

CILA Subsidence SIG Conference

Legal Update

Philip Adamis
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Contact Details



Philip Adamis
Solicitor

1 Threadneedle Street
London EC2R 8AY

Tel: 0870 365 9373

Fax: 0870 365 8009

Email: philip.adamis@halliwells.com

***Perrin v. Northampton Borough Council* [2007] EWCA
Civ 1353**

- Tree Preservation Orders
 - S198(6)(b) Town & Country Planning Act 1990
 - Protection not absolute
 - No TPO shall apply to the
 - cutting down
 - uprooting
 - topping or lopping of any trees
- so far as may be necessary for the prevention of abatement of a nuisance

Perrin

Cont'd...

- First instance
 - existence of possible engineering solutions irrelevant to the proper operation of the exemption
- Court of Appeal
 - overturned decision
 - purpose of legislation is to preserve trees
 - existence of possible engineering solutions is relevant

Hilda's Montessori Nursery Ltd v. Tesco Stores Ltd
[2006] EWHC 1054

- Causation – key ingredient
 - did tree roots cause or materially contribute to the subsidence and damage?
- Soil desiccation
 - severe desiccation v. desiccation
 - watery summers – lack of severe desiccation

Hilda's Montessori

Cont'd...

- Decision
 - soil generally of high plasticity
 - soil particularly susceptible to shrinkage
 - tree roots found where desiccation present
 - desiccation, albeit slight, present at or near start of growing season
 - desiccation found where damage had occurred
 - therefore, more probable than not, that damage caused by moisture extraction from the trees

***L E Jones (Insurance Brokers) Ltd v. Portsmouth City Council* [2002] EWCA Civ 1723**

- 3 issues:
 1. Was Portsmouth CC the right defendant?
 2. Did Claimant fail to give Portsmouth the opportunity to abate the nuisance?
 3. Was underpinning necessary?

L E Jones

Cont'd...

- Was Portsmouth the right defendant?
 - Hampshire CC - statutory duty to maintain highway
 - Contract between Hampshire CC and Portsmouth CC whereby Portsmouth CC contractually responsible for maintaining trees
 - Sufficient control over the hazard which constitutes the nuisance (occupier)
 - Control also lies at the heart of liability of a non-occupying owner
 - breach of covenants of a lease
 - failure to exercise right to enter and carry out repairs

L E Jones

Cont'd...

- Portsmouth found to have sufficient control over trees, both in fact and law, to prevent nuisance occurring
- Opportunity to abate nuisance
 - What is a reasonable opportunity to abate the nuisance is a question of fact
 - Burden of showing that a claimant has failed to give reasonable opportunity to abate the nuisance rests on the defendant

L E Jones

Cont'd...

- Involves showing that:
 - defendant did not have sufficient time to abate nuisance; and
 - if sufficient time had been allowed, it would have ensured that the nuisance was abated
- Audit trail

L E Jones

Cont'd...

- Was underpinning necessary?
 - Onus on defendant to show that a claimant has failed to take reasonable steps to mitigate his loss
 - What steps, if any, has local authority taken to abate the nuisance?
 - If not, reasonable to underpin?
 - Claimant not required to wait indefinitely for local authority to abate?

- Audit trail....again
 - tell defendant intention to underpin
 - provide copy of Scheme of Underpinning and quotations
 - deadline in which to respond

Hiscox Insurance v. London Borough of Haringey

- Limitation in circumstances of continuing nuisance
- Hearing of limitation as a preliminary issue
- Claimant's case
 - cause of action in respect of all damage did not accrue until such time as underpinning works were completed

Hiscox Insurance

Cont'd...

- Defendant's case
 - cause of action accrued at such time as damage occurred
 - damage had been the impairment of the load-bearing capacity of the subsoil manifest as cracking in the superstructure of the property

Hiscox Insurance

Cont'd...

- Judge found in favour of the Defendant
 - all superstructure damage occurred before 23 June 2000
 - proceedings issued on 23 June 2006, therefore claim statute barred
- Underpinning is only directed to protection against the risk of future damage

ABI Domestic Subsidence Tree Claims Agreement – Third Party Liability

- applies to policies covering domestic properties owned/tenanted/occupied by an insured in a personal capacity
- subscribing insurers
- covers claims in respect of subsidence damage caused wholly or partly by tree root encroachment

ABI

Cont'd...

- Insurers agree not to pursue recovery against insurers of the owned/tenanted/occupied property responsible for the liability of the tree encroachment
- doesn't apply where there has been a recurrence of damage or no reasonable preventative measures have been taken
- doesn't cover uninsured losses

ABI

Cont'd...

- Practical points
 - Increase in knowledge of the public generally regarding the effects of encroaching tree roots
 - reasonable foreseeability in nuisance claims
 - Cambridge Water v. Eastern Counties Leather
 - Notice of nuisance
 - notification – needs to be clear
 - reasonable period in which to abate nuisance
 - failure to abate nuisance will negate agreement (including inadequate measures)

Mediation

- *Dunnett v. Railtrack Plc* [2002] EWCA Civ 303
- *Halsey v. Milton Keynes General NHS Trust* [2004] EWCA Civ 576
- *The Earl of Malmesbury & others v. Strutt & Parker* [2008] EWHC 424

Mediation

Cont'd...

- Dunnett
 - If a party rejects ADR out of hand, they will suffer the consequences when costs to be decided
 - Parties have a duty to further the overriding objective of the CPR which includes consideration of ADR
 - Defendant won the case but had refused to mediate – did not recover its costs against losing party

Mediation

Cont'd...

- Halsey
 - Clinical negligence case
 - Defendant disputed liability and refused Claimant's invitation to take part in ADR
 - Defendant succeeded at trial and was awarded its costs
 - Defendant had not been unreasonable to refuse mediation (Claimant's offer had been "somewhat tactical")

Mediation: Halsey

Cont'd...

- Mediation would have been disproportionate
 - costs –v- claim value
- Up to losing party to show winning party was unreasonable in refusing mediation
- Case has attracted a lot of criticism:
 - allows parties to refuse mediation, provided it is reasonable to do so, without facing costs consequences

Mediation

Cont'd...

- Malmesbury
 - Professional negligence claim against surveyors – valuation
 - Claimant's valuation of claim - £87.8m
 - Awarded £915,139 at trial
 - Mediation had been suggested and agreed to by the parties

Mediation: Malmesbury

Cont'd...

- Unrealistic and unreasonable attitude taken by parties in the mediation
- Held: a party who agrees to but then takes an unreasonable position within mediation is in the same position as a party who unreasonably refuses to mediate – ie. there will be costs consequences

Mediation in Tree Root Cases

- Overriding objective
 - need to consider before issuing proceedings
 - can refuse but must be reasonable
 - if parties agree, need to act reasonably at mediation
- Costs of mediation –v- value of claim
- Liability or quantum or both
- Decision-makers to be present
 - insurers
 - local authority