

Enquiries to:
Contact name; Simon Pugh
T: 01223 457401
E: simon.pugh@cambridge.gov.uk
DX 5854, Cambridge



Legal Services

Richard Buxton
Solicitor
19B Victoria Street
Cambridge CB1 1JP

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:

Simon Pugh • Solicitor • Head of Legal Services
PO Box 700, Cambridge, CB1 0JH
www.cambridge.gov.uk • Switchboard: 01223 457000

Lexcel
Practice Management Standard
Law Society Accredited



"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

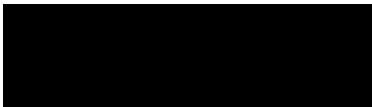
damage by removal of the tree (or, presumably, less drastic but adequate steps). He adds:

"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

A black rectangular redaction box covering the signature of Simon Pugh.

Simon Pugh
Head of Legal Services

RICHARD BUXTON

ENVIRONMENTAL & PUBLIC LAW

19B Victoria Street
Cambridge CB1 1JP

Tel: (01223) 328933

Fax: (01223) 301308

www.richardbuxton.co.uk

law@richardbuxton.co.uk

Cambridge City Council
The Guildhall
Cambridge CB2 3QJ

Attn:

Ms Carina O'Reilly, Executive Councillor carinaoreilly@gmail.com

Mr Alistair Wilson, CC Council Asset Manager alistair.wilson@cambridge.gov.uk

Mr Simon Pugh, Legal Dept. simon.pugh@cambridge.gov.uk

Our ref: DVE1-002/RB

Email: rbuxton@richardbuxton.co.uk

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

Partners: Richard Buxton* MA (Cantab) MES (Yale), Susan Ring* LLM Env (London), Adrienne Copithorne* BA (Cantab) MA (UC Berkeley),
Lisa Foster Juris D MSc (UEA) MA (York) Consultant: Paul Stookes* PhD MSc LLB

Associates: Caroline Chilvers BA (Hons), Carolyn Beckwith BA (Hons) LLM

Practice Manager: Sheryl Taylor

London office: 419 Richmond Road, East Twickenham TW1 2EX Tel: 020 8296 1881

Authorised and regulated by the Solicitors Regulation Authority No.74899

* Solicitor-advocate

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.

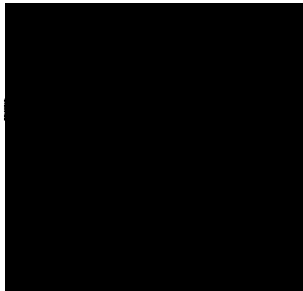
The overall result strikes us not only as legally correct but in line with common sense and public policy. It cannot be right that a public authority is legally liable for the results of people building properties where they might become susceptible to a pre-existing nuisance. The Court does set out 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



Enquiries to:
Simon Pugh
Head of Legal Services
T: 01223 457401
E: simon.pugh@cambridge.gov.uk
DX 5854, Cambridge



Richard Buxton
Solicitor
19B Victoria Street
Cambridge CB1 1JP

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 explicitly restricted

Simon Pugh • Solicitor • Head of Legal Services
PO Box 700, Cambridge, CB1 0JH
www.cambridge.gov.uk • Switchboard: 01223 457000



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

A black rectangular redaction box covering the signature of Simon Pugh.

Simon Pugh
Head of Legal Services

RICHARD BUXTON

ENVIRONMENTAL & PUBLIC LAW

19B Victoria Street
Cambridge CB1 1JP

Tel: (01223) 328933

Fax: (01223) 301308

www.richardbuxton.co.uk

law@richardbuxton.co.uk

Cambridge City Council
The Guildhall
Cambridge CB2 3QJ

Attn:

Ms Carina O'Reilly, Executive Councillor carinaoreilly@gmail.com

Mr Alistair Wilson, CC Council Asset Manager alistair.wilson@cambridge.gov.uk

Mr Simon Pugh, Legal Dept. simon.pugh@cambridge.gov.uk

Our ref: DVE1-002/RB

Email: rbuxton@richardbuxton.co.uk

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

Partners: Richard Buxton* MA (Cantab) MES (Yale), Susan Ring* LLM Env (London), Adrienne Copithorne* BA (Cantab) MA (UC Berkeley),
Lisa Foster Juris D MSc (UEA) MA (York)

Associates: Caroline Chilvers BA (Hons), Carolyn Beckwith BA (Hons) LLM

Consultant: Paul Stookes* PhD MSc LLB

Practice Manager: Sheryl Taylor

London office: 419 Richmond Road, East Twickenham TW1 2EX Tel: 020 8296 1881

Authorised and regulated by the Solicitors Regulation Authority No.74899

* Solicitor-advocate

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.

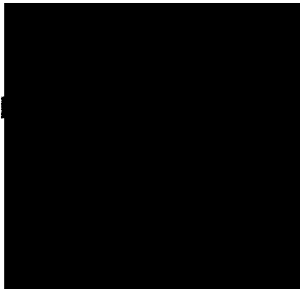
The overall result strikes us not only as legally correct but in line with common sense and public policy. It cannot be right that a public authority is legally liable for the results of people building properties where they might become susceptible to a pre-existing nuisance. The Court does set out 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



RICHARD BUXTON

ENVIRONMENTAL & PUBLIC LAW

19B Victoria Street
Cambridge CB1 1JP

Tel: (01223) 328933

Fax: (01223) 301308

www.richardbuxton.co.uk
law@richardbuxton.co.uk

Mr Simon Pugh
Legal Dept.
Cambridge City Council
The Guildhall
Cambridge CB2 3QJ

simon.pugh@cambridge.gov.uk

Copies to

Ms Carina O'Reilly, Executive Councillor carinaoreilly@gmail.com

Mr Alistair Wilson, CC Council Asset Manager alistair.wilson@cambridge.gov.uk

Our ref: DVE1-002/RB

Email: rbuxton@richardbuxton.co.uk

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, nor the limited number of cases cited

Partners: Richard Buxton* MA (Cantab) MES (Yale), Susan Ring* LLM Env (London), Adrienne Copithorne* BA (Cantab) MA (UC Berkeley),
Lisa Foster Juris D MSc (UEA) MA (York) Consultant: Paul Stookes* PhD MSc LLB

Associates: Caroline Chilvers BA (Hons), Carolyn Beckwith BA (Hons) LLM
Practice Manager: Sheryl Taylor

London office: 419 Richmond Road, East Twickenham TW1 2EX Tel: 020 8296 1881

Authorised and regulated by the Solicitors Regulation Authority No.74899

* Solicitor-advocate

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.

