Claim No: 8SN00362

IN THE SWINDON COUNTY COURT

Between

PHILIP SELWYN-SMITH

Claimant

and

SAM GOMPELS

Defendant

JUDGMENT

Note: In this judgment, references in square brackets refer to page numbers in the trial bundle, unless otherwise stated.

Introduction

[1] The claimant Mr Selwyn-Smith and his wife live at Castle Leaze, Great Hinton, Trowbridge, Wiltshire. The defendant, Mr Gompels and his wife and family live at the neighbouring property, Hinton House, Great Hinton. Hinton House includes a small paddock adjacent to Castle Leaze. The Castle Leaze property includes a garage and workshop ("the garage") which stands along the boundary with that paddock. The layout is shown in greater detail on the plan at [56].

[2] As at January 2005, there stood a solitary Austrian pine tree, approximately in the centre of the paddock. It was approximately 28 metres high and stood approximately 15 metres from the boundary with Castle Leaze, where the garage stood. The scene is well illustrated by the two photographs at [162] – although the leaning tree should be ignored at this stage.

[3] On 13 February 2005, in strong, perhaps squally but by no means exceptional winds, the tree snapped at a point some 4 or 5 feet above ground level and fell. It fell onto the Castle Leaze garage. Unfortunately, Mr Selwyn-Smith was inside at the time; he was struck and suffered serious injuries. Beyond this, serious damage was inflicted not only to the building, but also to some of the contents.

[4] Subsequent examination of the tree showed severe basal decay, caused by the fungus *Phaeolus schweinitzii*, otherwise known as Brown Rot. At paragraph 9 of their joint statement [115], the two expert witnesses in the case spoke of this fungus as follows:

> "[It] is not easily detected and is often overlooked even by experienced foresters, but is occasionally detected. It is typically identified after trees have failed. It has two forms of fruiting body and does not present obvious external signs or symptoms."

It is common ground that this decay was the dominant cause of the tree's failure.

[5] By this claim, Mr Selwyn-Smith claims damages against Mr Gompels in respect of his injuries and other losses, on the ground of negligence. The pleaded allegations of negligence are admirably concise and I set out the operative sub-paragraphs at paragraph 4 of the Amended Particulars of Claim [4]:

"(a) Failing to have any system for the inspection of the tree and to ensure that it was inspected regularly by a trained tree inspector to ensure that it continued to be safe. Such inspection would have revealed insect boreholes indicating decay and remedial management such as felling.

"(b) Failing to heed that the tree was vulnerable to falling onto the Claimant's property. It had previously been one of three such trees; the first fell about 12 years ago; the second was removed in 2001 having developed a lean; the removal of the second tree increased the exposure of the third tree to wind from a northerly direction and this, combined with the weight of the crown displaced towards the Claimant's property, predisposed the tree towards falling in that direction."

On behalf of the defendant, these allegations of negligence are denied. No other cause of action has been alleged.

[6] Quantum was agreed between the parties before the start of the trial, in the sum of approximately £89,000. The trial therefore proceeded on the issue of liability alone. I heard oral evidence from Mr Selwyn-Smith, Mr Freddie Giles, Mr

Gompels, and Mr Shaun Davies. I also heard expert evidence from Mr Cocking on behalf of the claimant and Dr O'Callaghan on behalf of the defendant.

The history of the tree

[7] The above recitation of the allegations of negligence shows a history which is alleged to have been relevant. The paragraphs that now follow elaborate that history and include my findings of fact where appropriate.

[8] The original planting comprised a group of three saplings of the same Austrian pine species. The date of planting was the subject of anecdotal evidence only, which set 1912 as the relevant year. The precise year is in fact immaterial; I am satisfied that 1912 gives a sufficient indication of the age of the trees.

[9] Some time in the 1990's (probably the earlier half), the first tree ('tree 1') either fell or was felled. This was at a time before either Mr Selwyn-Smith or Mr Gompels had purchased their respective houses and neither they nor Mr Giles nor Mr Davies knew any detail of this event. So both the year and the cause of this event remain unknown. Nor was any evidence suggested of any remaining tree stump, which might have yielded some clues, either in recent years or even now.

[10] Whenever it was that tree 1 came down, a number of years elapsed without mishap. So there was no evidence that decay or other disease in tree 1 had any effect on trees 2 and 3 or was replicated in them. On the contrary, the inference from the passage of those years is that this did not happen; and on that basis, the subsequent decay in tree 3 developed independently of tree 1.

[11] Mr and Mrs Selwyn-Smith purchased Castle Leaze and moved into it in about 1998. Mr and Mrs Gompels purchased Hinton House and moved into it in 2000. Both Mr Selwyn-Smith and Mr Gompels began to notice that tree 2 was developing a lean. In either 2000 or early 2001, Mr Selwyn-Smith took some photographs, as now appearing at [162-164]. The lean is extremely obvious; moreover, the tree was by now threatening a power line serving Castle Leaze.

[12] Mr Selwyn-Smith approached Mr Gompels about tree 2. Mr Gompels did not act as swiftly as Mr Selwyn-Smith might have wished; in evidence, he spoke specifically of some kestrels nesting in the tree at the time. But in my judgment

there was nothing either unreasonable or sinister in any delay which did occur. Sometime in 2001, Mr Gompels (in his own words) "used a chainsaw and removed the tree myself having had the electricity cable dropped to the floor temporarily until this work was done" [155].

[13] There was no evidence before me to suggest any decay in tree 2. Indeed, in the next paragraph of his statement at [155], Mr Gompels positively averred that it showed no signs of decay at the time of its removal. Presumably some stump was left, but again no evidence of this stump was adduced before me. In the result, I find that there was no decay present in tree 2. It was taken down because it was leaning, no more and no less. And, although not canvassed in evidence, the inference to be drawn by the reasonable landowner would in my judgment be that it was leaning because the roots were failing to hold firm, for some reason.

[14] In contrast, the remaining tree 3 stood erect and remained erect. In his report dated April 2005 at paragraph 4.12 [42], Dr O'Callaghan on behalf of the Defendant postulated that the rotting stump of tree 2 could in due course have become the source of the decay in tree 3, via their overlapping root systems. But this hypothesis was not explored further. For example, it did not feature in the joint statement of the two experts. And it was never suggested that this specific sequence of events should have occurred to the reasonable landowner as a possibility, following the felling of tree 2.

[15] At the time that tree 2 was felled, tree 3 was apparently sound and in good health. The expert witnesses Mr Cocking and Dr O'Callaghan were agreed in their oral evidence that, if an expert had been called in at that stage (during say 2001-2002), he probably would not have detected anything untoward. Indeed, the evidence of Mr Cocking on behalf of the claimant went further. In his supplementary letter dated 27 January 2009 [119], he stated that an expert would not even have advised that the crown should be rebalanced. The point here being that the presence of trees 1 and 2 had caused the crown of tree 3 to grow somewhat out of balance and the removal of trees 1 and 2 had now left tree 3 exposed in that condition.

[16] Thereafter, Mr Gompels made some irregular and informal examinations of tree 3. He describes the process at paragraphs 14-18 of his witness statement [156] and was cross-examined on the subject in the course of his oral evidence. I do not accept his own description of "regular inspections", but I do accept that he looked at the tree occasionally. He observed it standing up to winds, seemingly without trouble. Some times, he went up close to it and observed a good colour leaf (perhaps he should more aptly have referred to good colour needles); a good crown; a trunk and branches which showed no signs of any decay. He hung a swing from the tree for his young children; I accept that he would not have done this had he suspected any risk. Overall, he was not aware at any time of any signs of distress.

[17] Mr Gompels' oral evidence on two specific topics was rather less satisfactory. First and contrary to his witness statement, he started positively to assert that he had seen insect boreholes; he then retreated from this position. Second, he introduced for the first time the assertion that he had kicked the bark in the course of his inspections; he then retreated from this position, to say that he would have thought that at some stage during the years up to 2005 he had kicked the bark, perhaps not with his heel but with the toe of his shoe. In my judgment, these passages of evidence were unconvincing. If anything important turned on them, they would presumably have been explored further in cross-examination and I would certainly now be obliged to analyse them more closely, leading probably to unfavourable conclusions as to Mr Gompels' motivation at that particular stage. But the fact is that in my opinion nothing important does turn on these matters. As will be seen, his conduct falls to be assessed by the standard of a reasonable prudent landowner: either he did comply with this standard or he did not do so – and in large part the answer is determined by objective assessment of whether signs were apparent which should have led to the instruction of an expert. I therefore explore the matter no further. I merely conclude that Mr Gompels did not in fact observe any insect boreholes and did not test the bark to any significant degree. That said, I accept his later response that, even if he had seen insect holes, he would not have been unduly concerned. Likewise, I accept his response towards the end of his cross-examination to the question whether he had read any literature about hazards or diseases in trees; he replied: "Specifically no, because I

didn't know I had any problem that needed treating. [This tree] looked like a perfectly normal, healthy tree in the middle of a field."

[18] For his part, Mr Selwyn-Smith was not perturbed by the continuing presence of tree 3, even following the removal of tree 2. He knew that tree 1 had been removed at some time in the past; he also of course knew in detail of the removal of tree 2. He could see tree 3 from a distance and of course he was aware of its proximity to his garage / workshop. His lack of concern is not to be overstated. He was observing only from a distance and there is no question of him being under any duty of care. I merely regard his state of mind as some indication of the attitude of a reasonable observer, acting from a distance, but with knowledge of the history and also the proximity of the tree to a building.

[19] Following the collapse of tree 3, and as I have already observed, decay was readily visible. The experts Mr Cocking and Dr O'Callaghan also observed a limited number of insect boreholes, falling well short of an infestation. Working from photographs, Mr Cocking considered in his report [19] the likelihood that there was a significant area of dead bark present immediately prior to the stem failure. Whilst declining to draw inferences as to specific areas shown in the photographs, Dr O'Callaghan did agree in cross-examination that there was a likelihood of some dead bark somewhere around the trunk by the time that the tree failed. But as Mr Cocking himself volunteered [19], such dead bark may not be discernible to the untrained eye. Nor was such a symptom pleaded in the Particulars of Claim as a matter which should have been observed by Mr Gompels. In my judgment therefore, the possible presence of dead bark is immaterial to the central issue, as shortly to be formulated.

The relevant law

[20] In *Noble v Harrison* [1926] 2KB 332, the defendant's beech tree overhung a highway; in fine weather, a branch suddenly broke and fell onto the claimant's vehicle. The County Court Judge found that neither the defendant nor his servants (sic) knew that the branch was dangerous; the fracture was due to a latent defect not discoverable by any reasonably careful inspection. He nevertheless held the

defendant liable in nuisance. In the Court of Appeal, Rowlatt J concluded as follows, when allowing the appeal:

> "I see no ground for holding that the owner is to become an insurer of nature, or that default is to be imputed to him until it appears or would appear upon proper inspection that nature can no longer be relied upon."

[21] In *Brown v Harrison* (1947) 177LT 281, the claimant was injured in very similar circumstances. At first instance, Stable J had formulated the law as follows:

> "Having regard in each particular case to the circumstances of that particular case, if there is a danger which is apparent, not only to the expert but to the ordinary layman, which the ordinary layman can see with his own eyes, if he chooses to use them, and he fails to do so, with the result that injury is inflicted, as in this case, upon somebody passing along the high road, the owner is in those circumstances responsible, because in the management of his property he has not acted as a normal reasonable landowner would act. That as I understand it is the extent of the duty."

In the Court of Appeal, this formulation was not challenged and the court concerned itself purely with the question whether the principle had then been correctly applied to the facts. After quoting the above formulation, Somervell LJ added the following observation: "The danger, therefore, must be apparent to the ordinary layman."

[22] *Caminer v Northern & London Investment Trust Ltd* [1951] AC 88 was a House of Lords decision. The circumstances of the accident were again similar, but this time involving an elm tree. The fall of the tree was due to a combination of (a) non-lopping of the branches, (b) the action of the wind in the crown, and (c) undiscovered (and undiscoverable) rot in the roots. The Court of Appeal reversed the finding of the trial judge in favour of the claimant. The claimant appealed to the House of Lords. It is important to observe that the defendant / respondent was a limited company, which acted as landlord of a block of flats in central London. The test of a reasonable and prudent landowner was expressly approved and/or adopted by Lord Porter at p.97, by Lord Normand at p.99, by Lord Oaksey at p.104, and by Lord Reid at p.108. Still at p.108, Lord Reid elaborated as follows:

> "What inspection will suggest will depend on the knowledge and experience of the inspector, and there has been some controversy about the degree of knowledge and experience necessary for adequate inspection. Plainly it would be no use to send a person who knew nothing about trees. The

alternatives put forward were that he should be an expert or that he should have at least such knowledge and experience of trees that a landowner with trees on his land would generally have. As the question depends on what a reasonable man would do, I think it may be put in this way. Would a reasonable and careful owner, without expert knowledge but accustomed to dealing with his trees and having a countryman's general knowledge about them, think it necessary to call in an expert to advise him, or would he think it sufficient to act at least in the first instance on his own knowledge and judgment?"

[23] At p.99, Lord Normand propounded the test of conduct in slightly different terms:

> "The test of the conduct to be expected from a reasonable and prudent landlord sounds more simple than it really is. For it postulates some degree of knowledge on the part of the landlord which must necessarily fall short of the knowledge possessed by scientific arboriculturalists but which must surely be greater than the knowledge possessed by the ordinary urban observer of trees or even the countryman not practically concerned with their care."

[24] The difficulty then affecting the House of Lords was the paucity of evidence as to what a reasonable and prudent landlord would have done, as expressly noted by Lord Normand at p.101 and Lord Radcliffe at p.111. As I read the diverse speeches of their Lordships, in the result they dismissed the claimant's appeal because the expert evidence was to the effect that, whatever inspection had been undertaken, nothing would have been disclosed. Hence the headnote at p.89:

> "... inasmuch as the tree was apparently sound and healthy and the evidence did not establish that inspection by an expert would have revealed that it was dangerous, the occupiers were not liable in either negligence or nuisance."

[25] The above three cases and others are all cited at para.9-24 of Charlesworth & Percy on Negligence (11th Ed). In the result, I consider the following summary of the law in that paragraph to be accurate:

> "The occupier of land is not liable if a tree, which he did not know and had no reasonable grounds for knowing was unsafe, falls onto the highway and injures a person who is passing along the highway. His duty is to act as a prudent landowner to prevent his trees which adjoin the highway from being a danger to persons who are on the highway but he is not bound to call in an expert to examine his trees, unless he has reason to believe that they may be unsafe."

This passage appears in a chapter entitled 'Highways and Transport'. But before me, it was accepted by both counsel that the duty of care owed by Mr Gompels to Mr Selwyn-Smith could be no higher than the duty of care owed to passers-by, if the tree had overhung the highway.

[26] However, this summary leaves over the question of the level of knowledge about trees to be attributed to the reasonable landowner when he is a 'mere' householder. All or almost all of the reported cases seem to have involved a defendant who was either a limited company or a private owner of a large estate, who employed staff to tend to that estate, including the trees. Through such staff, the various defendants either possessed or reasonably should have possessed a level of knowledge greater than a mere householder. Is the householder to be judged by the same standard as the estate owner?

[27] I pause to observe that Mr Stead, counsel for Mr Gompels, referred to two further, unreported County Court cases: *Corker v Wilson,* Mayor's and City of London Court, HHJ Simpson, 10 November 2006 and *Atkins v Scott,* Aldershot & Farnham County Court, HHJ Hughes QC, 14 August 2008. Once more, the defendant in each case was the private owner of a large estate, who employed staff. I therefore derive no assistance on this issue – although I do note that in each of the cases the trial judge endorsed a very informal system of inspection, with the result that in each case the claim failed.

[28] I consider that another legal principle applies at this stage, namely that the standard of the duty owed by a landowner to act in respect of natural nuisances on his land (and his corresponding duty of care) varies according to his resources. I refer here to *Goldman v Hargrave* [1967] 1AC 645, per Lord Wilberforce at p.663[1]. Applying this principle, one sees how the standard of the duty can vary, as one moves from (say) highway authorities and other public bodies, to the owners of large estates, to farmers (large then small) and finally to the mere householder. In each case, I consider that the knowledge to be attributed to the landowner is the knowledge commensurate with the land in question and the resources reasonably

[1] Also to *Leakey v National Trust* [1980] QB 485, for the proposition (if needed) that the Privy Council decision in *Goldman v Hargrave* does form part of the law of England and Wales.

available to the owner of such land. The law does not then require the landowner to engage an expert unless and until reasonable inspection by the standards of that knowledge discloses or should disclose that the tree might be unsafe.

[29] Where on this scale is Mr Gompels to be placed? I do not understand Hinton House to include any or any significant land beyond that shown on Dr O'Callaghan's plan at [56]; it is not an extravagant property and most certainly does not constitute an estate; it is a family house, with (judging from the photographs) such land as it possesses left as paddock(s) rather than being tended as a garden. As to Mr Gompels himself, he has a degree in agriculture from Reading University, but his studies did not include tree management or arboriculture. He is now a director of a family company supplying healthcare products. He described in oral evidence how he and his wife own a 20-acre parcel of agricultural land some five miles from Hinton House. About 10 to 15 years ago, he engaged a contractor to remove dead elms from the hedgerows of this land and thereafter he has engaged an (agricultural) contractor to cut the hedges. He did not consider that these matters had endowed him with any special expertise. I agree. He did nonetheless claim a fondness for trees and said in evidence that he has read books about trees, although not about tree diseases. I accept this evidence. He uses a chainsaw from time to time, as shown by the felling of tree 2. For his part, Dr O'Callaghan considered that this experience would have endowed Mr Gompels with a knowledge as to the behaviour of wood. For my own part, I do not draw any such inference; nor in the event would it make any difference to the outcome. The overall result in my judgment is that Mr Gompels is a practical person, with a robust knowledge of land and trees, perhaps greater than many householders and certainly greater than most urban householders. This level of knowledge is commensurate with a property like Hinton House. But it does not amount to any special expertise as to tree health.

[30] Miss Newbery, counsel for Mr Selwyn-Smith, submitted in closing that the above summary from Charlesworth & Percy is not exhaustive and that the standard of knowledge required of Mr Gompels was higher than just stated. I understood this submission to have been a continuation of both her Skeleton and her summary when opening the case. In her Skeleton, she wrote as follows:

> "A landowner would be expected to have knowledge of the attributes of a particular tree, and to consult publications on the management of trees from, for example, the Forestry Commission. Where the landowner lacks this sort of knowledge and/or does not have access to it, he would be expected to obtain advice from someone with greater expertise who is able, for example, to recognise all the signs of possible weakness in the tree."

When opening the case, she submitted that Mr Gompels should have had regard to the document produced by the Forestry Commission entitled 'Hazards from Trees'. And during the course of the hearing, she also placed reliance on the document published by the HSE entitled 'Management of the Risk from Falling Trees – SIM 01/2007/005'.

[31] If this submission was put on a general basis, to the effect that all tree-owning landowners, including domestic householders, should educate themselves from literature such as this in advance of their own inspections, then I respectfully disagree. Absent any reason to suspect a defect in the relevant tree, I consider that the imposition of such a duty on a private householder would constitute an addition neither contemplated nor authorised by the three particular cases that I have considered above, in particular *Noble v Harrison* and *Brown v Harrison*.

[32] Further and in any event, both the relevance and the application of the two documents cited by Miss Newbery are questionable, for the following reasons:

(1) As agreed by both counsel, the Forestry Commission Guide is written for the owners and managers of woodland. It is envisaged that the owner (whether an individual or a corporation) has a staff, whose duties include routine inspections at a modest level of skills, with expert inspection to be commissioned if then thought necessary. It is also notable that Appendix 1 to this document sets out 15 types of hazard to be looked for, but does not include the hazard put at the forefront of the claim in the present case, namely insect boreholes. Dr O'Callaghan's explanation for this omission was the rarity of such boreholes.

(2) The HSE document is expressly directed to 'FOD Inspectors' and 'local authority enforcement officers'. Like observations apply as to the employment of staff to undertake periodic, proactive checks of trees in a frequently visited zone (see para.10.ii). At the same time, paragraphs 7

and 10.viii advise that individual tree inspection (by an expert?) is only necessary where a particular tree has been identified as having structural faults that are likely to make it unstable. In the present case, tree 3 did not have any discoverable structural fault as at the time following the felling of tree 2.

[33] I conclude that the duty of care owed by a private householder such (effectively) as Mr Gompels remains that of a reasonable and prudent landowner – as stated by legal authority. But the standard of that duty accords with the fact he is a 'mere' householder. He is obliged to act in a practical and sensible manner, commensurate with the size of his property. For example, he will be alive to the factors such as described by Mr Gompels: leaf colour, health of the crown, overall appearance of the trunk and branches for signs of decay. These are surely matters of common sense. Moreover, the owner must bear in mind the proximity of the tree to any occupied building or right of way. But unless these matters disclose grounds for concern, the owner is not obliged to educate or train himself further. If he detects grounds for concern, the owner is obliged to take reasonable steps to address those concerns, which may or may not include further research undertaken by him before the instruction of an expert. But that is a later stage.

[34] I myself address one final topic under this heading in this judgment. Expert evidence can (and in the present case does) give help as to what an expert would or would not have observed as to the condition of a given tree. It can also help as to the likelihood of an untrained person detecting signs which might point to danger. But the decision as to what the reasonable non-expert landowner should have done in any particular case is in my judgment one for the court, not for the experts. In the present case, Mr Cocking on behalf of the claimant gave oral evidence (in development of paragraph 4.4 of his report) to the effect that Mr Gompels should have called in an expert to inspect tree 3, following the removal of tree 2. At paragraph 3.15 of his addendum report [109], Dr O'Callaghan disagreed with this proposition. I note the factors advanced by each of the two experts, but adhere to the view that the answer is a matter for the court, not for expert evidence. (Mr Stead made the additional point that experts who give evidence on this issue have an interest to serve, namely to encourage the involvement of

experts on a continuing basis. This point may have force, but I do not use it for the purpose of this judgment)

The lay witness evidence

[35] I have already covered the relevant parts of the evidence of Mr Selwyn-Smith in the earlier parts of this judgment. He was the instigator of the felling of tree 2; he himself was not concerned by the continuing presence of tree 3.

[36] Mr Giles has known Mr Selwyn-Smith for some forty years. He is a farmer and describes himself as "a countryman with a lot of experience with trees". He has personally planted a 14-acre wood with some 5,000 trees and continues to manage that wood. He describes himself as "knowledgeable about trees generally and on a practical basis". On any interpretation therefore, he has a level of expertise greater than persons such as Mr Gompels. He inspected the tree after it had fallen. He observed the decay – as anyone would have done – and opined that even a lay person would have realised that there was something wrong with it. He observed a "considerable number" of insect boreholes and opined in his oral evidence that he would have thought there was a problem, if he had seen those holes. In my judgment, this last observation must yield to paragraph 15 of the experts' joint statement [116]. Overall and with no disrespect to him, I did not gain much assistance from Mr Giles's evidence on the issues which I must decide. He was necessarily applying his own standards to an inspection made after the event.

[37] I have already covered the relevant parts of the evidence of Mr Gompels in the course of this judgment

[38] Mr Davies said that, as at February 2005, he was a professional tree surgeon – halfway between a tree surgeon and an arboriculturalist. He has increased his technical qualifications since 2005. On the day of the tree failure, he attended at the scene at Mr Gompels' request; he removed the crown and the trunk of the tree, back to the boundary with Mr Gompels' property; he observed substantial decay. In cross-examination, he was asked various questions about the detection of dead bark, the significance of insect holes, the detection of fungi. But he was necessarily answering these questions using his own expertise and, again with no

disrespect to him, his evidence did not give me assistance as to the issues which I must decide.

The expert evidence

[39] The following paragraphs address the relevant parts of the expert evidence not already covered in this judgment.

[40] The joint statement starting at [114] is important. Neither expert resiled from its contents. In particular:

(1) At paragraph 12, "the presence of the decay fungus would not have been obvious to a lay person not trained in arboriculture or forestry" (emphasis added). Indeed, at paragraph 13, it is stated that the presence of the decay fungus would not necessarily have been easily detected even by an expert. Disagreement on this latter topic is set out at paragraph 21, but in my judgment the answer is academic, for reasons which will become apparent.

(2) At paragraph 15, "the insect boreholes would not have alerted a lay person not trained in arboriculture or forestry to the fact there could have been decay within the trunk, but occasionally a lay person might have noticed them and considered that something could be amiss" (emphasis added). At paragraph 14, it is recorded that the insect boreholes only "might have alerted an expert to undertake a closer inspection leading to detection of the decay". At paragraph 22, a disagreement on this issue is set out, but for like reasons I consider the answer to be academic.

(3) At paragraph 23, there is disagreement between the experts as to whether the felling of tree 2 (and thus the removal of both trees 1 and 2) should have put Mr Gompels in a heightened state of awareness as to tree 3, so as to cause him to instruct an expert. I have already observed that the answer to this issue is a matter ultimately for the court, taking into account the factors identified in the experts' evidence.

[41] Two other matters arose in the course of the experts' oral evidence:

(1) Mr Cocking and Dr O'Callaghan were agreed that an expert who examined tree 3 in 2001 or 2002 (following the felling of tree 2) would probably not

have detected anything untoward. Although not expressly stated by them, it must surely follow that an expert would not have recommended any remedial action at that stage[2].

(2) Mr Cocking and Dr O'Callaghan were each asked what advice that inspecting expert would give as to future inspections. Mr Cocking stated that there would be a recommendation for future inspections on an annual basis. In cross-examination, he explained the reasons for this: trees change; this tree was reaching the end of its normal lifespan; the position of the tree and its bias remained relevant. Dr O'Callaghan's assessment was slightly different. In the case of a tree owner who had no special knowledge at all, he would expect re-inspection to be advised on a cycle of every other year or every 18 months. But on Dr O'Callaghan's assessment, Mr Gompels was possessed of some slight additional expertise[3]. For a client such as him, Dr O'Callaghan considered that the advice would be to keep an eye on the tree and, if anything changed, to call in an expert once more.

Discussion

[42] Miss Newbery did not allege that there were defects in tree 3 itself at any time, which should reasonably have been observed by Mr Gompels, thereby prompting him to call in an expert. This stance was surely inevitable, given the experts' agreement that the presence of the decay would not have been obvious to a lay person and that the boreholes would not have alerted a lay person. As to the (unpleaded) issue of dead bark, the evidence which I have summarised in paragraph 19 in this judgment did not in my assessment come close to establishing that there was here a feature that should have been observed by a lay person, on pain of negligence.

[43] Miss Newbery instead put her case on a carefully staged basis, starting from the felling of tree 2. In summary, the history of the three trees, the fact that tree 3 was now left alone and exposed, plus the proximity to a used building now meant that Mr Gompels should reasonably have called in an expert to advise (and had Mr Gompels read the Forestry Commission Guide, he would have found

[2] See [15] above in this judgment for some specific evidence from Mr Cocking on this point.
[3] See paragraph 29 in this judgment.

recommendation to that effect). She accepted that on a balance of probabilities, had an expert been called in, nothing untoward would have been detected. But, she continued, future re-inspection would have been advised and Mr Gompels would have been negligent if he failed to follow that advice. Re-inspection in 2004 or thereabouts would then have identified the decay.

[44] As to this last proposition, I am satisfied on the evidence that a competent, trained tree inspector would have detected the decay if inspecting in or about 2004. Mr Cocking was certain to this effect [22]; Dr O'Callaghan moved to a position where he said that such a person "might have detected the problems" [108]. I am content to conclude that he would have detected the problems, on a balance of probabilities. However, this is only the end point of Miss Newbery's analysis; the crucial starting point is the allegation that Mr Gompels should have called in an expert following the felling of tree 2 in 2001.

[45] In his original report [21], Mr Cocking forebore to give any answer on this issue and instead offered only comment; it was only in the joint statement and thereafter that he expressed any firm opinion. Dr O'Callaghan has been clear throughout that he does not consider it incumbent on Mr Gompels to do so. As previously identified in this judgment, the answer is one for the court; and the wisdom of hindsight must be avoided.

[46] I refer back at this stage to paragraphs 7 – 19 in this judgment, where I recited the history of trees 1 and 2 and included certain findings of fact. Despite their central importance, I do not repeat those paragraphs in this section of the judgment. Instead, I draw the following conclusions. First, there was no reason to deduce in 2001 that the demise of tree 1 some ten years or so earlier might impinge on the continuing viability of tree 3. Second, the felling of tree 2 was undertaken for purely mechanical reasons, namely its lean. Absent any lean in tree 3, there was no reason for a layman to consider that the felling of tree 2 would impinge on the continuing viability of tree 3; nor was the increased exposure of tree 3 a major factor. Third, tree 3 manifested no symptoms of ill health which should have alerted a reasonable landowner (nor indeed an expert at that stage). I add the fact that I accept the oral evidence of Mr Gompels that, in the course of his subsequent informal inspections, he did contemplate the direction in which tree 3 might fall (in

a sense, he risked being damned if he did contemplate this and damned if he did not). Given the prevailing wind, he assessed it would probably fall away from the garage. The experts broadly agreed with this assessment, although it was of course far from definitive, given that wind direction could and did vary.

[47] The proposition that the combination of the above factors did not require a reasonable landowner to call in an expert is corroborated by two matters. First and significantly, the experts' agreement that even an expert who inspected in 2001 or 2002 would not have detected anything untoward and (by implication) would not have advised any remedial action. So the history and the set-up would not have alerted even an expert at that stage. Second (and less significantly), Mr Selwyn-Smith knew the history and the set-up of tree 3 and was not himself perturbed: see paragraph 35 in this judgment.

[48] In the result and avoiding hindsight, I conclude that the circumstances were not such that Mr Gompels' omission to call for expert advice fell below the standards of a reasonable and prudent landowner. I do not consider that he was negligent in this regard.

[49] This finding is sufficient to dispose of the claim. But for the sake of completeness and lest this conclusion be held to be wrong, I briefly address the remaining steps in Miss Newbery's case. The difficulty is that I believe that some sort of *Bolitho*[4] analysis (or similar) would be needed here – as to which I received no submissions at all. I confine myself to the following brief findings:

(1) Had an expert inspected in 2001 or 2002, I am satisfied that he would have given some advice as to future re-inspection.

(2) On a balance of probabilities, I find that the expert would have recommended periodic re-inspection, at intervals of approximately 18 months (subject to season). But it remains possible that such an expert would have followed Dr O'Callaghan's suggestion in respect of Mr Gompels, namely to warn him to keep an eye out for symptoms and to call in an expert once more if the tree changed. (Dr O'Callaghan also envisaged a standard form leaflet being handed to Mr Gompels, illustrating the symptoms that might be seen) If it is

[4] *Bolitho v City & Hackney HA* [1998] AC 232.

relevant to ask whether such advice from an expert would have been negligent, I am frankly unable to answer that question - notwithstanding the fact that I myself would not have placed Mr Gompels into any different category. The question was never raised; there was no evidence on it; no submissions were addressed to it.

(3) Whatever the precise recommendation, Mr Gompels would have been negligent if he had failed to follow it.

(4) Had periodic re-inspection been advised, that regime would have detected the decay before the tree fell, and the accident would have been averted.

(5) Had Dr O'Callaghan's lesser advice been given, the sequence of events would not have been altered; the accident would still have happened.

[50] Also for the sake of completeness, I add two final matters:

(1) I have reached my conclusion without reference to section 1 of the Compensation Act 2006 – as cited to me by Mr Stead on behalf of Mr Gompels.

(2) Had I found that there was negligence by Mr Gompels, I would not have found any contributory negligence on the part of Mr Selwyn-Smith.

Conclusion

[51] It follows from all the above that Mr Selwyn-Smith's claim must be dismissed.

Adrian Palmer Q.C.
Recorder

22 December 2009