Case No: A1/2012/3046

Neutral Citation Number: [2013] EWHC Civ 1233
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
TECHNOLOGY AND CONSTRUCTION COURT
Mr Justice Edwards-Stuart
[2012] EWHC 2257 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/10/2013

Before:

LORD JUSTICE MOORE-BICK
LORD JUSTICE AIKENS
and
LORD JUSTICE VOS

- -

Between:

Josephine Robbins	**Respondent /Claimant**
- and -	
London Borough of Bexley	**Appellant/ Defendant**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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Mr Andrew Bartlett QC and Mr Muhammed Haque (instructed by Clyde & Co) for the Appellant, London Borough of Bexley
Mr Stephen Furst QC and Mr Daniel Crowley (instructed by Plexus Law) for the Respondent, Mrs Robbins

Hearing date: 8th October 2013

- -

Judgment

Lord Justice Vos:

1. This is an appeal against the order made by Edwards-Stuart J on 2nd November 2012, whereby he awarded the Respondent, Mrs Josephine Robbins ("Mrs Robbins"), damages for nuisance and negligence in the sum of £150,081.48 against the Appellant, the London Borough of Bexley (the "Council"). The figure for damages was agreed between the parties.

2. The case has an unusual procedural history in that it was commenced in the Croydon County Court and transferred to the Technology and Construction Court (the "TCC") after 3 days of evidence had been heard. The continued hearing was then expedited and heard in February 2012. Edwards-Stuart J gave judgment on 16th August 2012, having waited some time for the emergence of a seemingly relevant Court of Appeal decision in Berent v. Family Mosaic Housing [2012] EWHC Civ 961, which was handed down on 13th July 2012 ("Berent").

3. Mrs Robbins is the owner of a semi-detached house with a part 2-storey and part single storey extension at the rear at 6 Radnor Avenue, Welling, Kent ("No 6"). To the East and rear of No 6 is Danson Park, owned by the Council. A row of poplar trees (the "poplars") ran roughly North/South behind the houses in Radnor Avenue, at a perpendicular distance of a little over 30 metres from the rear of the extensions to those properties. The judge found that roots emanating from two of these poplar trees known as "T1" and "T2" were responsible for causing damage to the foundations of No 6, by the well-known process of soil desiccation. In particular, he found that T2 (30.7 metres from No. 6) was the major contributor to the removal of moisture from the clay beneath the foundations of No 6, and that T1 (between 32 and 36 metres from No. 6) also made a material contribution to this extraction of moisture.

4. The Council appeals the judge's decision on 5 grounds to which I shall come in due course; but, in essence, it argues that, having made two clear findings, his decision that causation was made out cannot stand. The findings in question were:-

   i) on the basis of current expert knowledge in 1998, it would have been reasonable for the Council to have undertaken a programme of cyclical reduction in the crowns of the poplars by 25% every 3 or 4 years from 1998; and

   ii) if such a programme had been undertaken, it would not in fact have prevented the damage to No 6.

5. Mrs Robbins's response to this argument was to say that, following Bolitho v. City and Hackney Health Authority [1998] AC 232 ("Bolitho"), the correct causation question is not what should the defendant have done in order to fulfil its duty to the claimant, but what would the defendant have in fact done if it had fulfilled its duty to the claimant; and the judge actually found that, had the Council undertaken any programme of cyclical pruning (as it should have done), it would in fact have reduced the crowns of the poplars by an amount necessary to avoid the damage. Whether he in fact made such a finding is also in dispute before us.

6. Before coming to these issues, I shall set out as briefly as possible the main elements of the chronological background and the judge's findings.

Chronological background

7. In 1969, Mrs Robbins purchased No. 6.

8. In 1996/1997, a claim was made by the owners of No 10 Radnor Avenue in respect of damage caused to their property from 3 of the poplars, which were 33.2 metres, 35 metres and 34 metres respectively from it.

9. From early 1998 onwards, as the judge found, the Council knew that the poplars were capable of causing damage to any rear extension in Radnor Avenue that was within 35 metres of any of them.

10. In 1998, some work was apparently undertaken to reduce the crowns of the poplars. I shall return to the evidence on this point.

11. In summer 2003, damage was first sustained to the left (or North) end of the rear extension to No 6.

12. In May 2004, the Building Research Establishment's Horticulture LINK project 212, entitled "*Controlling water use of trees to alleviate subsidence risk"* ("Hortlink") was published by the Building Research Establishment. Hortlink concluded that, to reduce soil dessication caused by wild cherry and London plane trees, it was necessary to reduce crown volume by 70-90%, and that the duration of such a benefit was up to two years. The judge found that Hortlink was applicable to poplars, but that the Council could not be criticised for failing to take the results of Hortlink into account before at least mid-2005.

13. In July 2004, the Council issued a works order requiring a 25% crown reduction in the poplars to be completed by September 2004. The works order was not carried out.

14. In early 2005, the Council issued a further works order requiring a 25% crown reduction in the poplars to be completed by 30th April 2005. The works order was again not carried out.

15. On 30th March 2006, the Council's document entitled "*Review of Trees and Woodlands*" recommended that the Council "*should maintain its current policy of undertaking inspections and programmed works across the borough on an approximately four-year cyclical programme*".

16. In summer 2006, further damage was sustained to the left (or North) end of the rear extension to No 6.

17. In September 2006, the Council undertook a very severe crown reduction in the poplars, so as to remove the whole dynamic canopy and all leaf bearing shoots.

18. In summer 2007, No 6 suffered much less settlement as a result of the 2006 crown reduction works and higher rainfall in that year.

19. On 20th May 2009, Mrs Robbins issued a claim form against the Council claiming damages for nuisance and/or negligence, and on 10th September 2009, Mrs Robbins filed her Particulars of Claim again claiming damages for nuisance and/or negligence.

20. In 2011, the poplar trees were once again heavily pruned.

21. On 22nd November 2011, HH Judge Ellis adjourned the trial to the TCC after 3 days of evidence.

22. On 16th August 2012, Edwards-Stuart J delivered judgment holding the Council liable for the damage that occurred to No. 6 in both 2003 and 2006 and awarding damages in the total sum of £150,081.48 plus interest.

The judge's findings

23. As the oral argument developed, it became apparent that the parties disagreed as to precisely what findings the judge had made as to breach of duty. Accordingly, in respect of the breaches he found, I shall record the judge's exact words. In other respects, a summary will suffice as follows:-

i) The prevailing advice in 1998 was that crown reduction to prevent the risk of subsidence should take place every 3-4 years, subject to an upper limit of not removing more than 30% of the tree canopy or leaf area. The judge thought that this 30% figure referred to branch length.

ii) A reduction in overall branch length of at least 30% would be required to produce a reduction in the volume of the canopy of more than 70%.

iii) According to Hortlink, it was necessary to reduce crown volume by 70-90% to reduce soil desiccation, and the duration of such a benefit was only up to two years.

iv) By early 1998, it was reasonably foreseeable that the roots from the poplars could cause shrinkage in the soil up to 35 metres away, and that the rear extension of No 6 (which was less than 35 metres away from T1 and T2) was at real risk of subsidence.

v) T2 was the major contributor to the removal of moisture from the clay beneath the foundations of No. 6, and T1 also made a material contribution to this extraction of moisture (these findings applied by implication to 2003 as well as 2006).

vi) The extension to No 6 suffered damage as a result of seasonal volume changes in the subsoil caused by the extraction of moisture by vegetation in 2003 and 2006.

vii) T1 and T2 were pruned very severely in September 2006 so as to remove all the leaf bearing shoots.

viii) A crown reduction of 25% of branch length (amounting to less than 70% of crown volume) would not have had any significant influence on the moisture removal caused by the poplars.

ix) From early 1998 onwards, the Council "*could reasonably have been expected to respond to its awareness of the foreseeable risk of damage being caused by*

the poplars" by embarking on a programme of cyclical crown reduction, and should have done so (paragraphs 146 and 162 of the judgment).

x) Sian Thomas, the Council's Tree and Woodland Technician noted in February 2007 that T2 was believed to have been crown reduced in 1998. The note suggests that the Council did not embark on any structured pruning of the poplars between 1998 and 2007. In October 2005, a vegetation survey undertaken by OCA, consultant arboriculturalists, recorded that poplars T1 and T2 had been "*very heavily topped*" in the past and had significant new growth that was more than 5 years old. The judge concluded that "*[t]his suggests that the Council's belief that T2 had been crown reduced in 1998 was correct*".

xi) Mr Mollison, an Environment Manager for the Council, gave evidence that the 2005 works order was subsequently carried out in September 2006.

xii) At paragraphs 154-155, the judge said this:-

> "*[154] Mr Crowley submitted ... that since the Council recognised the need for this work in 2004, and again in early 2005, and indeed placed orders for it to be done, it should have ensured that it was carried out. Had it been done at any time before the summer of 2006, in particular in 2005, he submitted, the damage that occurred during that summer would never have happened.*
>
> *[155] I accept Mr Crowley's submission. ... In the light of what it knew (and should have foreseen) I consider that the failure of the Council to ensure that the crown reduction work (to T2 and the adjacent large poplars) it considered necessary in 2004 and early 2005 was carried out reasonably promptly was negligent. I find that if this work had been carried out at that time it would have been done in much the same way as the work that was eventually done in September 2006. This would probably have prevented the significant further damage that was caused to No 6 during 2006. However, it would not have prevented the damage that occurred in 2003*".

xiii) It was a reasonable inference that, if the Council had put in place, a cyclical pruning programme in 1998 as it should have done, the poplars would have received the type of treatment in 1998 that they received in 2006.

xiv) Had the Council pruned again in 2001, this would probably not have prevented the 2003 damage; had the Council pruned in 2002, it would probably have prevented the 2003 damage. Thus causation of the 2003 damage depended on whether the Council adopted a 3-year or 4-year pruning cycle.

xv) The onus was on the Council to show that, if it had acted with reasonable care, the damage would still have occurred (Phethean-Hubble v. Coles [2012] EWCA Civ 349 per Longmore LJ at paragraph 90 – ("Phethean")), and it did not do so. But in any event, the Council's 30th March 2006 document referred to a policy of cyclical pruning every 4 years, and that is what it would probably have done in 1998. If it had done so, it could not have been criticised.

The Council's Grounds of Appeal

24. The Council raises the following 5 main grounds of appeal:-

i) Ground 1: The judge should not have held the Council liable for the 2003 or the 2006 damage. Having found that the Council should have reduced the crowns by only 25% every 3-4 years from 1998, the judge also found that a 25% crown reduction would have had no effect on soil desiccation. Accordingly, the breach of duty found by the judge did not cause the damage to No 6.

ii) Ground 2: Having held that the Council would in fact probably have undertaken very severe reduction had it done the 2006 works earlier, he wrongly used that finding to hold that the damage would have been avoided had the Council done the works it should have done. The error of law was to compare the actual position with what would have happened in fact (a very severe reduction), instead of with what would have happened if the Council had fulfilled its minimum duty (a 25% crown reduction).

iii) Ground 3: The judge was wrong to infer that hypothetical contractors undertaking crown reduction in 2002/2006 would have gone beyond their instructions to effect a 25% crown reduction (and effected a very severe reduction), as they actually did in September 2006.

iv) Ground 4: The judge should not have reversed the burden of proof, so as to require the Council to show that, even if it had acted with reasonable care, the damage would still have occurred. The principle in Phethean was inapplicable.

v) Ground 5: The judge was wrong to hold that the 2003 damage would have been avoided by a 3 or 4 yearly 25% reduction started in 1998.

The Respondent's Notice

25. Mrs Robbins rebuts the Council's points by making two points in her Respondent's Notice as follows:-

i) The judge could and should have found that T2 was heavily pruned in 1998 and in 2011 in support of his finding that the works the Council should have done would have effected a very severe reduction after 1998.

ii) The judge should anyway have found that the Council should have undertaken a very severe reduction in accordance with Hortlink between mid-2005 and early 2006.

26. Mr Stephen Furst QC, leading counsel for Mrs Robbins, ultimately decided not to press the second point in his Respondent's notice.

27. Before dealing with all the live points in the appeal, I should say something about the cause of action relied upon by Mrs Robbins.

Claims in negligence and nuisance

28. The case against the Council was pleaded, as I have said, in both nuisance and negligence. In fact, however, in the course of the hearings below, little attention seems to have been paid to the difference, if any, between the principles governing liability in nuisance and liability in negligence in cases of this kind. The court therefore invited the parties to address it on this question.

29. In response, the parties agreed that the case had been run at first instance primarily on the basis of the negligence claim, and that Mrs Robbins had not at any stage sought to suggest that the law of nuisance was materially different for the purposes of this case. Mr Furst also agreed that he was not seeking to advance any different position on the appeal. In the circumstances, it is not necessary for me to say much more about this aspect of the matter.

30. I should, however, point out that the parties referred below to Solloway v. Hampshire County Council [1981] 79 LGR 449, where Dunn LJ had summarised the existing law of nuisance by citing Megaw LJ's judgment in Leakey v. National Trust [1980] 1 QB 485 where he said that: "*[t]his leads on to the question of the scope of the duty. This is discussed, and the nature and extent of the duty is explained, in the judgment in Goldman v Hargrave [1967] 1 AC 645 at pp 663, 664. The duty is a duty to do that which is reasonable in all the circumstances, and no more than what, if anything, is reasonable, to prevent or minimise the known risk of damage or injury to one's neighbour or to his property*". Lord Cooke of Thorndon in Delaware Mansions Limited v. Westminster City Council [2002] 1 AC 321 at page 333 said in relation to tree roots that: "*the label nuisance or negligence is treated as of no real significance*" and that "*the concern of the common law lies in working out the fair and just content and incidents of a neighbour's duty rather than affixing a label and inferring the extent of the duty from it*" (see also Tomlinson LJ at paragraph 12 in Berent).

31. In the circumstances, it is hardly surprising that the parties in this case were prepared to argue the matter as if the law of nuisance were the same as the law of negligence. That said, I would want to echo the words of Tomlinson LJ at paragraph 19 of Berent where he said that: "*[a]lthough we were not unnaturally referred to several cases involving damage allegedly caused by tree roots, such disputes call for the application of the general law of negligence and nuisance. There is not some specific set of principles applicable to cases of this type alone*".

32. I have, therefore, treated this case as one of negligence, as it was argued. No material difference in the law of nuisance was suggested as being relevant. Though the judge mentions nuisance twice in his judgment, he plainly understood the position to be as the parties have submitted it to have been before him.

33. Before proceeding to deal with the grounds of appeal on their merits, it is perhaps useful to say something about the two cases upon which the parties placed the greatest reliance, even though neither was cited or relied upon before the judge.

Bolitho

34. The facts of Bolitho are very well known. In short, a 2 year old child was in hospital with breathing difficulties. A doctor was summoned but failed to attend, and the child

suffered cardiac arrest and brain damage. A professional negligence claim was brought against the Health Authority. The judge held that the doctor was in breach of duty in failing to attend, and that intubation would have avoided the damage, but that the doctor would not in fact have intubated had she attended. Accordingly, at all levels up to the House of Lords, the Health Authority was held not to have caused the damage the child suffered.

35. Lord Browne-Wilkinson (with whom the remainder of the House agreed) held at page 239G that in all cases of causation: "*the primary question is one of fact: did the wrongful act cause the injury? But in cases where the breach of duty consists of an omission to do an act which ought to be done (e.g. the failure of the doctor to attend) that factual enquiry is, by definition, in the realms of hypothesis. The question is what would have happened if an event which by definition did not occur had occurred*".

36. Lord Browne-Wilkinson continued by saying that the question of what would have happened was not conclusive in that case, because, if the doctor ought, in order to have met proper professional standards of care, to have intubated the child, that would have been enough to establish causation. The doctor could not escape liability by establishing she would have hypothetically broken another duty of care. He continued as follows:-

> "*I adopt the analysis of Hobhouse LJ in Joyce v Merton Sutton and Wandsworth Health Authority [1996] 7 Med L.R. 1. In commenting on the decision of the Court of Appeal in the present case, he said (at p.20):*
>
> *'Thus, a plaintiff can discharge the burden of proof on causation by satisfying the court <u>either</u> that the relevant person would in fact have taken the requisite action (although she would not have been at fault if she had not) <u>or</u> that the proper discharge of the relevant person's duty towards the plaintiff required that she take that action. The former alternative calls for no explanation since it is simply the factual proof of the causative effect of the original fault. The latter is slightly more sophisticated: it involves the factual situation that the original fault did not itself cause the injury but that this was because there would have been some further fault on the part of the defendants; the plaintiff proves his case by proving that his injuries would have been avoided if proper care had continued to be taken. In Bolitho [in the CA] the plaintiff had to prove that the continuing exercise of proper care would have resulted in his being intubated.' (Hobhouse LJ's emphasis.)*
>
> *There were, therefore, two questions for the judge to decide on causation: (1) What would Dr Horn have done, or authorised to be done, if she had attended Patrick? and (2) If she would not have intubated, would that have been negligent? The [<u>Bolam v. Friern</u> Hospital [1957] 1 WLR 582] test has no relevance to the first of those questions but is central to the second*".

<u>Beary</u>

37. In <u>Beary v. Pall Mall Investments (a firm)</u> [2005] EWCA Civ. 415, it was held that an independent financial advisor had negligently failed to advise the claimant client about the possibility of taking out an annuity, but that the claimant would <u>not</u> have done so, unless he had been positively advised that he should. The breach did not,

therefore, cause the loss claimed. The Claimant argued that, had the IFA performed his duty of explaining about annuities, he would in fact have advised that one be taken out. Dyson LJ (as he then was) held that such an enquiry was inadmissible at paragraphs 30-1 as follows:

> "*In Bolitho, the claim would have succeeded either if the judge had found that the doctor who negligently failed to attend, would as a matter of fact have intubated if she had attended, or if it would have been negligent not to intubate. It was necessary on the facts of that case to consider what the doctor would have done if she had attended the child. But it does not follow that it is necessary in every case to ask what a defendant would have done if he or she had not been negligent. That question falls to be considered only where it is relevant on the facts of the particular case. In Bolitho it was relevant because the negligence lay in the failure to attend, and there was a causal link between that failure and the injury suffered by the child, because, if the doctor had attended and if she would have intubated, she would thereby have averted the injury. This causal link on the facts of that case was the hypothetical conduct of the defendant herself. In many negligence cases, the question is what would the claimant or some third person have done if the defendant had not been negligent. Usually, the only relevant question in relation to a defendant's conduct is: what* should *the defendant have done? It will not often be meaningful to go on to ask what the defendant* would *have done if he had not been negligent. It is tautologous to say that, if the defendant had not been negligent, he would not have acted negligently.*
>
> *31. In my judgment, there is no scope for the application of the Bolitho principle in the present case. The negligence lay in failing to advise on the possibility of an annuity, advice which the judge found would not have led Mr Beary to reject the recommendation of the PMI fund. In such a case, it is meaningless to ask what Mr Jefferies would have done if he had not been negligent. If he had not been negligent, what he should have done and what he would have done are one and the same: ie advise on the possible option of an annuity. I would reject the first ground of appeal*".

38. The Council argues by analogy that it was not necessary or appropriate in this case to ask what the Council would have done to perform its duty to take reasonable care to prevent damage from its tree roots. If the Council had not been negligent "*what [it] should have done and what [it] would have done are one and the same*".

39. I can now turn to deal with the grounds of appeal.

The grounds of appeal

Ground 1: The breach of duty found by the judge did not cause the damage to No. 6

Ground 2: The error of law in comparing the actual position with what would have happened in fact (a very severe reduction), instead of with what would have happened if the Council had fulfilled its minimum duty (a 25% crown reduction)

40. These two grounds should sensibly be dealt with together. It can be said at the outset that the logic of Ground 1 is immediately appealing. The judge found that the Council

was negligent in not reducing the crowns by not more than 25% every 3-4 years from 1998, and that a 25% crown reduction would have had no effect on soil dessication. Accordingly, the breach of duty found by the judge did not cause the damage to No 6. What caused the damage to No 6 was the failure to take steps which it was never the duty of the Council to undertake before 2006, namely a severe crown reduction (i.e. one reducing the canopy volume by 70-90% as indicated as being necessary by Hortlink).

41. Though this argument does not seem to have been made to the judge, he did ultimately find that the Council would in fact have undertaken severe crown reduction, had they actually adhered to a 3 or 4-yearly programme of works to the poplars.

42. In my judgment, it is important first to identify the duty of the Council and the breaches of duty held to have been established by the judge. His findings in this regard are not appealed.

43. As was accepted on all sides in argument, the Council's duty was, from 1998, to take such steps as were reasonably required to prevent damage being caused by the roots of the poplars to Mrs Robbins's property. The duty was not to undertake any specific programme of works. The programmes of works referred to by the judge (e.g. 3 or 4-yearly cyclical pruning to 25% or 30% of branch length) were simply various possible ways in which the Council could have discharged its duty.

44. Mr Andrew Bartlett QC, leading counsel for the Council, submitted that the judge had held in paragraphs 154-155 that the primary breach of duty was the Council's failure to ensure that the works orders for a 25% crown reduction was carried into effect. I cannot agree. In my judgment, paragraphs 154-155 and 146 and 162, properly read, make it clear that the breach of duty held to have been established by the judge was the Council's failure to take reasonable steps to put in place and carry out a programme of crown reduction in respect of the poplars from 1998 onwards. In essence, having held that damage was foreseeable, he held that it would have been reasonable for the Council to have acted in this way. The judge also held that the Council negligently failed to ensure that the works orders it had given were carried out, but this is to be regarded as very much a subsidiary holding.

45. On this analysis, the interesting causation arguments advanced under Grounds 1 and 2 are irrelevant, because the judge plainly found that the failure to put in place <u>any</u> programme of cyclical pruning was responsible for the damage to No 6 both in 2003 and in 2006. Since the Council had done absolutely nothing between 1998 and September 2006, this was hardly a surprising conclusion.

46. This could have been an end of the debate, but Mr Bartlett's argument did not, of course, stop there. He contended that the judge applied the wrong causation comparison, and that, had the judge followed a <u>Beary</u> rather than a <u>Bolitho</u> approach, he would have had to conclude that, even if the Council had performed its duty, the loss would not have been avoided. Mr Bartlett's attractive submission was that it was quite illogical and unfair for the Council to be held liable, when, even if they had fulfilled their duty by undertaking a 3 or 4-yearly 25% or 30% pruning cycle, which would have been a reasonable thing for them to do, the damage would still have

occurred. Mrs Robbins would, therefore, achieve a windfall if she were to recover damages.

47. It is perhaps useful first to point out, as Mr Furst did in his reply, that the position here is almost the same as it was in Bolitho itself. It could have been said in Bolitho that it would have been illogical and unfair for the doctor to have been held liable, as she would have been, if her evidence had been that she would have intubated, had she attended. In that situation, even though intubation was beyond the standard of care required, the doctor would have been liable in damages for her breach of duty in not attending. The 'windfall' would have been that claimant child would have succeeded, even though the damage would still have occurred if the doctor had fulfilled her duty by attending but not intubating.

48. But that does not answer the question of whether this is a Beary type case or a Bolitho type case. In my judgment, it is clearly a Bolitho type case.

49. The decision in Beary turned on the finding that it was not relevant on the facts of that case to ask any question beyond: what should the defendant have done? In that case, the IFA's duty was to advise with reasonable professional skill and care, but the specific breach of duty was the failure to advise of the possibility of an annuity. That was what was negligent. The IFA was under no duty to advise that the annuity should be taken out. He might have advised on all manner of other things, had he advised about the possibility of an annuity, but that was nothing to the point. The claimant was simply to recover for losses caused by the negligence, namely not being advised that he could take out an annuity. That negligence caused no loss, as he would not have done so, even if he had received that advice.

50. In this case, as in Bolitho, the Council's breach of duty was not doing anything, which compares to the doctor not attending. The facts, therefore, demanded that the judge go on to ask what would have happened if the doctor, or in this case the Council, had done something, rather than nothing.

51. In this case, the content of the Council's duty was to take some reasonable steps to avoid the damage. Such steps could hypothetically have included building a concrete wall to block the spread of the roots, or a cyclical pruning programme, or many other possibilities. Likewise the content of the doctor's duty could hypothetically have included treating the patient in a number of different possible ways. Both factual situations required the court to ask what would, in fact, have happened if the defendants had fulfilled their duties. In Beary, as Dyson LJ made clear, if the IFA had fulfilled his duty, he would have advised of the possibility of taking out an annuity; that was it. There was no need for a further far reaching factual enquiry.

52. For these reasons, it seems to me that the judge was justified on the facts, and as a matter of the proper application of the rules of causation, in asking what the Council would in fact have done, had it taken reasonable steps to prevent the damage. The Council's error is in assuming that the judge found the content of its duty was simply to undertake a particular 25% cyclical pruning regime, and that its breach was its failure to undertake such a regime. That is not, in my judgment, how the judge's judgment is properly to be understood.

53. In these circumstances, in my judgment, both Grounds 1 and 2 are unsustainable. The judge correctly applied the causation test to the breaches of duty that he held to have been established. That he did so in a robust and common sense kind of way accorded with the way the case had been argued before him, and cannot, in my judgment, be criticised.

Ground 3: The judge was wrong to infer that hypothetical contractors undertaking crown reduction would have gone beyond their instructions to effect a 25% crown reduction (and effected a very severe reduction)

54. Ultimately, this seems to have become Mr Bartlett's central point. He argued, in effect, that even if it were right to evaluate what the Council would in fact have done if it had undertaken a programme of cyclical crown reduction, the judge should not have inferred that the works would have been more extensive than those ordered in 2004 and 2005.

55. I found this a puzzling point, since it was perfectly clear that the judge relied on the evidence before him to make this inference. He relied on Sian Thomas's note of early 2007 and on the OCA's 2005 survey. Both pointed towards there having been an earlier crown reduction, the latter suggesting very heavy topping. The judge relied also on the fact that in September 2006, all the leaf shoots had been removed, so that the whole crown was effectively taken off. In his permission to appeal decision, the judge referred to the fact that "*it was also part of the evidence that the trees had been heavily pruned in 1998, and the fact that they received similar treatment in 2006 was fairly strong prima facie evidence of what would have happened in 2004 and 2005*".

56. In my judgment, the judge was perfectly justified in inferring that, if the canopy reduction works had taken place from 1998 onwards, they would, on a balance of probability, have been undertaken more severely than the later works orders envisaged. Mr Bartlett suggested also that the judge did not, in any event, make such a finding. I reject that submission. The judge said in his judgment that it was a "*reasonable inference that, if this [cyclical crown reduction from 1998] had happened, the poplars would have received the type of treatment in 1998 that they received in 2006*".

57. I would, therefore, reject Ground 3 also.

Ground 4: The judge should not have reversed the burden of proof, in accordance with Phethean

58. This ground only relates to the 2003 damage, because the judge held that whether or not that damage would have occurred depended in fact upon whether the Council adopted a 3-year or 4-year pruning programme. If a 3-year programme were adopted, the pruning would have been in 1998 and 2001, which would not have been sufficiently close to 2003 to avoid that damage (bearing in mind the Hortlink conclusion that even heavy pruning only had beneficial effects for a maximum of 2 years).

59. This ground of appeal does not really arise for two reasons: first, the judge held in paragraph 162 that the Council would in fact probably have adopted a 4-yearly pruning cycle, based on its 30th March 2006 note. Secondly, the breach of duty was,

as I have held, the failure to put in place any programme of cyclical pruning from 1998, not the failure to put in place a specific programme. Accordingly, the consequences of whether the Council might hypothetically have chosen 3 or 4-yearly cycles, or indeed brought forward or postponed one year's work due to other exigencies, were irrelevant.

60. In these circumstances, I prefer to leave the question of the appropriate approach to the burden of proof in this situation to another occasion upon which the matter affects the outcome of the case. The judge was, in my judgment, entitled to find that the breach of duty he held to have occurred caused the 2003 damage.

Ground 5: The judge was wrong to hold that the 2003 damage would have been avoided by a 3 or 4 yearly 25% reduction started in 1998.

61. The Council argued that only a minority of the non-negligent options would have prevented the 2003 damage, so the judge was wrong to conclude that causation was established. For the reasons I have given under Grounds 1, 2 and 4 above, I think the judge was entitled to find that the breach of duty established had caused the 2003 damage.

Respondents' Notice Point 1: The judge could and should have found that T2 was heavily pruned in 1998 and in 2011 in support of his finding that the works the Council should have done would have effected a very severe reduction after 1998.

62. I have already dealt with the substance of this point under Ground 3 above. I have no doubt that the judge was justified in making the inference that the poplars would in fact have been heavily pruned beyond 25% or 30%, had a cyclical pruning programme been put in place.

Conclusion

63. For the reasons I have sought to explain, the judge reached the correct conclusions as to causation. In my judgment, therefore, his decision should be upheld and the appeal dismissed.

Lord Justice Aikens:

64. I agree with the judgment of Vos LJ. I have also had the opportunity to read Moore-Bick LJ's judgment in draft and I agree with it also.

Lord Justice Moore-Bick:

65. The circumstances giving rise to this appeal, together with a summary of the judge's findings, are set out fully in the judgment of Vos L.J., whose account I gratefully adopt.

66. The Council's appeal rested on two principal submissions. The first was that the judge was wrong to ask himself what the Council *would* have done if it had taken steps to prevent damage to Mrs. Robbins' house by the encroachment of tree roots. Rather, it is said, he should have asked himself what it *should* have done, a question that was to be answered by reference to the content of its duty towards Mrs. Robbins and other householders in Radnor Avenue. Since the accepted practice, at least until the summer

of 2005, was to reduce the size of the crown by not more than 30% (significantly less than 70% of total volume) every three or four years, the Council submitted that it could not reasonably have been expected to do more than that. It follows that its duty extended no farther than to take measures which, as it turned out, would not have prevented the damage that was caused to Mrs. Robbins' house in 2003 or 2006. It would be contrary to principle and unfair, so it was said, to hold the Council liable for doing nothing if it could not have been held liable had it taken such steps as were reasonable at the time. The second submission was that, even if the judge was right to ask himself what the Council *would* have done, he was wrong to find that any crown reduction carried out between 1998 and 2006 would have been as extensive as that carried out in 2006 and thus sufficient to prevent damage.

67. The first of these submissions is undoubtedly attractive because it is difficult at first sight to understand why the Council should incur liability as a result of failing to take action when it would not have done so if it had taken steps that were reasonable by the standards of the time, albeit ineffective. However, I am not persuaded that the argument is sound. It is not right to say that the Council's duty was to implement a programme of cyclical crown reduction. Its duty was to take reasonable steps to prevent the trees from causing damage to Mrs. Robbins' house and it was not suggested that this was a case in which the risk of damage was so remote and the costs of preventative action so great that no action was required on the part of the Council. The implementation of a programme of crown reduction consistent with current best practice was one, perhaps the only, way of performing the Council's duty (certainly no other was suggested), but the duty itself cannot properly be defined in those terms: see *Clerk & Lindsell on Torts*, 20th ed. paragraph 8-137. Once one accepts that the Council's duty cannot be defined in terms of a particular crown reduction programme (in this case 25% of branch length every 3-4 years), it becomes necessary to ask what would have happened if a programme of crown reduction had been implemented. That is a question of fact.

68. There was a good deal of discussion in the course of the argument of the decisions in *Bolitho v. City and Hackney Health Authority* [1998] A.C. 232 and *Beary v. Pall Mall Investments* [2005] EWCA Civ. 415. In my view these cases demonstrate that where the breach of duty consists of a failure to act (as is the case here), it will often be necessary to consider what would have happened if the defendant had in fact fulfilled his duty to the claimant. *Bolitho* also explains why the Council's "windfall" argument cannot be accepted.

69. *Bolitho* was a case in which the fulfilment of the immediate requirements of a doctor's duty of care to her patient would have presented her with a choice between two courses of action, in respect of which she continued to owe the patient a duty of care. The case is authority for the proposition that a defendant who has failed to fulfil his duty of care cannot escape liability by showing that he would in any event have failed to discharge his duty at a later stage. It is also authority for the proposition that, if the defendant faced with a choice of that kind would have acted in a way which was more favourable to the claimant than the fulfilment of his duty strictly required, the patient is entitled to the benefit of that. Although that can be characterised as giving the claimant a "windfall", it does no more than reflect the actual consequences to the claimant of the breach of duty on which he sues. *Beary* was a case in which the court held that on facts of that case fulfilment of the defendant's duty to advise that an

annuity was available would not have given rise to a need for further action on his part because the client would not have pursued the matter. Accordingly it was irrelevant, and therefore unnecessary, to ask what would have happened if the advice had been given. The question considered in ***Bolitho*** did not arise.

70. In the present case the Council's failure to take any action in discharge of its duty to Mrs. Robbins makes it necessary for the court to determine what would have happened if it had done so. The judge was entitled to find that the only steps it could reasonably have taken were to implement a programme of cyclical crown reduction; the next question is what, as a matter of fact, would have happened if it had done so.

71. Mr. Bartlett submitted that the judge had not in fact made any finding about the extent to which the crown of T2 had been reduced in 1998, basing himself on the judge's comment in paragraph 157 of the judgment that "it may well be" that it had been reduced in 1998 to the same extent as it had in 2006, but in my view there is nothing in that point. The question the judge was addressing at that point was what would have happened if the Council had implemented a programme of crown reduction. The evidence tended to show that T2 had been "very heavily topped" in the past (an expression which is suggestive of a far more severe pruning than a mere 25% reduction of the crown) and by 2005 had substantial new growth at least five years old. In 2006 the reduction was also very severe, extending to the whole of the dynamic canopy, despite the fact that the work instruction called for reduction and re-shaping of the crown by 25%. Whether the reduction in 1998 had been quite as severe as that carried out in 2006 was not the point. There was nothing in the evidence to explain what had led the contractors in 2006 to exceed (apparently) their instructions to such a significant extent and Mr. Bartlett was therefore able to submit that the judge was not entitled to infer that they would have acted in the same way whenever work of that kind had been carried out. Taken overall, however, the evidence of what had been done in 1998 and 2006 was in my view sufficient to support the judge's finding that a reduction in 2004 (when the work was first ordered) would have been of similar severity to that eventually carried out in 2006 and (implicitly) that if any earlier reductions had been carried out (as he held they should have been) they would have been similarly severe.

72. Until the publication of the Hortlink study it was accepted practice to carry out crown reduction at intervals of approximately 3 to 4 years. The judge found that the Council would probably have adopted a 4-year cycle. It follows from his earlier findings that if it had put in place a proper programme of crown reduction the trees would have been severely reduced in 2002 and 2006. On the evidence of the Hortlink study that would have prevented or reduced the damage to Mrs. Robbins' property in 2003. Whether it would have prevented or reduced the damage suffered in 2006 depends on whether the work was carried out early in the year or in the autumn. The instruction issued in 2005 called for the work to be done by 30th April 2006 and the judge found that the Council had been negligent in failing to ensure that it had been completed before the summer of 2006. In my view he was entitled to make that finding and to find that if the work had been carried out earlier it would have prevented the damage that occurred in 2006.

73. In these circumstances I agree with Vos L.J. that the fourth ground of appeal based on the decision of this court in *Phethean-Hubble v. Coles* [2012] EWCA Civ 349 does not arise and like him I prefer to express no opinion on it.

74. Finally, Mr. Bartlett submitted that there were a variety of courses that could have been adopted by the Council in taking reasonable measures to prevent the trees causing damage to properties in the vicinity and that the judge was not entitled to hold it liable on the basis that it had failed to implement a particular programme of crown reduction that would in fact have been effective to prevent damage to Mrs. Robbins' house.

75. In substance this ground of appeal raises the same point as that raised by the primary grounds of appeal, which I have already rejected. As soon as the Council became aware that the trees might cause damage to properties in Radnor Road it came under a duty to the owners to take reasonable steps to prevent them doing so. The judge was satisfied that it had taken action in the form of crown reduction of T2 in 1998, but had thereafter done nothing until the autumn of 2006. The question he had to decide was what would have happened if the Council had proceeded with a proper crown reduction programme and that involved deciding with what frequency and to what extent the exercise would in fact have been repeated. On the evidence before him the judge was entitled to find that the Council would have adopted a four-year cycle and that if the work had been carried out in early 2002 and early 2006 the damage caused in the summer of 2003 and 2006 would not have occurred. As far as the damage that occurred in 2006 is concerned, however, it is worth bearing in mind that the judge held that whatever the Council might otherwise have done or not done, it had been negligent in failing to ensure that the works order issued in 2005 for the crown reduction of the poplars in Danson Park (including T2) by the end of April 2006 was carried out. If it had been, the roots of T2 would not have caused damage to Mrs. Robbins' house during the summer of 2006.

76. For these reasons, as well as those given by Vos L.J., I agree that the appeal should be dismissed.

77.