Neutral Citation Number: [2018] EWCA Civ 2232

Case No: B3/2017/0578

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
SIR ALISTAIR MACDUFF (sitting as a deputy High Court Judge)
[2017] EWHC 278 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/10/2018

Before:

LORD JUSTICE BEAN
LORD JUSTICE FLAUX
and
MR JUSTICE HENRY CARR

- -

Between:

WITLEY PARISH COUNCIL	**Appellant**
- and -	
ANDREW CAVANAGH	**Respondent**

- -
- -

Michael Pooles QC (instructed by **DWF LLP**) for the **Appellant**
Paul Bleasdale QC (instructed by **Slater & Gordon**) for the **Respondent**

Hearing date: 3 October 2018

- -

Approved Judgment

Lord Justice Flaux:

Introduction

1. The appellant (to which I will refer as "the Council") appeals with the permission of Thirlwall LJ against the Order dated 14 February 2017 of Sir Alistair Macduff sitting as a Deputy High Court Judge of the Queen's Bench Division that judgment be entered against the Council in favour of the respondent claimant on the issue of liability with quantification of damages to be assessed.

2. At the conclusion of the hearing before this Court on 3 October 2017, we indicated that the appeal would be dismissed with reasons for that decision to follow. These are the reasons.

Factual background

3. The Council owns land at Witley in Surrey adjoining the main A283 Petworth Road in an area where the local authority is Waveney District Council (to which I will refer as "WBC"). On 3 January 2012, after a stormy night, a mature lime tree some 25-30 metres high on the Council's land adjacent to the main road and to a bus stop and two benches fell across the road at the same moment as a single decker bus driven by the claimant was passing by. The bus was crushed and the claimant sustained serious personal injury for which he claims damages from the Council.

4. The Council had asked Mr Kevin Shepherd, a tree surgeon and specialist (who was the second defendant in the proceedings in the Court below but against whom the judge dismissed the claim) to undertake an inspection of all the trees on their land in 2006. His report recommended the removal of deadwood and 20% thinning of the lime tree which was said to be healthy. The report stated: "the survey will be for 24 months". Those works to the tree were subsequently carried out by Mr Shepherd.

5. The Council had in place at the relevant time a system of inspection of all their trees, including this lime tree, every three years, in accordance with which Mr Shepherd was instructed to inspect the trees again in 2009. In the instructions to him from the Council, this lime tree was specifically identified as one he should inspect. His report of his 2009 inspection recorded against this tree; "no works" which the Council understood to mean that he had inspected it and it was healthy requiring no work. In evidence at trial Mr Shepherd sought to maintain that "no works" meant that he had not inspected the tree as he had refused to inspect trees without having full maps which had not been provided, as he had explained to the relevant Council officer. The judge disbelieved that evidence as deliberately untruthful and held that Mr Shepherd had inspected the tree in 2009, albeit only in a cursory fashion.

6. By the time the tree fell there was an indication of internal decay in the form of a fungal bracket 300 mm above ground level which had begun to form at some stage after the earlier inspection in 2006. One of the principal issues before the judge was whether the fungal bracket had begun to form at the time of the second inspection in 2009. The judge found (preferring the evidence of the Council's expert Mr Barrell to that of the claimant's expert Dr O'Callaghan on this issue) that the bracket was just beginning to form in the late summer of 2009 so that even if Mr Shepherd had inspected fully and properly, he would not have discovered it. In those circumstances,

he found that any negligence by Mr Shepherd was not causative of the accident. There is no appeal against any of these findings.

The evidence before the judge on the issue of frequency of inspection and his findings on that issue

7. In those circumstances the critical issue before the judge, with which the present appeal is also concerned, was whether, as the Council contended, its three year inspection regime (in circumstances where, as was common ground, there was no obvious defect in this tree) was reasonable or whether, as the claimant and his expert contended, given the size and location of the tree, more frequent inspection of it, every 18 months to 2 years, was required. For the purposes of this appeal, it is necessary to summarise the evidence before the judge on this issue and his conclusions in relation to it.

8. I have already referred to Mr Shepherd's statement in his 2006 report that the survey was for 24 months. The judge concluded that this reflected his expert advice that the next survey of all the trees should be conducted two years later. Mr Michael Pooles QC who appeared on behalf of the Council submitted that the judge erred in reaching that conclusion, and all Mr Shepherd was saying is that his findings would be valid for two years. I cannot accept that submission. It seems to me that the judge was right to conclude that Mr Shepherd's advice was that there should be an inspection every two years.

9. On 4 March 2010, the tree officer from WBC Mr Arno Spaarkogle attended a meeting of the Council and informed them that WBC, which owned a great number of trees, zoned their trees into high, medium and low risk areas. Trees in a high risk area were inspected annually. Mr Spaarkogle confirmed this in oral evidence before the judge but added that the practice ceased in 2013 due to lack of resources and WBC now adopted a three year inspection regime for high risk zones.

10. In his Expert Report at 4.5.4. Dr O'Callaghan said this:

> "The location of the 25-30 metre high lime tree adjacent to a bus stop and two benches where people and vehicles are frequently present places the lime tree in a high risk zone and on that basis it should have been inspected more frequently than every three years. Annual inspections would have been ideal but an 18 month inspection interval would have been acceptable as on this basis the tree would have been inspected alternately in leaf and out of leaf. A competent tree inspector would have advised [the Council] accordingly. An inspection of a single tree on an 18 month interval is not, in my opinion disproportionate as it takes no more than four hours to undertake the inspection and prepare a brief report on the condition of the lime tree."

11. Mr Barrell referred in his report to the Department of Transport Code of Practice of 2005 which said that trees should be inspected every five years, "a period which may be reduced on the advice of an arboriculturist." He considered this too long but that

inspecting every one to two years was impractical for a highway authority and that he would be more comfortable with a three to four year inspection frequency.

12. In their expert reports, the experts referred not only to this Department of Transport Guidance (which as the judge noted the experts agreed was only a "starting point") but to three other available pieces of published guidance: (i) a 1975 Department of the Environment Circular which gave no guidance as to frequency of inspection; (ii) a Forestry Commission Practice Guide from 2000 (which the judge found helpful) and (iii) a 2007 Health and Safety Executive Sector Information Minute ("the HSE SIM"). Although the experts agreed that the SIM was a relevant reference for determining the type of inspection required for roadside trees, the judge did not find it useful in determining civil liability, since it was essentially directed to the standard required to avoid prosecution.

13. In the Joint Statement of the Experts at paragraph 6, it was agreed that: "in normal circumstances, with the exception of post severe weather conditions, an inspection frequency of three to four years is reasonable for this type of location." Paragraph 8 recorded Dr O'Callaghan's opinion that this tree was in a high risk zone as described in the HSE. Mr Barrell did not agree, considering that the tree was in a zone of "frequent public access", fundamentally different from a high risk zone. Paragraph 9 recorded Dr O'Callaghan's opinion that this tree was: "an obvious high risk category tree, i.e. one that poses a risk of causing damage to people and property; and it was located in a high risk category zone, i.e. one that is visited by people frequently on a day to day basis and for these reasons…more detailed and frequent assessments of the tree were required as the Forestry Commission advises".

14. In cross-examination, Mr Pooles QC took Dr O'Callaghan to paragraph 6 of the Joint Statement. Dr O'Callaghan agreed that the Council was aware of its duty and was treating all its trees in the same way with a triennial cycle of inspection which was better than some other similar authorities. He accepted that the general approach of the Council was commendable.

15. However, later in cross-examination, Dr O'Callaghan expanded on his opinion, which he maintained, that this tree should have been inspected more frequently than every three years:

> "Q So that example [in the HSE SIM] deals with a tree in a place frequently visited by the public, but only requires individual tree inspection if it has been identified has having structural faults likely to make it unstable and a decision has been made to keep that tree there.
>
> A That is the guidance, but if you look at an individual tree, as this tree was, in an area of very very frequent use by the public, a bus service underneath it, you don't necessarily have to follow it and say, "I'll only do this if it develops a fault." It is prudent management to look at that tree more closely because of its position and its location.
>
> Q But, it you are right that, there is no guidance to that effect anywhere, is there?

> A No, just common sense.
>
> Q If you are right on that, you are saying that every tree beside an A road has to be individually inspected?
>
> A No, I'm not saying that, I'm saying you've got to make a decision on trees individually. And, in an area like this, where you've got a single, very large mature tree to a bus stop, by an A road, the only tree there, that tree is a potential high risk and it's in an area of high risk, so, therefore, I would inspect more frequently and with more detail.
>
> Q Just help me with this. You say it is a "potential high risk".
>
> A Yes.
>
> Q What you are saying is, if it falls over, it can cause damage.
>
> A Yes, if you do a risk assessment on that tree and you – if a risk assessment was done on the tree, and you look at three things: the potential for the tree to fail and the consequences of a failure.
>
> Q "Three things", you said
>
> A Yeah, and the size of the tree – the size of the part that would actually fall. You can either have the whole tree come over, or you can have a large branch come off the tree, so you're looking at the size and the likelihood of a part of the tree to fail; you're looking at the potential of the whole tree to fail. But risk is actually potential of – by consequences."

16. He went on to deny that this would necessitate more frequent inspection of all trees adjacent to main roads, although he agreed that all trees beside major roads had the potential to cause serious harm. He also agreed that it usually needed something else to trigger an individual inspection and that usually would be a sign of ill-health but could be a professional opinion because one tree may cause more harm than another.

17. Both in cross-examination by counsel for Mr Shepherd and in re-examination Dr O'Callaghan reiterated his opinion that the inspection frequency for this lime tree should have been more frequent than every three years, namely every 18 months. He also reiterated in re-examination that this was because he regarded the tree as a high risk tree in a high risk zone for which more frequent inspections were required.

18. The consistent evidence of the Council's expert Mr Barrell was that the three year inspection cycle which the Council employed was reasonable and acceptable for all the Council's trees, including this lime tree. At [26] of his judgment, the judge referred to Dr O'Callaghan apparently making concessions in cross-examination and then returning to his original opinion whereas Mr Barrell had kept to the agreement in the joint report. At [27] he referred to the fact that in evidence Dr O'Callaghan had accepted that he was mistaken to refer to this as a high risk category tree which it would only be if inspection showed it to be unhealthy. However, it was in a high risk

position immediately adjacent to a relatively busy A road. In terms of tree risk all that could be said is that it was large, heavy and was leaning out towards the road.

19. Having dealt with the other issues which are no longer live before this Court, the judge turned to the issue of whether the Council was negligent in only inspecting this tree on a three-year cycle. At [51] to [54] the judge refereed to the advice from Mr Shepherd and Mr Spaarkogle (as set out at [8] and [9] above) in relation to inspection at more frequent intervals. He then referred at [56] and [57] to the 2012 survey of the Council's trees carried out after the accident by Mr Andrew Pinchin, a chartered arboriculturist whose opinion was that all the sites were high risk sites and he recommended re-inspection in two years.

20. The judge then referred to the various pieces of written guidance to which I have referred at [11] and [12] above. As I have said, he said he received most assistance from the Forestry Commission Guide from which he distilled the principle at [67] of his judgment:

> "where a tree…is within an area (one may say a high risk area but the language is unimportant) where people or high value property are within their falling distance, inspection is necessary. If it can be reasonably foreseen that there is a risk of serious injury/damage, a duty arises to minimise that risk; this is particularly the case alongside a public road, more so if it is busy and more so if the relevant tree(s) is / are large or old. It is known that trees (particularly older trees) can become diseased and unstable within a relatively short time frame."

21. The judge then set out at [68] and [69] his reasons for concluding that this lime tree should have been inspected more frequently than every three years:

> 68. In my judgment, this lime tree, alongside a relatively busy public road was in a high-risk position. It required regular inspection. It may not in itself have been a high-risk tree (insofar as no tree is to be deemed high-risk unless and until inspection shows it to be in difficulties). But it presented a higher risk than a smaller tree; than a younger tree; than a tree leaning away from the road. And there was another feature. If it failed it would undoubtedly cause severe damage, even if it fell when there was no vehicular of pedestrian traffic. The house opposite the tree was in direct line and was in fact damaged. It was saved from more severe damage by Mr Cavanagh's bus. If the bus had not broken the fall of the tree, anyone in the upper storey would have been liable to suffer serious injury.
>
> 69. I have reached the firm conclusion that this tree, in this position, should have been inspected more frequently than every three years. I can refer to the first bullet point in paragraph 9 of the Joint Experts' Report (2/ 748). Dr O'Callaghan accepted that he was wrong to call this tree an *"obvious high risk category tree"*. But he was clearly correct in saying that it posed a risk of causing damage to people and

> property; also that it was in a high-risk category zone. In my judgment it was also part way to being a *"high risk category tree"*. It was large. It was mature on the cusp of being old. It was heavy. It was leaning in the wrong direction. True, it appeared healthy to all but a detailed visual inspection; there was no excessive dead wood or lack of foliage. But it was clearly a higher risk than a smaller tree; than a younger tree; than a lighter tree; than a tree leaning the other way. And it was in a position of extreme high risk where, if it came down it was liable (as it did) to cause severe injury and/ or other damage. Like all trees it could be struck with disease at any time. Latent root rot might be developing but not showing. A three-year period of neglect could be crucial - as indeed it turned out to be. I wholly concur with Dr O'Callaghan's statement that: "*more detailed assessments of the tree were required as the Forestry Commission advises."*

22. The judge rejected Mr Barrell's contrary opinion based on the HSE SIM. At [70] he added three further things. First that when tendering for the 2009 survey the Council had asked for an individual report on this tree which the judge said can only have been because of its position and potential for harm, in itself a recognition of the need for especial care. The second matter was Mr Pooles' submission that the Council had exceeded its duty by treating all its trees with the same care and subjecting them to a three year inspection cycle. In relation to that point the judge said:

> "That, I fear, is a part of the problem. This lime tree was treated to the same inspection regime as all other trees, including young saplings in areas far from the madding crowd. Of course, I have not been educated on the full tree stock, but I suspect that there may be a small handful of trees within the parish which might have merited more frequent inspection. I suspect that there was none that had more potential for causing harm than this lime tree. What was required here was a distinction. If the vast majority of the tree stock had been inspected (as it could well have been) on a much more infrequent basis (and perhaps left to the groundsman for occasional pruning etc) a proper and more rigorous system of inspection could have been instigated in respect of the small number of trees which merited especial care; trees which were large, heavy, old/mature, and in places where they could cause serious damage. On the application of simple negligence principles (taking account of the risk of failure together with the risk of serious damage) the material lime tree should have been inspected at least every two years. If I had been required to say so, I would have found that an 18-month cycle (inspection in and out of leaf) would have been reasonable. I am further satisfied that the FC Practice Guide is the most relevant piece of literature and that it fully supports this finding. It is also of great significance that, prior to the accident, this was the advice being given to Witley by arboriculturists (Mr Shepherd and Mr Spaarkogle).

23. The third matter referred to the fact that other trees in the parish were not of this size and weight:

> "In the course of this trial I was told (I think) that Witley Parish is some 11 square kilometres in size. It has a good number of trees, but the vast majority are either not along the road side or are not of a size and weight where they would cause severe injury or damage if they were to fail. I do understand (and have directed myself) that the First Defendant is not an insurer and that resources are finite. It has not been suggested that the inspection policy has been influenced by a lack of funds."

24. The judge then referred to the zoning policy which had now been adopted by the Council. It appears that this was an error but that does not detract from the validity of the point he had just made which I have quoted. The judge went on to conclude in [71] that the Council had been negligent in not inspecting this tree every two years and that had they done so, that inspection would have discovered the tree was diseased well in advance of the accident.

The grounds of appeal.

25. The grounds for which permission to appeal was given are as follows:

(1) The judge erred in accepting Dr O'Callaghan's evidence notwithstanding that he had departed from the position in paragraph 6 of the Joint Statement, that he accepted in cross-examination that the three year regime was reasonable and that his report was predicated upon the tree being high risk when it was accepted and was common ground as recorded in [69] of the judgment, that it was not.

(2) The judge erred in placing significance on the fact that (i) the tree was mature when the experts agreed that age was only relevant when a tree was at or towards the end of its life which this tree was not; (ii) the tree was leaning towards the road which none of the experts considered of any significance.

(3) The judge erred in concluding that the various written guidance supported his conclusion in that: (i) he wrongly rejected the relevance of the HSE SIM which whatever the purpose of its authors, was accepted by the experts as relevant; (ii) he wrongly rejected the Department of Transport guidance which was agreed by the experts as the starting point; (iii) he wrongly construed the Forestry Commission guidance (which pre-dated the government guidance) as applicable because it only identified large, old trees (which this is not) as requiring frequent inspection and it was at odds with other guidance.

(4) The judge wrongly concluded that there was a body of opinion which supported his conclusion since (i) Mr Shepherd did not place a two year time limit on his 2009 report; (ii) Mr Minchin's subsequent report did not distinguish between any of the trees and what the judge said about the tree stock in [70] was speculation; (iii) Mr Spaarkogle did not recommend a two year inspection period. He had referred to an annual inspection by WBC of roadside trees which had proved impractical and been replaced by three year inspections; (iv) the judge placed a

duty on the Council which went beyond the expert's reasoning or supporting documentation in requiring the zoning of tree stock.

Relevant legal principles

26. It was common ground before this Court that the relevant legal principles are correctly summarised by Coulson J as he then was in *Stagecoach South Western Trains v Hind* [2014] EWHC 1891 (TCC) at [68] (omitting references to earlier cases):

> "Accordingly, I consider that the principles relating to a landowner's duty in respect of trees can be summarised as follows:
>
> (a) The owner of a tree owes a duty to act as a reasonable and prudent landowner;
>
> (b) Such a duty must not amount to an unreasonable burden or force the landowner to act as the insurer of nature. But he has a duty to act where there is a danger which is apparent to him and which he can see with his own eyes;
>
> (c) A reasonable and prudent landowner should carry out preliminary/informal inspections or observations on a regular basis;
>
> (d) In certain circumstances, the landowner should arrange for fuller inspections by arboriculturalists. This will usually be because preliminary/informal inspections or observations have revealed a potential problem, although it could also arise because of a lack of knowledge or capacity on the part of the landowner to carry out preliminary/informal inspections. A general approach that requires a close/formal inspection only if there is some form of 'trigger' is also in accordance with the published guidance referred to in paragraphs 53-55 above.
>
> (e) The resources available to the householder may have a relevance to the way in which the duty is discharged."

27. The Council was refused permission to appeal on a ground which contended that the judge had failed to apply these principles correctly, so that it has to be accepted for the purposes of this appeal that he stated and applied the legal principles correctly. From this it follows that the present appeal is concerned only with a challenge to the judge's findings of fact and evaluation of the evidence.

The parties' submissions

28. In his oral submissions, Mr Pooles QC focused on the point that although this tree was admittedly in a high risk location, it was not a high risk tree by reference to any recognised or published criteria. He submitted that the trigger for concern is a sign of ill-health and that is what would make a tree a high risk tree. He relied upon paragraph 3 of the Department of the Environment 1975 Circular and that the Forestry

Commission guidance that annual inspections in high risk locations would only be required in the case of large old trees, which this was not. It was a mature tree, one half to two thirds through its natural life. It was to all appearances perfectly healthy. It was not a high risk tree, as had been accepted at trial and as recorded in the judgment.

29. Mr Pooles QC placed particular reliance on the HSE SIM. He submitted that the judge had been wrong to discount this on the basis that it was directed at enforcement officers in relation to potential prosecutions given that (i) the experts agreed that it provided relevant guidance in relation to the issues in this civil litigation; (ii) any Health and Safety Act offence would involve breach of a duty of care in the same was as civil liability in negligence. The HSE SIM provided:

> "Individual tree inspection should only be necessary in specific circumstances, for example where a particular tree is in a place frequently visited by the public, has been identified as having structural faults that are likely to make it unstable, but a decision has been made to retain it with these faults".

30. As before the judge, Mr Pooles QC was critical of the evidence of Dr O'Callaghan on the basis that he had conceded in cross-examination that the Council's three year inspection cycle was reasonable, but had then resiled from that concession in re-examination. Mr Pooles QC submitted that the judge was faced with a stark difference of opinion between the experts and had preferred Dr O'Callaghan without explaining why, in circumstances where there was no foundation for the opinion expressed in paragraph 9 of the Joint Statement.

31. On behalf of the claimant, Mr Bleasdale QC submitted that the judge's key reasoning at [69] of his judgment cannot be faulted. The Council's case was essentially that the only trigger to more frequent inspection of a tree in a high risk location such as this tree was if the tree is defective. This was intuitively incorrect and contrary to common sense as Dr O'Callaghan said in cross-examination in the passage I have quoted at [15] above, where he dealt with the guidance in the HSE SIM.

32. Mr Bleasdale QC submitted that there was no prescription in any of the written guidance or in the case law as to the appropriate period between inspections for particular trees. An appeal against findings of fact such as this one faces a high hurdle which the Council could not surmount here. The judge had set out accurately what the evidence was and properly evaluated it. He had been entitled to discount the HSE SIM as being directed to standards applicable to criminal prosecutions and to prefer the evidence of Dr O'Callaghan to that of Mr Barrell. His reasons for doing so were clear from his judgment as a whole.

Analysis and conclusions

33. Despite the elegance of Mr Pooles QC's submissions, I cannot accept them for a number of reasons. First and foremost, as I have already said, the appeal is a challenge to the judge's findings of fact and on analysis those findings were ones the judge was entitled to make in evaluating all the evidence before him. Contrary to Mr Pooles QC's submissions, I consider that the judge's core reasoning at [68] to [70] of his judgment was supported by evidence, in particular the expert evidence of Dr O'Callaghan and the Forestry Commission guidance. The judge's reasoning in [68]

and [69] as to the relevance of the size and weight of the tree and its potential to cause very serious injury or damage reflects the evidence which Dr O'Callaghan gave in cross-examination and re-examination which I have quoted at [15] and [17] above.

34. Despite Mr Pooles QC's argument (which seems to have been accepted by the judge at [25]-[26] of the judgment) that Dr O'Callaghan conceded the point about a three year inspection cycle being reasonable and then went back on that to reiterate what he had said in his report, I consider that, viewing his evidence as a whole, he remained consistent in his opinion. What was agreed in paragraph 6 of the Joint Statement was always subject to the caveat of the opinion he expressed in paragraphs 7 and 9. In any event, even if there was an inconsistency in his evidence (whereas Mr Barrell remained consistent) the judge was aware of that (see [26]) and took it into account in his evaluation of their respective expert evidence. That was quintessentially a matter for the trial judge who saw and heard the witnesses. There is nothing in the suggestion that the judge has failed to set out why he preferred the evidence of Dr O'Callaghan to that of Mr Barrell. As Mr Bleasdale QC submitted, his reasons for doing so are clear from the judgment as a whole, in particular the key passages at [68] to [70]. In my judgment, there is no ground for interference with the judge's evaluation of the evidence.

35. There is also nothing in Mr Pooles QC's criticism that there is no foundation for Dr O'Callaghan's opinion set out in Paragraph 9 of the Joint Statement and reiterated in the passages in cross-examination and re-examination which I have quoted at [15] and [17] above that the high risk location of this tree and the risk of it causing damage to people and property. As Dr O'Callaghan says the more detailed and frequent assessment of such a tree is in accordance with the Forestry Commission advice. In my judgment that is clearly a reference to a passage in the Forestry Commission document in a section headed "Zoning a Site" which reads:

> "A third zone, representing a need for inspection to be carried out more frequently as well as after severe storms, may be appropriate for the strip along the public road. The need for such a zone applies especially if the road is busy and if the trees are large or old enough to represent a significant potential hazard. The same category of zoning for inspection may also be satisfactory for the amenity and car-parking area, where people and property are close to trees for much or all of the time. However, this area will probably need to be placed in a somewhat higher category, to take account of the need for inspections to be done with especial rigour. Also, the usage of this zone may be more conducive to trees becoming hazardous, for example due to vehicle impacts and soil compaction."

36. Mr Pooles QC's submission that the Forestry Commission guidance on frequent inspection only applied to large, old trees essentially overlooked this particular passage in the document. When asked about it by this Court Mr Pooles QC submitted that the Council had in effect designated the whole parish as a high risk area. However, that is no answer to the force of the point being made in this passage about the need for particular "rigour" in inspecting large trees which are adjacent to a main road and which represent a significant potential hazard. I consider that the judge's conclusions in [68] and [69] about the need for inspection of this tree, given its

maturity, size and location, more frequently than every three years is consistent with the guidance in this passage, with which Dr O'Callaghan's opinion is also consistent.

37. Furthermore, although Mr Barrell maintained in evidence that the three year inspection cycle was appropriate and reasonable for this tree, other aspects of his evidence would seem to support the judge's conclusion that more frequent inspection was required for this tree. In his report he said: "…my experience is that it is common for mature trees to have significant internal decay with no obvious external indications of that internal condition". In cross-examination he accepted that a mature tree with such internal decay could fail in two years, which supports the judge's conclusions at [69] as to the risk this tree posed and at [70] that inspection of this tree at least every two years was required.

38. Like the judge, I do not consider that much reliance can be placed on the HSE SIM. To the extent that the passage relied upon by Mr Pooles QC quoted at [29] above seems to be suggesting that individual inspection of a tree in a frequently used location (which would seem to correspond with what is described elsewhere as a high risk location) is only required where there is some sign of a defect, that would seem to be out of line with other guidance, particularly that of the Forestry Commission. The HSE seems to be advocating a less stringent inspection regime, possibly because it is looking at potential criminal prosecution rather than civil liability and, in any event, this is only an "example" of when inspection of an individual tree is required. In my judgment, nothing in this guidance assists as to how frequent the inspection of this tree should have been and Dr O'Callaghan's evidence when cross-examined about this guidance (quoted at [15] above) is to be preferred.

39. Mr Pooles QC was critical of other passages in the key paragraphs [68] to [70] of the judgment, for example the judge's comparison of this tree with other trees in the parish. However there is no suggestion in the Grounds of Appeal that the judge's findings in this regard were not supported by evidence or were somehow an invention on his part. In any event, whatever other large trees there were in the parish, the judge was entitled to conclude that this tree required inspection at least every two years.

40. Mr Pooles QC also criticised the judge for taking account of the fact that the tree was leaning "in the wrong direction" i.e. over the road, on the basis that none of the experts had identified this as a relevant factor. However, the judge was not hidebound by the expert evidence and was entitled to exercise his own common sense. Having seen the photographs of the tree before it fell and of the damage to the claimant's bus and the house it was passing when the tree fell (which are exhibited to Mr Barrell's expert report) I consider that the judge was fully entitled to prefer Dr O'Callaghan's evidence to that of Mr Barrell and to reach the conclusions he did.

41. In my judgment, the judge's reasoning in relation to the need for inspection at least every two years and his conclusion as to the liability of the Council are unimpeachable. The appeal is dismissed.

Mr Justice Henry Carr

42. I agree

Lord Justice Bean

43. I also agree