was implicit in the House of Lords' judgment that the removal of the offending tree will either render the remedial works unnecessary or less extensive. It therefore follows that the question as to whether notice and the opportunity to abate has been given will not arise unless there is evidence before the court that the remedial works would have been rendered unnecessary or less extensive had the tree been removed.

Conclusions

Although the Judge's comments did not form part of his substantive judgement, his views are of interest insofar as they arguably mark a shift away from the widely held view that all tree related damage to properties built on clay in close proximity to trees is reasonably foreseeable. However, it is submitted that, to the extent that the learned Judge's views are in error, it should be borne in mind that this is a first instance decision and does not therefore overturn existing appeal court authorities. As for the abatement point, Defendant tree owners should be aware that there is little purpose in trying to run a defence based upon the claimant's alleged failure to give notice and a reasonable opportunity to abate unless there is real evidence before the court that tree works would have rendered the remedial works unnecessary or less extensive.

And finally...

The Judge was particularly uncomplimentary as to apparent attempts by those acting on behalf of the Second Claimant to (in the Judge's words) "noble" their arboricultural expert into reneging on a key concession made in the experts' joint memorandum: a salutary lesson for those involved!

Gaston Whybrew

28th May 2003

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