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Legal Services

Richard Buxton
Solicitor
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24 February 2015

Our reference: LIO008055
Your reference: DVE1-002/RB

Dear Mr Buxton

Alexandra Gardens – alleged tree root damage – consultation

Thank you for your letter of 18 February 2015 and for the extract from the judgment in Coventry v Lawrence.

I have given very careful thought to your letter and have reviewed the case law. You will understand that the City Council would be very grateful to you if you had found a way out of the difficult position it finds itself in. It is with enormous regret that the City Council is putting forward plans for works to the trees adjoining Alexandra Gardens and anything that might cast doubt on established legal precedent regarding tree root damage is of great interest, even if it is, as you point out, "obiter" and of persuasive rather than binding weight.

However, for reasons I will explain, I did not regard the comments you have cited as helping the Council's position.

Although, as you say, claims relating to tree roots are predicated on the law of nuisance, there are different sorts of nuisance. Different legal considerations apply depending on the nature of the alleged nuisance.

Lord Carnwath, in his judgement in Coventry v Lewis, makes clear the distinction between different types of nuisance. At paragraph 175 Lord Carnwath says:

"The present appeal raises important issues relating to an area of the law which has received little attention at the highest level, that is "nuisance by interference with enjoyment" (as distinct from "nuisance by encroachment or damage")…."

Lord Neuberger makes the same distinction. At paragraph 1, he says, introducing his judgment:

"This appeal raises a number of points in connection with the law of private nuisance, a common law tort. While the law also recognises public nuisance, a common law offence, this appeal is only concerned with private nuisance, so all references hereafter to nuisance are to private nuisance. It should also be mentioned at the outset that the type of nuisance alleged in this case is nuisance in the sense of personal discomfort, in particular nuisance by noise, as opposed to actual injury to the claimant's property (such as discharge of noxious material or removal of support)."

In paragraph 56 Lord Neuberger summarises his proposition that "it may well be wrong to hold that a defendant's pre-existing activity gives rise to a nuisance". The paragraph goes on to list circumstances in which his proposition might apply. One of these is that "it can only be said to be a nuisance because it affects the senses of those on the claimant's land".

It seems clear to me that Lord Neuberger's comments are directed to "nuisance by interference with enjoyment" (noise from a speedway track) and not to "nuisance by encroachment or damage" (for instance, damage by encroaching tree roots). Whilst his comments regarding "coming to the nuisance" are very interesting, he expressly excludes nuisance of the type relevant to the issues affecting the Alexandra Gardens trees.

As you know, the leading authority for liability in respect of tree root damage remains the decision of the House of Lords in 2001 in Delaware Mansions Ltd v City of Westminster. This has been followed, and elaborated on, by a long line of cases, most recently including the decisions by the Court of Appeal in Robbins v Bexley London Borough Council and Berent v Family Mosaic Housing.

In the Delaware decision, Lord Cooke of Thorndon sets out the basis for liability in respect of tree root damage. Although he refers to the law of nuisance, he makes it plain that he considers there is no real distinction between the law of nuisance and the law of negligence in this context. As a consequence, he sets out a standard test of the sort one would associate with tortious liability in negligence. In summary, the test set out is:

1. Is there a duty between neighbours with regard to the trees?

2. Did the tree roots cause the damage to the neighbouring property?

3. Was that damage reasonably foreseeable?

4. Were there any practical steps that could have been taken to minimise or avoid the damage?

5. Did the owner of the land on which the trees are situated act in a reasonable way in response to the damage?

Lord Cooke goes on to say that a local authority or other tree owner is entitled to be given notice that trees are causing damage and the opportunity of avoiding further

damage by removal of the tree (or, presumably, less drastic but adequate steps). He adds:

"Should they elect to preserve the tree for environmental reasons, they may fairly be expected to bear the cost of underpinning or other reasonably necessary remedial works…."

I do understand the point you are seeking to make regarding the construction of extensions once the trees reached maturity, when the risks associated with tree root damage might perhaps have been anticipated. However, setting aside factual issues in this context, the legal position is very clear and is no less clear in the light of the comments of Lord Neuberger to which you have drawn my attention.

In your letter you ask for full details of claims, evidence in each case of alleged damage and proposed remediation. You will understand that the City Council is faced with a real prospect of litigation. Whilst recognising the legitimate public interest in the reasons why the City Council is obliged to propose tree works, it also needs to be mindful of the need to protect its interests in relation to litigation and of legitimate expectations of confidentiality on the part of householders whose property is suffering damage. We have done our best to tread this fine line and do not propose to release further information about individual claims.

Yours sincerely

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Head of Legal Services

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18 February 2015

Dear Sirs

Alexandra Gardens – alleged tree root damage – consultation

We have been asked by local residents to comment on the Council's consultation dated 12th January 2015 regarding the above by residents in the area.

We believe the contents of this letter will be significantly helpful to the Council. There is an important legal point which we believe has been missed and which is potentially critical to the issue facing the Council.

The claims relating to tree roots are predicated on the law of nuisance. If A's tree damages B's property by encroaching roots, then B may have a claim in nuisance. Now, until recently it was well established that it was no defence to "come to a nuisance". Thus if B built his house next to A's noxiously fuming factory, it was no defence for A that B had moved into the area affected by the factory's fumes. The Supreme Court has however recently considered this area of the law in Coventry v. Lawrence [2014] UKSC 13. We attach an extract of the relevant part of the judgment. In summary the Supreme Court's decision in that case is to the effect that it is at least arguable that a tree owner (the Council in a case like this) is not liable for nuisance where it involves the use of land (eg. for a house extension) that was not previously used as such.

The context for the Coventry case was noise from a motor racing stadium and track. There, the house whose owners complained of the noise had been in existence prior to the motorsports undertaken and so the question of coming to a nuisance did not arise. However, we understand that many if not all of the tree root cases in which the Alexandra Gardens trees are implicated involve extensions etc to properties which postdate the maturity of the trees. Of course it is another issue anyway as to whether the trees are in fact causing damage to the properties in question, but even if they were, the Council has the self-same defence of coming to a nuisance. This is because the use of the land of the properties in question has been changed to make

them susceptible to the effects of the trees which was benign before. Further or alternatively, you will see that the Supreme Court indicated that the matter can be analysed in the context of character of the area.

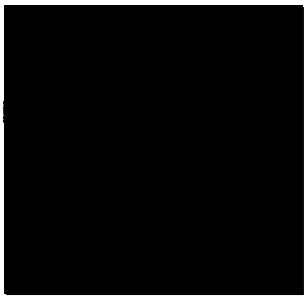
The overall result strikes us not only as legally correct but in line with common sense and public policy. It cannot be right that a public authority is legally liable for the results of people building properties where they might become susceptible to a pre-existing nuisance. The Court does set out various qualifications at paragraph 56 but as it says there, these are criteria that do not necessarily have to be satisfied. Clearly the point is "obiter" but it has strong and helpfully persuasive weight for the position of people and bodies in the position that the council is now in.

We trust you will agree that the Council should re-examine this whole issue in the light of the points above. Please confirm that you will do so.

Our clients are also concerned lack of any arboricultural advice relating to the alleged damage in the particular cases which have given rise to claims and full details must please be provided so that members of the public that can know precisely what the evidence is in each case for the alleged damage and proposed remediation. Can you please advise the website address where these will be found?

We are concerned that the consultation is flawed in that respect and indeed our clients are concerned about the standard of consultation generally on this matter eg. the number properties consulted this time was a lot less that in 2010 over substantially the same issue and in any event considering the importance of the park to this part of Cambridge. We will say no more about this for now but do reserve our clients' rights.

Yours faithfully



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CAMBRIDGE CITY COUNCIL

Richard Buxton
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03 March 2015

Our ref: LIO008055
Your ref: DVE1-002/RB

3 March 2015

Dear Mr Buxton

Alexandra Gardens – alleged tree root damage – consultation

Thank you for your letter of 2 March.

In your statement as to the "current law", you are as I understand it relying upon the *obiter* statements of the Supreme Court in *Coventry v Lawrence* in relation to a situation where a claimant had built on or changed the use of his/her land.

As you are aware, and as we have already rehearsed, the facts in that case did not relate to a case whether the claimant had built on or changed the use of his/her land, so the court did not reach a decision on that point. Accordingly I would respectfully suggest that it is premature to regard these *obiter* comments as statements of the current law on nuisance.

Second, even if they were to be regarded as statements of the current law, I think you are downplaying the distinction which the court made between a nuisance relating to personal discomfort *"as opposed to actual injury to the claimant's property (such as discharge of noxious material or removal of support)"*, given that the court made it clear from the outset (paragraph 1 of the judgment) that the scope of nuisance being considered was limited.

Similarly, as my earlier letter pointed out, in para 56 Lord Neuberger stated that *"…where a claimant builds on, or changes the use of, her land, I would suggest that it may well be wrong to hold that a defendant's pre-existing activity gives rise to a nuisance provided that (i) it can only be said to be a nuisance because it affects the senses of those on the claimant's land, (ii) it was not a nuisance before the building or change of use on the claimant's land…"* i.e his remarks were explicity restricted

to the case of a "nuisance to the senses", not a case where physical damage is being caused to the claimant's property.

Thirdly, your comments rest upon the assumption that no nuisance is being caused prior to the construction of an extension to an existing property, whereas in *Delaware Mansions* (which remains the leading case on tree root nuisance) it was stated that the nuisance consisted not of damage to the buildings but of damage by tree root desiccation to the *"load bearing capacity"* of the claimant's land. On that basis it would appear (although the point may be arguable) that the claimant's property is (or may be) suffering a nuisance by reason of the presence of the tree roots prior to and regardless of the construction of an extension.

Fourthly, and more fundamentally, it appears that the court is envisaging a situation where a new building appears where none existed before – as in the case of *Miller v Jackson* - rather than a case where an existing property owner builds an extension to an already existing property. In the case of *Sturges v Bridgman*, referred to in para 54 of the judgment, the claimant's construction work *"merely involved an extension to an existing building"* and therefore the issue of "coming to the nuisance" was not even raised.

In the case of a modern extension to an older building, modern building guidelines generally require the building to take into account the presence of nearby vegetation and construct the building accordingly. If a claimant (or his builders) does not do so then that may well have an effect on liability but that is a separate issue from that of "coming to a nuisance".

Fifthly, any claims against the Council are likely to be brought in negligence as well as nuisance. Whilst the two largely overlap it is not clear that any perceived change to the law of nuisance as it is currently applied would necessarily translate to a claim brought in negligence.

In short, leaving aside for now the extent to which the current claims relate to extensions to existing buildings as opposed to damage to the original buildings, it is not uncommon for claims to be brought against local authorities in relation to such extensions, and we do not consider that *Coventry v Lawrence* radically changes how such claims should be treated.

In *Coventry* the Supreme Court expressed the view that in the past injunctions may have been granted more readily than was appropriate and that damages were often a more satisfactory remedy. The main immediate effect of *Coventry* may well be that a court would be more reluctant to award an injunction for tree removal or management than in the past, but that would not affect the Council's potential liability for damages.

Having said all that we recognise that the issues raised in *Coventry* are potentially of some assistance in relation to tree root claims. At present however the Council is obliged to act to protect its position in the light of the law as it currently stands. I do

not think that it would be appropriate to defer tree works intended to minimise damage to neighbouring buildings as a result of the decision in that case.

There is some urgency from a tree management point of view as well. I understand that it is strongly advisable to carry out pruning of this nature as soon as possible and not whilst the tree buds are beginning to break, which could be very soon. If we do not go ahead soon, it may be necessary to delay works until the end of the summer.

I am not yet able to respond to your request for an undertaking and will get back to you on this.

I will ensure that copies of this correspondence is available to committee members.

Yours sincerely

[redacted]

Simon Pugh
Head of Legal Services

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18 February 2015

Dear Sirs

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The context for the Coventry case was noise from a motor racing stadium and track. There, the house whose owners complained of the noise had been in existence prior to the motorsports undertaken and so the question of coming to a nuisance did not arise. However, we understand that many if not all of the tree root cases in which the Alexandra Gardens trees are implicated involve extensions etc to properties which postdate the maturity of the trees. Of course it is another issue anyway as to whether the trees are in fact causing damage to the properties in question, but even if they were, the Council has the self-same defence of coming to a nuisance. This is because the use of the land of the properties in question has been changed to make

them susceptible to the effects of the trees which was benign before. Further or alternatively, you will see that the Supreme Court indicated that the matter can be analysed in the context of character of the area.

The overall result strikes us not only as legally correct but in line with common sense and public policy. It cannot be right that a public authority is legally liable for the results of people building properties where they might become susceptible to a pre-existing nuisance. The Court does set out various qualifications at paragraph 56 but as it says there, these are criteria that do not necessarily have to be satisfied. Clearly the point is "obiter" but it has strong and helpfully persuasive weight for the position of people and bodies in the position that the council is now in.

We trust you will agree that the Council should re-examine this whole issue in the light of the points above. Please confirm that you will do so.

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Yours faithfully

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2 March 2015

Dear Mr Pugh

Alexandra Gardens – alleged tree root damage – consultation

Thank you for your prompt response of 24 February to our letter of 18 February about the above. I have also seen the Agenda for the 4 March planning committee meeting recommending that the various tree works are carried out.

I am disappointed and somewhat surprised by the terms of your response. I appreciate that the observations you make have some basis, but I believe it does not represent what the current law is on this issue.

The net effect of your response is the City Council is preparing to sanction damage to a hugely valuable public asset on the basis of what we consider to be a serious error of law.

It will not surprise you that we have sought the views of counsel, and have been in touch with Stephen Tromans QC who is an eminent public and environmental lawyer including experience of nuisance cases. In view of the urgency his advice was brief, but I quote:

> I am afraid I have only been able to have the quickest of looks at this, but even on a quick look the position seems nowhere near as black and white as CCC suggest. Plainly in Coventry v. Lawrence the SC was talking about amenity-type nuisances and not property damage, but equally there is nothing which categorically says that the general principles canvassed (eg. by Lord Neuberger PSC at 53-58) could not apply to a case where the claimant alters his property to make what was not a nuisance before (tree roots) now a nuisance. It seems to me a genuinely open question. Nor is the Delaware Mansions case as clear-cut as is suggested by CCC. So far as I can see, neither in Delaware Mansions, not the limited number of cases cited

in it, nor in the cases which have subsequently applied it, have facts analogous to this case been considered. Clearly the basic principle underlying Delaware Mansions is reasonableness between neighbours (see e.g. para 29). It seems to me entirely in line with that principle that a landowner who has been the author of their own misfortune by building an extension in a location where it may be affected by an established tree should not be able to thrust the burden onto the local authority landowner. I believe therefore that CCC and their insurers could properly take a more robust approach than they appear to be doing. Obviously they would face litigation risk, but it does not seem as clear cut as CCC appear to think.

Given that the Council is not apparently prepared of its own volition to take that robust approach, it strikes us that in these circumstances the appropriate way forward is for the matter to proceed to judicial review to determine whether the Council is erring in law, or not.

I confirm that we are provisionally instructed to do that, which would involve issuing a claim against the Council seeking a declaration as to the correct legal position. Presumably property owners/their insurers would be served as interested parties.

The main reason for writing now, and urgently, is to ensure that there is no work on the trees while this litigation is in progress. I need your undertaking to that effect. This will save the need for what could be extremely urgent and costly legal work in circumstances which are (obviously) not that urgent, because even if the trees are causing damage, the process is very slow.

Please could you give such undertaking (ie. if the Council decides at the meeting on 4 March that the tree works will be done). Our experience is that the Court would expect the same to be given rather than to involve it in interim work, and I trust you would agree and provide same without difficulty.

The circumstances are obviously potentially slightly unusual as in one sense you would be on our side (we think). Therefore you might also care candidly to discuss the logistics of taking the matter forward.

Please would you confirm that our letter of 18 February, your response, and this reply are made available to and explained to committee members. I am surprised to see no reference to the point in the committee report.

I reserve the position on the need in any event to disclose details of the claims and the expert advice to which the Council is working. Plainly residents cannot properly be consulted on the proposals unless they know what the basis and justification for them is.

I look forward to hearing from you. We spoke earlier and I trust conveyed the message that we wish if at all possible to be constructive about this matter. However you will appreciate that I must have that undertaking (or similar comfort, such as an assurance that the works will not proceed for X days/weeks anyway). I do not want to be involved in overnight injunctions if that can be avoided.

[redacted]

Extract from Coventry v. Lawrence [2014] UKSC 13

"Coming to the nuisance"

47. For some time now, it has been generally accepted that it is not a defence to a claim in nuisance to show that the claimant acquired, or started to occupy, her property after the nuisance had started – ie that it is no defence that the claimant has come to the nuisance. This proposition was clearly stated in *Bliss* 4 Bing NC 183, 186 per Tindal CJ. Coming to the nuisance appears to have been assumed not to be a defence in *Sturges v Bridgman* 11 Ch D 852. And in *London, Brighton and South Coast Railway Co v Truman* (1885) LR 11 App Cas 45, 52, Lord Halsbury LC described the idea that it was a defence to nuisance as an "old notion … long since exploded" and he also said that "whether the man went to the nuisance or the nuisance came to the man, the rights are the same" in *Fleming v Hislop* (1886) LR 11 App Cas 686, 697.

48. More recently, in *Miller v Jackson* [1977] 1 QB 966, 986-987, the majority of the Court of Appeal held that the principle was well-established. However, Lord Denning MR, in the minority, considered that the proper approach was for court to "balance the right of the cricket club to continue playing cricket on their cricket ground", as they had done for 70 years, "as against the right of the householder", whom he described as "a newcomer" who had built "a house on the edge of the cricket ground which four years ago was a field where cattle grazed": see pp 976 and 981. He held that there was no nuisance given that the cricket club had "spent money, labour and love in the making of [the pitch]: and they have the right to play upon it as they have done for 70 years", and answered with a resounding no his own rhetorical (in both senses of the word) question whether this was "all to be rendered useless to them by the thoughtless and selfish act of an estate developer in building right up to the edge of it?": see p 978.

49. Geoffrey Lane LJ (with whom Cumming-Bruce LJ agreed) accepted, albeit with some regret, that it was not for the Court of Appeal "to alter a rule which has stood for so long", namely "that it is no answer to a claim in nuisance for the defendant to show that the plaintiff brought the trouble on his own head by building or coming to live in a house so close to the defendant's premises that he would inevitably be affected by the defendant's activities, where no one had been affected previously": p 987. Accordingly, he concluded that the claim in nuisance was made out.

50. The respondents suggest that there is authority prior to the decision in Bliss 4 Bing 183, which supports the contention that the law was somewhat different in earlier times. *Leeds v Shakerley* (1599) Cro Eliz 751 was cited as an authority for the proposition that coming to the nuisance was a defence, but it may well be explained on the ground that the wrong complained of was the single act of diverting a watercourse, as opposed to the continuing loss of the watercourse. In his Commentaries on the Laws of England 1st ed, (1765-1769), Vol II Chap 26, p 403, Blackstone, after explaining that a defendant can be liable in nuisance for setting up a tannery near my home, continues "but if he is first in possession of the air and I fix my habitation near him, the nuisance is of my own seeking, and must continue". And in the criminal, public nuisance, case of *R v Cross* (1826) 2 Car & P 483, 484, Abbott CJ said that a defendant whose trade was said to be a nuisance to a householder or a

user of a road "would be entitled to continue his trade [if] his trade [had been] legal before the erection of the houses in the one case, and the making of the road in the other".

51. In my view, the law is clear, at least in a case such as the present, where the claimant in nuisance uses her property for essentially the same purpose as that for which it has been used by her predecessors since before the alleged nuisance started: in such a case, the defence of coming to the nuisance must fail. For over 180 years it has been assumed and authoritatively stated to be the law that it is no defence for a defendant to a nuisance claim to argue that the claimant came to the nuisance. With the dubious 16th century exception of *Leeds* Cro Eliz 751, there is no authority the other way, as the observations of Blackstone and Abbott CJ were concerned with cases where the defendant's activities had originally not been a nuisance, and had only become an arguable nuisance as a result of a change of use (due to construction works) on the claimant's property.

52. Furthermore, the notion that coming to the nuisance is no defence is consistent with the fact that nuisance is a property-based tort, so that the right to allege a nuisance should, as it were, run with the land. It would also seem odd if a defendant was no longer liable for nuisance owing to the fact that the identity of his neighbour had changed, even though the use of his neighbour's property remained unchanged. Quite apart from this, the concerns expressed by Lord Denning in *Miller* [1977] 1 QB 966 would not apply where a purchasing claimant has simply continued Page 15 with the use of the property which had been started before the defendant's alleged nuisance-causing activities started.

53. There is much more room for argument that a claimant who builds on, or changes the use of, her property, after the defendant has started the activity alleged to cause a nuisance by noise, or any other emission offensive to the senses, should not have the same rights to complain about that activity as she would have had if her building work or change of use had occurred before the defendant's activity had started. That raises a rather different point from the issue of coming to the nuisance, namely whether an alteration in the claimant's property after the activity in question has started can give rise to a claim in nuisance if the activity would not have been a nuisance had the alteration not occurred.

54. The observations I have quoted from Blackstone and Abbot CJ were in the context of cases where the defendant's activity only becomes a potential nuisance after a change of use or building work on the claimant's property, and they therefore provide some support for the defendant in such a case. However, in both *Sturges and Miller*, it appears clear that the defendant's activities pre-dated the plaintiff's construction work, and it was only as a result of that work and the subsequent use of the new building that the activities became a nuisance. However, Miller was not concerned with damage to the senses, but with physical encroachment on, and potential physical damage to, the plaintiffs and their property (through cricket balls). In *Sturges*, the only issue raised by the unsuccessful defendant was prescription, the nuisance at least arguably involved more than offence to the senses, and the plaintiff's construction work merely involved an extension to an existing building (see at 11 Ch D 852-853, 854, 860-861).

55. It is unnecessary to decide this point on this appeal, but it may well be that it could and should normally be resolved by treating any pre-existing activity on the defendant's land, which was originally not a nuisance to the claimant's land, as part of the character of the neighbourhood – at least if it was otherwise lawful. After all, until the claimant built on her land or changed its use, the activity in question will, ex hypothesi, not have been a nuisance. This is consistent with the notion that nuisance claims should be considered by reference to what Lord Goff referred to as the "give and take as between neighbouring occupiers of land" quoted in para 5 above (and some indirect support for such a view may be found in *Sturges*, at pp 865-866).

56. On this basis, where a claimant builds on, or changes the use of, her land, I would suggest that it may well be wrong to hold that a defendant's pre-existing activity gives rise to a nuisance provided that (i) it can only be said to be a nuisance because it affects the senses of those on the claimant's land, (ii) it was not a nuisance before the building or change of use of the claimant's land, (iii) it is and has been, a reasonable and otherwise lawful use of the defendant's land, (iv) it is carried out in a reasonable way, and (v) it causes no greater nuisance than when the claimant first carried out the building or changed the use. (This is not intended to imply that in any case where one or more of these requirements is not satisfied, a claim in nuisance would be bound to succeed.)

57. It would appear that the Court of Appeal adopted this approach in *Kennaway v Thompson* [1981] QB 88. In that case, Lawton LJ seems to have assumed that the noise made by the defendant's motorboats on the neighbouring lake should not be treated as a nuisance in so far as it was at the same level as when the plaintiff built her house nearby, and was a reasonable use reasonably carried out. However, a subsequent and substantial increase in the level of noise (due to larger boats and increased proximity to the plaintiff's house) and in the frequency of activity did constitute a nuisance.

58. Accordingly, it appears clear to me that it is no defence for a defendant who is sued in nuisance to contend that the claimant came to the nuisance, although it may well be a defence, at least in some circumstances, for a defendant to contend that, as it is only because the claimant has changed the use of, or built on, her land that the defendant's pre-existing activity is claimed to have become a nuisance, the claim should fail.

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