Perrin and another v. Northampton Borough Council and others 2007

Royal Courts of Justice, 19th December 2007.
This case is an appeal against an earlier judgement

In the supreme court of judicature court of appeal (civil division) on appeal from the high court of justice technology & construction court
(his honour judge peter coulson qc)

B e f o r e :
LORD JUSTICE WALL
MR JUSTICE BLACKBURNE and SIR JOHN CHADWICK

Between:
PERRIN and another Claimants/ Respondents
- and -
NORTHAMPTON BOROUGH COUNCIL Defendant/Appellant
and others Defendants

Mr James Findlay and Mr Ryan Kohli (instructed by Sharpe Pritchard, Elizabeth House, Fulwood Place, London WC1V 6HG) for the Appellant
Mr Graham Eklund QC and Mr Robin Green (instructed by Gaston Whybrew, 886 The Crescent, Colchester Business Park, Colchester, Essex CO4 9YQ) for the Respondents
Hearing date: 19 July 2007

Sir John Chadwick:

This is an appeal from an order made on 26 September 2006 by His Honour Judge Peter Coulson QC, sitting in the Technology and Construction Court, on the hearing of a preliminary issue in proceedings brought by Ms Alison Perrin and Mr William Ramage. The defendants to those proceedings are the appellant, Northampton Borough Council, and the claimants' neighbours, Mr Frederick Shephard and his wife, Mrs Sandra Shephard. Mr and Mrs Shephard took no part in the hearing of the preliminary issue and they are not parties to this appeal.

The claimants are the owners and occupiers of property at Great Billing, Northamptonshire, known as 19 Elwes Way. Mr and Mrs Shephard own adjoining property, known as 35 Church Walk. Within the curtilage of 35 Church Walk there are two mature oak trees. Those trees are the subject of a tree preservation order made by Northamptonshire County Council on 6 June 1974.

The purpose of a tree preservation order (as the statutory term suggests) is to protect the tree or trees in respect of which it is made from operations which might be expected to cause damage or

destruction: in particular, to protect the tree from cutting down, uprooting, topping or lopping without the consent of the local planning authority. But the protection is not absolute: the provisions now enacted as section 198(6)(b) of the Town and Country Planning Act 1990 have the effect that no tree preservation order shall apply to the cutting down, uprooting, topping or lopping of any trees ". . . so far as may be necessary for the prevention or abatement of a nuisance."

For the purposes of the preliminary issue before the judge (but not otherwise) it was to be assumed: (a) that one of the two oak trees to which I have just referred was causing a nuisance by root encroachment into 19 Elwes Way; (b) that the nuisance could be abated or prevented by the cutting down, uprooting, topping or lopping of the tree; and (c) that the nuisance could also be abated or prevented by works other than the cutting down, uprooting, topping or lopping of the tree. Examples of such other works were the underpinning of the dwelling house on 19 Elwes Way or the erection of a concrete root barrier. On the basis of those assumed facts the preliminary issue to be determined was whether, for the purposes of section 198(6)(b) of the 1990 Act, in determining whether cutting down, uprooting, topping or lopping of a tree may be necessary for the prevention or abatement of a nuisance, it is irrelevant that there are other possible works that could prevent or abate the same nuisance.

At paragraph [78] of his judgment, [2006] EWHC 2331 (TCC), the judge concluded that "the possibility that other engineering works could be carried out is irrelevant to the proper operation of s.198(6)(b)". He went on to say this:

"[78] . . . Whilst it would, I think, be wrong for me to express the view that, in every conceivable case that might arise under s.198(6)(b), the existence of possible engineering works will always be irrelevant, for the reasons which I have set out above, I consider that, in the vast majority of cases, the fact that alternative engineering schemes are available would indeed be irrelevant to the proper operation of the exemption. "
To the extent that that observation was intended to qualify his conclusion in the present case, it was not reflected in the order which the judge made. The answer to the preliminary issue, as it appears in the order of 26 September 2006, is an unqualified affirmative.

The effect of the judge's order, in cases where the facts are such as those assumed in the present case - that is to say, in cases where nuisance by root encroachment could be abated or prevented either by something done to the tree itself which (but for the exemption contained in section 198(6)(b) of the 1990 Act) would contravene the tree preservation order or by some other works not involving the cutting down, uprooting, topping or lopping of the tree – is that, for the purposes of the exemption, it can always be said to be "necessary" to do something to the tree itself: no matter how major that something might be nor how minor the other works. At the least, if the judge were correct, it can be said, in "the vast majority" of such cases, that it is "necessary" to do something to the tree itself; notwithstanding that the nuisance could be abated or prevented by other works. The result must be that, in such cases, a tree preservation order provides only the limited protection to which the judge referred at paragraphs [71] and [77] of his judgment: "the cutting down, uprooting,

topping or lopping of the tree must be the minimum necessary to abate or prevent the nuisance."

That, if I may say so, is a surprising conclusion. If it is appropriate (as the judge accepted) to ask what is the minimum that needs to be done to the tree itself in order to abate or prevent the nuisance, why should it be irrelevant to ask whether (having regard to other possible means of abating or preventing the nuisance) anything needs to be done to the tree itself? Common sense suggests that the task in such cases should be to identify and evaluate the various possible means of abating or preventing the nuisance – whether by doing something to the tree itself or by other works – and then to ask, in the light of that evaluation, whether it is, indeed, necessary to do something to the tree, and (if so) what.

Permission to appeal to this Court was granted by Lord Justice Rix on 17 November 2006. He was told that the appeal raised a very important issue for local planning authorities and others anxious to protect valued trees. It was said that the conclusion which the judge reached was contrary to the practice and long held understanding of many local planning authorities.
The legislation

The tree preservation order in the present case was made under section 60 of the Town and Country Planning Act 1971. That section, so far as material, was in these terms:
"60(1) If it appears to a local planning authority that it is expedient in the interests of amenity to make provision for the preservation of trees or woodlands in their area, they may for that purpose make an order (in this Act referred to as a 'tree preservation order') with respect to such trees, groups of trees, or woodlands as may be specified in the order; and, in particular, provision may be made in any such order –
(a) for prohibiting (subject to any exemptions for which provision may be made by the order) the cutting down, topping, lopping or wilful destruction of trees except with the consent of the local planning authority, and for enabling that authority to give their consent subject to conditions; . . . "
Legislation in those terms had been introduced in the Town and Country Planning Act 1947 (as section 28(1)(a)); and re-enacted in the Town and Country Planning Act 1962. The provisions are now contained in sub-sections (1), (2) and (3)(a) of section 198 of the Town and Country Planning Act 1990. It is an offence to act in contravention of a tree preservation order: section 210 of the 1990 Act.

Section 198(6) of the 1990 Act is in these terms:
"198(6) Without prejudice to any other exemption for which provisions may be made by a tree preservation order, no such order shall apply –
(a) to the cutting down, uprooting, topping or lopping of trees which are dying or dead or have become dangerous, or
(b) to the cutting down, uprooting, topping or lopping of any trees in compliance with any obligations imposed by or under an Act of Parliament or so far as may be necessary for the prevention or abatement of a nuisance."

An exemption in those, or substantially similar terms, had been included in the 1947 Act and each of the two subsequent Acts.

Section 174 of the 1971 Act – now re-enacted as section 203 of the 1990 Act – provided that the matters for which provisions might, under section 60 of the 1971 Act, be made by a tree preservation order included the payment by the local planning authority, subject to such exceptions and conditions as may be specified in the order, of compensation in respect of loss or damage caused or incurred in consequence of the refusal of any consent required under the order, or of the grant of any such consent subject to conditions.

The 1974 tree preservation order

As I have said, the tree preservation order in the present case was made on 6 June 1974 by Northamptonshire County Council. The order (No 147 of 1974) was confirmed by the Secretary of State on 21 February 1975. It was taken over by Northampton Borough Council ("the Council") when that authority became the local planning authority.

The 1974 order was made in the form (or substantially in the form) prescribed by regulation 4 of the Town and Country Planning (Tree Preservation Order) Regulations 1969 (SI 1969/17). In particular, article 2 of the 1974 order provided that, subject to the provisions of the order and to the exemptions specified in the second schedule (which are not material in the present case), no person shall, except with the consent of the authority and in accordance with the conditions, if any, imposed on such consent, cut down, top, lop or wilfully destroy or cause or permit the cutting down, topping, lopping or wilful destruction of any tree, or comprised in any group of trees, specified in the first schedule; and article 5 of the order provided that, where the authority refused a consent under article 2, they might certify that the tree or trees (in respect of which consent was refused) had an outstanding or special amenity value. The importance of that latter provision lay in the proviso to article 9. That article – reflecting section 174 of the 1971 Act – provided that a person who had suffered loss or damage in consequence of a refusal of consent should be entitled to compensation from the authority: but that entitlement was subject to the proviso that no compensation should be payable in respect of loss or damage suffered by reason of a refusal of consent in the case of any trees which were the subject of a certificate in accordance with article 5.

The application for consent

The order of 29 June 2006 (directing the trial of a preliminary issue on assumed facts) had required the parties to agree a joint statement of agreed facts (in addition to the assumed facts). In the light of that agreed statement I should add to the facts that I have already set out: (i) that, on 26 April 2004, the insurance agent acting for the claimants' insurers sought consent from the Council to fell the oak tree whose roots were said to be the cause of the nuisance; (ii) that consent was refused by notice dated 21 June 2004; (iii) that, on the same day (21 June 2004), the Council certified, under article 5 of the 1974 order, that the tree had outstanding amenity value; and (iv) that an appeal to the Secretary of State from the Council's refusal of consent was dismissed by letter dated 24 January 2005.

When refusing consent to fell the oak tree the Council gave as their reasons:
"1. The tree proposed for removal is a tall, broad-spreading and healthy specimen and should have a long potential safe useful life expectancy. Together with an adjacent oak tree of similar age, it forms Group G4 of the tree preservation order. The group stands in the garden of a house overlooking the open valley that defines the western edge of the old core of the village of Great Billing. The group forms a handsome and prominent feature in views along and over the valley, part of which is a public park, and is also an amenity to the village and its conservation area (within which the trees stand), particularly in views from the direction of the Parish Church of St Andrew. Consequently the removal of the tree would have a significantly detrimental impact on the amenity of a wide area and its enjoyment by the public.
2. The removal of the tree is not justified by the evidence which has been submitted in support of the application in that it has not been demonstrated beyond reasonable doubt that the damage evident at 19 Elwes Way is the result of settlement caused by the tree proposed for removal. Absent evidence includes:
(i) Live roots uncovered beneath the foundations of the house in the vicinity of structural damage and that can be unequivocally identified as originating from the tree proposed for removal;
(ii) Monitoring data relating to the structural damage extending over a period of not less than 18 months to establish whether the damage is of a progressive or cyclical nature;
(iii) Data to demonstrate that the oak tree contributed to, or caused the recent on set of the damage rather than other local phenomena, e.g. normal seasonal fluctuations in soil volume acting on shallow foundations, leaking drains, newly established vegetation.
3. Since the evidence submitted in support of the application does not demons trate beyond reasonable doubt that the structural damage is the result of the root activity of the oak tree, the amenity considerations are considered to outweigh the reasons for the tree's removal."
It must be kept in mind, first, that – in making the application for consent – the applicant must be taken to have accepted that it was not necessary to fell the tree in order to prevent or abate the nuisance. If it were necessary to fell the tree for the prevention or abatement of the nuisance the 1974 order would have no application: section 198(6)(b). There would be no need to seek consent under article 2 of the order. Second, that the application was for consent to fell the tree: there was no application (so far as appears from the statement of agreed facts or from the refusal notice) for consent to carry out works of topping or lopping: in particular, there was no application for consent to cut the encroaching roots. Third, that the factors which the local planning authority may take into account in deciding whether to grant or refuse consent under a tree preservation order are not the same as the factors which would lead to a decision that it was, or was not, necessary for the prevention or abatement of a nuisance to cut down, uproot, top or lop a tree in re spect of which a tree preservation order had been made. Indeed, as I have pointed out, it is only in cases where it is not necessary to carry out the proposed operations to the tree in order to prevent or abate the nuisance that the question whether to grant or refuse consent to those operations can arise.

In those circumstances it is not at all surprising that the Council did not address either (i) the question whether (if the structural damage to 19 Elwes Way was, indeed, caused by encroachment by roots of the oak tree proposed for removal) there were works (other than operations to the tree itself) which would abate or prevent the nuisance or (ii) the question whether there were operations to the tree itself, short of felling, which would abate or prevent the nuisance. The Council's decision

turned on the question whether the evidence to support the conclusion that the tree was the cause of the damage was sufficiently cogent (to the standard of "beyond reasonable doubt") to justify the removal of a tree of outstanding amenity value.

The certificate of outstanding amenity value, also issued on 21 June 2004, rehearsed much of the first reason in the refusal notice. In addition the Council expressed the view that the tree proposed for removal was the more significant component of the group of two trees comprising Group G4 of the 1974 order. It was said that: "The two trees appear to have grown up in a longstanding synergistic relationship with regard to amenity and wind resistance. Removal of the first tree would expose the second tree, a specimen that appears to be of less vigour, to clearer sight and potential wind damage for which it would be likely to prove inadequately developed". The Council went on to point out that the effect of the certificate was to remove their liability to pay compensation for any loss or damage suffered as a result of their decision to refuse consent to felling.

The insurers' agents appealed to the Secretary of State against both the refusal of consent and the certificate. In determining those appeals the First Secretary of State relied on, and appended to his decision letter of 24 January 2005, the report of his inspecting officer (Mr D H Thorman BSc FArborA) made following a site visit on 3 December 2004. The First Secretary of State accepted the inspecting officer's conclusions that the oak tree "has a significant amenity value because of its prominence in the landscape, age, size, historical associations and conservation value as an old Oak tree with a long life expectancy to come". He accepted that the tree merited outstanding status. The decision letter continued:

"Whilst the Secretary of State accepts that the criteria for suspecting tree related subsidence damage to 19 Elwes Way are satisfied and there are indications that the appeal Oak is implicated, the evidence is not sufficient to justify felling a tree of such high amenity value, particularly as there is an alternative engineering solution to the removal of the appeal Oak."
The reference, in that passage of the decision letter, to the existence of "an alternative engineering solution" was prompted, no doubt, by paragraph 17 of the inspecting officer's report. It is, I think, helpful to set that paragraph in context:

"15. The appellant's claim that on the 'balance of probabilities' the appeal oak is the probable cause of foundation movement, is reasonable. However, that approach to tree management may apply where the suspect tree is of no particular value, either to the owner or to the community. In this case, the tree has a very high value in landscape amenity, conservation and historical terms, as outlined above. The tree therefore merits more than a 'balance of probabilities' assessment, so a more thorough investigation that includes level monitoring over a suitable period would be most appropriate.
16. Notwithstanding the above, there are alternatives to managing either the tree or the building. The tree is at nearly 14m distant from the house at 19 Elwes Way, so it would be reasonable to conclude that its root spread beneath the foundations is at the outer periphery. In such a case, and if

the movements are only seasonal, it is possible to reduce the effects on the building by pruning the tree sufficiently to reduce water uptake significantly. There are disadvantages of this approach, one of which is that trees normally respond to heavy pruning by vigorous re-growth, and pruning is then required to be repeated. However, the appeal oak is of considerable age, and it would likely take some time to restore what would be lost in terms of leaf area. The other disadvantage of pruning is the alteration of crown size and shape that would decrease its visual impact in the landscape.
17. The other alternative is an engineering solution, i.e. underpinning. This may be costly, but in this case, the cost would not compare with the value of the appeal tree. Even if it were to proved conclusively that the oak tree is implicated in damage to the building, the preferred solution in this case would be to stabilize the building on adequate foundations, rather than lose the tree, or even to lose part of the crown by pruning. The value of this tree in terms of its position in the landscape, to conservation and local history is immeasurable, so an alternative remedy to felling is paramount."
The First Secretary of State dismissed both the appeal against the refusal of consent to fell and the appeal form the article 5 certificate. There was no appeal from his decision. The claimants chose, instead, to commence these proceedings.

These proceedings

These proceedings were commenced by the issue of a claim form on 31 January 2006. The defendants to that claim, as issued, were the Council and Mr Shephard: Mrs Shephard was added as a defendant, by amendment, on 19 May 2006. The claimants sought a declaration that "for the purposes of section 198(6) Town & Country Planning Act 1990 (i) the tree [on the Shephards' property] is causing subsidence by root encroachment into the Claimants' land and (ii) it is necessary to cut down the tree to prevent and/or abate that nuisance". They sought (in the event that Mr and Mrs Shephard refused to allow the tree to be cut down) damages for nuisance and an injunction. Paragraph 7 of the particulars of claim contained the assertion that "as a matter of law, in determining whether cutting down the tree is necessary for the purposes of [section 198(6) of the 1990 Act], the possibility that other works (such as underpinning) might be carried out is irrelevant". It is likely, as it seems to me, that that assertion, with its reference to the possibility of underpinning, was included in an attempt to meet the suggestion, in the First Secretary of State's decision letter of 24 January 2005, that an alternative engineering solution to the perceived nuisance could be found.

Although Mr and Mrs Shephard were joined as defendants to the proceedings, the judge noted that the real dispute was not between the claimants and their neighbours. In a schedule of reasons attached to a (provisional) pre-emptive costs order which he made on 20 December 2006, Lord Justice Rix recorded that (as he must have been told) the claimants and Mr and Mrs Shephard share common insurers. The real dispute was between those insurers and the Council. That reality is reflected in a consent order, made at or about the same time as the order of 26 June 2006 by which the court directed the preliminary issue, staying proceedings between the claimants and Mr and Mrs Shephard on terms. Those terms provided: (i) that Mr and Mrs Shephard would arrange for the removal of the oak tree as soon as they were permitted by the Council to do so; (ii) that the cost of those works of removal would be borne by the claimants' insurers; (iii) that no claims for damages existing as at the date of the consent order would be pursued against Mr and Mrs Shephard; but (iv)

that the claimants were not prevented from bringing a fresh claim for damages against Mr or Mrs Shephard in respect of damage arising thereafter "which either the Second or Third Defendant could lawfully have avoided by felling or carrying out other works to the said Tree".

The Council served a defence on or about 17 July 2006. It was admitted that the claimants' property at 19 Elwes Way had suffered damage; but it was not admitted that that damage was caused by the oak tree. Paragraphs 5 and 6 of the defence contained averments (i) that it was not necessary to cut down the tree in order to prevent or abate a nuisance (if any) from encroaching roots and (ii) that "other methods would be capable of achieving the prevention or abatement of such nuisance that may exist, which methods include installation of a root barrier and/or pruning and/or cutting localised roots and/or underpinning". Paragraph 7 of the defence put in issue the claimants' contention that, in determining whether cutting down the tree is necessary for the purposes of section 198(6) of the 1990 Act, the possibility that other works (such as underpinning) might be carried out was irrelevant.

The judge's reasons

The preliminary issue came before the judge on 7 September 2006. In his judgement, delivered on 26 September 2006, [2006] EWHC 2331 (TCC), he noted, at paragraph [4] that it was common for local authorities to refuse permission to lop or fell trees protected by tree preservation orders on the grounds that other works could be carried out instead. He posed the question: "Is such an approach a legitimate interpretation of s. 198(6)(b) of the 1990 Act?". He went on to say this:

"[5] It is also instructive to stand back from these particular provisions of the 1990 Act and to note the effect on the claimants of the first defendant's stance in this case. At common law, a house owner whose property is damaged by the encroachment of roots belonging to a neighbour's tree has a claim against that neighbour in nuisance. As we shall see, in certain circumstances, that would render the neighbour liable for the costs of underpinning the property damaged by the tree roots. In the present case, the first defendant is contending that the costs of any such underpinning work that may be necessary should be borne by the claimants themselves, the owners of the property that has been damaged. Thus it is the effect of the first defendant's position in this case that, because this tree is the subject of a particular type of TPO, the claimants' ordinary rights at common law are effectively extinguished, and they can make no claim for the costs of any necessary underpinning works. Again it is necessary for me to determine whether that is a legitimate interpretation of the 1990 Act."

The judge returned to that theme at paragraph [79] of his judgment. He observed that the conclusion which he had reached at paragraph [78] (to which I have already referred) provided a solution which was not only workable but fair. He went on:

"[79] . . . There is not, and should not be, any significant difference between the position of a householder whose property is undermined and damaged by tree root encroachment from a tree that is not the subject of a TPO, and a householder whose property is undermined and damaged by

roots from a tree that is protected by a TPO. The whole point of s.198(6)(b) is that, where there is actionable nuisance, the TPO will not apply to whatever cutting down, uprooting, topping or lopping of the tree is necessary to abate or prevent that nuisance. One of the difficulties for the first defendant in the present case is that it was the inevitable consequence of their construction of s.198(6)(b) that, despite the existence of actionable nuisance, the claimants here would have had to pay for the costs of underpinning the foundations of their house. This was, on the first defendant's case, the direct result of the TPO and the certificate. That seemed to me not only unfair but, much more importantly, unsupported by any provision of the 1990 Act, and, for the reasons which I have given, contrary to s.198(6)(b)."
Those passages, as it seems to me, mis-state the Council's stance in the present dispute.

There is nothing in the material which I have seen to suggest that the Council has taken any stance on the question who (as between the claimants and Mr and Mrs Shephard) should bear the cost of any works - whether those be operations to the tree itself (pruning or cutting localised roots) or other works (the installation of a root barrier or underpinning) – which may be done to prevent or abate the nuisance (if any). The Council's stance, as it appears from the material before this Court, is: (i) that it is not necessary to fell the tree in order to prevent or abate a nuisance; (ii) that, because it is not necessary to fell the tree for that purpose, it would contravene the 1974 order if the tree were felled without the Council's consent; (iii) that consent to felling has been refused, for the reasons given in the refusal notice of 21 June 2004; and (iv) that, having regard to the article 5 certificate issued on 21 June 2004, there can be no claim against the Council for compensation in respect of the refusal of consent to fell. It is clear, as it seems to me, that the Council has not taken a stance (on the pleadings in these proceedings) on the question whether it is necessary, in order to abate or prevent the nuisance, to carry out operations to the tree itself (pruning or cutting localised roots) which stop short of felling or removing the tree; and that the Council has not indicated whether (if such lesser operations to the tree itself are not necessary, in the context of section 198(6)(b) of the 1990 Act) consent to those operations would be granted or refused on an application under article 2 of the 1974 order. So far as I am aware, no such application has been made.

The judge set out his conclusions at paragraphs [72] to [77] of his judgment. In summary, he held:

(1) The principal purpose of section 198 of the 1990 Act was to preserve trees through the mechanism of tree preservation orders: the exemptions in section 198(6) must be carefully construed so as to ensure that the principal purpose of the legislation was not frustrated.

(2) The determination of the question as to whether the lopping or felling of the tree is necessary to abate or prevent a nuisance was a question of fact. That question was to be determined on " the everyday sensible approach of a prudent citizen looking at the tree in question and deciding in his own mind whether he can properly say [that lopping or felling is necessary to abate or prevent a nuisance]". He took that test from the judgment of Mr Justice Farquharson in Smith v Oliver [1989] 2 PLR 1, 3E-F.

(3) In order to trigger the exemption under section 198(6)(b), the nuisance in question must be

actionable in law. There must be actual or imminent damage, not just the "pure encroachment" of roots or branches into or over the adjoining land.

(4) The word "necessary" in section 198(6)(b) provided a simple link between the cutting down, uprooting, topping or lopping of the tree and the prevention or abatement of the nuisance. It governed the extent of the operations that were to be carried out to the tree, and nothing more.

(5) The cutting down, uprooting, topping or lopping of the tree must be the minimum necessary to abate or prevent the nuisance. If the actionable nuisance could be abated or pre vented by, say, lopping, then the uprooting of the tree would not be covered by the section 198(6)(b) exemption and would be an offence under section 210 of the 1990 Act.
On the basis of those conclusions – and, in particular, the conclusion that the word "necessary" governed the extent of the work to the tree and nothing more – the judge rejected the submission that, in order to determine whether work to the tree ("lopping, felling or the like") was necessary under section 198(6)(b), it was appropriate to consider alternative engineering solutions or the other factors advanced by the Council (which the judge had set out at paragraph [51] of his judgment). He rejected, also, the submission that the mere fact that alternative engineering solutions might be available to abate or prevent the nuisance is or can be relevant to the proper operation of the section.

There is no challenge on this appeal to the conclusions which I have summarised as (1), (2), (3) and (5). Although, for my part, I have some doubt whether it is possible to draw a distinction, for the purposes of section 198(6)(b) of the 1990 Act, between what the judge described as "actionable nuisance" and "pure encroachment" of roots – conclusion (3) - it is unnecessary to resolve that doubt in the present case. In reaching that conclusion the judge preferred the submissions advanced on behalf of the Council to those of the claimants; notwithstanding support for the latter by Mr Mynors in his monograph The Law of Trees, Forests and Hedgerows (2002). The claimants do not seek to reopen the point in their respondents' notice. The appeal turns on whether the judge was correct in his conclusion – conclusion (4) – that the word "necessary", in the context of section 198(6)(b) of the 1990 Act, governs the extent of the work to the tree and no more.

The judge reached that conclusion for the reasons which he set out at paragraphs [53] to [58] of his judgment. At paragraph [53] he said this:

"[53] The first and obvious point to make is that the word 'necessary' in s.198(6)(b) provides a simple link between a range of possible works to the tree itself and the prevention or abatement of a nuisance: if any of those lopping/felling works to the tree are necessary to prevent or abate an actionable nuisance, then such works are permissible because 'no TPO shall apply'. The section does not say that cutting down or lopping must be 'reasonably necessary in all the circumstances' or that lopping or felling must be necessary 'having regard to the nature of the tree, the other available methods of preventing or abating the nuisance, the financial implications of the works, the financial standing of those involved, the nature of the amenity and the degree of the nuisance'. In other

words, as a simple matter of construction, the section is concerned only with allowing such cutting down or lopping works as may be necessary to prevent or abate an actionable nuisance. Accordingly, I accept Mr Green's principal submission that 'necessary' here refers to the extent of the cutting down, uprooting, topping or lopping required to abate or prevent the nuisance, and nothing more."
It was for that reason, as the judge observed at paragraph [54], that the various factors set out in a list advanced on behalf of the Council – to which I have already referred and which the judge had summarised at paragraph [51] of his judgment - were not factors which arose for consideration in determining whether it was necessary to carry out any operations on the tree itself. He went on to say this:

"[54] . . . As the Court of Appeal made plain in [Pabari v Secretary of State for Work and Pensions and another [2004] EWCA Civ 1480; [2005] 1 All ER 287], the Court must not qualify the word 'necessary' by reference to what might be regarded as reasonable. The word 'necessary' instead requires a high degree of exigency. The link in s.198(6)(b) is between the nuisance and the works to the tree itself. I can therefore find no reason why, as a matter of construction, the matters listed by Mr Findlay can be relevant. In many ways, the lengthy list of matters which Mr Findlay relied on is akin to the minute scrutiny of all the mortgage options and continuing remortgage options which, in Pabari, the Court of Appeal expressly ruled was not encompassed by the word 'necessarily'. The same point can be made in answer to Mr Findlay's argument that, under certain provisions of the Trades Descriptions Act 1968 and the Health and Safety at Work Act 1974 to which he referred, the court is obliged to consider a whole range of matters when looking at what is practicable or diligent. But each of the provisions that he relied on from these statutes was expressly qualified in a way that made such an approach entirely understandable: 'reasonable precautions', 'all due diligence', 'reasonably practicable', and so on. There is no such qualification here. Those other statutory provisions, therefore, did not assist the first defendant; their qualified language only served to confirm my view that a consideration of a wide range of other factors is not appropriate under s.198(6)(b), which contains no such qualifications."
It was for that reason, also, that the judge rejected the submission – which he described as being at the core of the Council's submissions - that alternative engineering schemes, "such as the underpinning of the house affected by the tree roots, or the installation of a concrete root barrier below the ground", must be considered before it could be concluded that any works to the tree itself were necessary. He said this:

"[55] . . . But it seems to me that that argument ignores the fact that s.198(6)(b) only identifies works to the tree: it makes no reference to the possibility of any other works, that do not involve the tree, that might prevent or abate the nuisance. It is a rule of statutory construction that where a statutory proposition might have covered a number of matters, but in fact mentions only some of them then, unless those mentioned are merely examples, the rest are to be taken as having been excluded from the proposition: see Bennion's Statutory Interpretation (Butterworth's, 2002) Part XXVIII, Section 390, page 1072. Cutting down, uprooting, topping or lopping of trees are all referred to in s.198(6)(b); no mention is made of engineering works in the ground or to the foundations of building affected. It is therefore reasonable to conclude that they have been excluded from the working of the section."

The judge found confirmation for his view that works other than operations to the tree itself were excluded from consideration under section 198(6)(b) of the 1990 Act in "a consideration of what s.198(6)(b) is intended to achieve". He identified the statutory purpose at paragraph [56] of his judgment:

"[56] . . . It is allowing a person to carry out works to the tree itself which, if the exemption at 198(6)(b) did not apply, would be a criminal offence pursuant to s.210. It is permitting the uprooting or lopping of an otherwise protected tree; it is making something lawful that would otherwise be unlawful. Compare that with the underpinning of the foundations or the installation of a concrete root barrier, on which the first defendant seeks to rely here. Ms Perrin and Mr Ramage were always entitled, provided that they could afford it, to underpin their house or install a concrete root barrier. That would be engineering work that would be carried out on their own land, without directly affecting their neighbour's tree. There is therefore no need for s.198(6)(b) to make mention of the possibility of such work, because it would always be lawful for such work to be carried out. It would make a nonsense of s.198(6)(b) to argue that the works which it was permitting (lopping, felling, etc) could only be carried out following a detailed analysis of the possibility of carrying out other works, which are not mentioned in the Act, which would not directly affect the tree and which were never at any time rendered unlawful by the Act in any event."

The judge found further support for his view in the claimants' submissions that section 198(6)(b) of the 1990 Act must be interpreted in a way which would make it simple for a member of the public (or, more specifically I think, to a neighbouring owner) to decide whether he could resort to self-help in a case where his property was suffering (or threatened with) damage from encroaching tree roots or branches. As he put it, the section must not be "unworkable". He said this:

"[57] In addition, I accept Mr Green's submission that it would be impossible for a member of the public, who wanted to avail themselves of the protection provided by s.198(6)(b), to decide whether or not uprooting or lopping was necessary if such a decision turned on the myriad factors outlined by Mr Findlay and summarised in paragraph 51 above. Mr Green made the telling point that, unlike, say, the provision under review in Pabari, which would be decided by a member of the Child Support Agency (and, on appeal, by a child support appeal tribunal, then a Commissioner and, on a further appeal, by the Court), s.198(6) involves no such decision-making structure. It is an exemption provided to members of the public to allow them, in certain limited circumstances, to take steps to deal with a tree otherwise protected by a TPO. In my judgment, the section would be unworkable if a member of the public had to weigh up all of the factors listed by Mr Findlay before coming to a clear view as to whether or not the works to the tree were necessary. Indeed, I consider that some of the matters that have been identified by Mr Findlay would be quite incapable of sensible evaluation by a member of the public, no matter how well informed. For example, it would simply not be open to them to say with any conviction that the tree in question either had or had not a particularly high amenity value. Accordingly, given the injunction in Pabari that the word 'necessary' has to be interpreted sensibly and practically, and that what is necessary to abate or prevent the nuisance is a matter of fact to be determined by 'the everyday sensible approach of a prudent citizen' (Smith v Oliver), I conclude that the section could not be sensibly applied by those whom it is seeking to help if Mr Findlay's long list of factors all had to be taken into account in determining

whether lopping or felling the tree was necessary to abate or prevent a nuisance.
[58] The point about the unworkability of s.198(6)(b) in such circumstances is further confirmed when it is remembered that s.198(6), amongst other things, provides a defence to the statutory offence of damaging a tree under s.210. As is made clear in Part XVII, section 271, pages 705-709 of Statutory Interpretation, a person cannot be guilty of an offence except under clear law. It would, I think, be impossible to operate s.198(6)(b) in a clear and coherent way if it was to be suggested that a man was guilty of an offence if he cut down a tree protected by a TPO in circumstances where the nuisance which he was anxious to prevent or abate might have been dealt with by the carrying out of expensive underpinning work instead. The section does not say that, and I do not believe that it can be interpreted as such."
Having reached the conclusion, for the reasons which he had set out at paragraphs [53] to [58] of his judgment, that, as a group, the various factors advanced by the Council as matters to be taken into account were not matters "relevant for the proper operation and application of s.198(6)(b) of the 1990 Act", the judge went on, at paragraphs [60] to [71] of his judgment to consider the relevance of each of those factors individually. Before addressing those later paragraphs, it is convenient to set out the judge's summary of those factors:

"[51] . . . Assuming an actionable nuisance, [counsel] submitted that lopping/felling works to the tree would only be 'necessary' following a consideration of all other alternative engineering schemes, such as the underpinning of the foundations and the installation of a concrete root barrier; the practical implications of the implementation of either the works to the tree or the engineering works in the ground (such as underpinning or the installation of the root barrier); the cost of the works to the tree and the comparative costs of any alternative engineering scheme; the financial position of the individuals concerned, including the owners of the property affected and the owners of the tree; whether or not the individuals concerned had effective and valid insurance; the nature, scope and extent of the amenity provided by the tree that is the subject of the TPO; and the extent of the actionable nuisance that had been established."
The judge addressed those factors under four heads: (i) amenity, (ii) the existence of alternative schemes, (iii) financial considerations and (iv) extent of the nuisance.

Under the first of those heads the judge held that the particular value of, or amenity level provided by, the tree had no relevance to the determination of the question (posed by section 198(6)(b) of the 1990 Act) whether the proposed operations (cutting down, uprooting, topping or lopping) were necessary for the prevention or abatement of a nuisance. He pointed out (correctly, in my view) that the fact that that would be a matter which could properly be taken into account by the authority (and by the Secretary of State) in the context of an application for consent to carry out operations to the tree itself was not inconsistent with that conclusion. He said this:

"[61] Whatever might be appropriate under the consent procedure, there is nothing in s.198(6)(b) which permits any sort of consideration of the amenity level provided by the tree. I do not consider that a sort of sliding scale, which I understand is sometimes used by local authorities when considering applications to fell, and which considers the particular amenity value of the tree in question, is permissible or relevant under s.198(6)(b). After all, s.198(6) only applies to a tree that is

the subject of a TPO. The section therefore assumes that the tree is of sufficient importance and amenity value to be the subject of a protection order in the first place. But that is all. If the necessary exemption is made out under s.198(6) then the tree can be cut down, uprooted, topped or lopped, no matter what amenity value it is said to supply."
He observed that it would be "quite impossible" for a person whose property was subject to a nuisance from encroaching roots "to endeavour to work out a sliding scale in which the level of amenity provided by the tree is balanced against the imminent danger of the collapse of part of his house."

Under the second head, the judge reaffirmed his view that "the mere fact that an actionable nuisance could be prevented or abated by the carrying out of engineering works in the ground or to the affected property does not automatically mean that cutting down, uprooting, topping or lopping will not be necessary under s.198(6)(b)". He developed further the reasons which led him to that view:

"[64] First, as I have already pointed out, that is not what the section says. The section provides a simple link between works to the tree and the prevention or abatement of a nuisance. It makes no reference to the need for a consideration of any other alternative schemes or ways in which the nuisance might otherwise be prevented or abated.
[65] Secondly, I believe that it would make a nonsense of the whole exemption at s.198(6)(b) if lopping or felling could always be avoided if alternative schemes could be shown to exist. The vast majority of cases of tree root damage could be dealt with by the expensive underpinning of the foundations of the property concerned, or the installation, often deep into the ground, of a concrete root barrier. Thus, if the mere existence of an alternative solution is enough to determine that lopping or felling will not be necessary under s.198(6)(b), the exemption would, as a matter of practicality, never apply. It would therefore be rendered of no effect at all.
[66] Alternative solutions, such as underpinning or the installation of concrete root barriers, will almost always exist. They are, however, not relevant to s.198(6)(b). Permission is not necessary for such engineering works to be carried out; neither is a criminal offence committed if such works are carried out. What the section is concerned with is the works to the tree itself for which, but for the exemption, the person carrying out the work would be committing a statutory offence."
The Council have made it clear in this Court that the judge was mistaken if he thought (as his observations in paragraph [65] suggest) that they were seeking to advance the contention that the mere existence of an alternative solution is, of itself, enough to determine that lopping or felling will not be necessary under section 198(6)(b) of the 1990 Act. That is not – and, they say, never was – their contention. Their case is that the existence of an alternative solution is a factor to be taken into account when determining whether lopping or felling is necessary.

Under the third head the judge observed that "inevitably linked to the question of alternative schemes is the question of their cost". He expressed the view that complex engineering works to foundations – or the installation of a concrete root barrier in the ground - would always cost considerably more than the "relatively modest" cost of employing a competent tree surgeon to carry out operations to the tree itself: it would, be wrong for the owner of a house affected by an actionable nuisance to be required (by the existence of the tree preservation order) to carry out

"much more expensive work" to abate or prevent the nuisance than (in the absence of the order) would have been necessary. He went on to say this:

"[68] In addition, as Mr Findlay accepted, if the question of the costs of the various putative schemes are relevant, then it is inevitable that consideration also has to be given to the financial standing of the owner of the tree and, on the other hand, the owner of the property that is affected by the tree. Such matters are extremely variable. Again, one asks rhetorically: How can a person who wants to avail himself of the remedy provided by s.198(6)(b) possibly work out what is necessary by reference to his and/or his neighbour's financial standing? It could mean that works which are 'necessary' one day would, as a result of a lottery win over a weekend, be rendered 'unnecessary' the following Monday. Again, it seems to me that this approach would make the section unworkable.
[69] The financial standing of those with an interest in the works to the tree or some other alternative scheme is inevitably going to be linked to their insurance position. Again, therefore, if Mr Findlay was right, work which, taking one view of the insurance position, was necessary might, because of a change in the insurance position, be rendered unnecessary. Again, it seems to me that these considerations are far removed from the clear and simple position set out in s.198(6)(b)."
Under the fourth head the judge began by rejecting the contention that the extent of the nuisance was a factor to be taken into account under section 198(6)(b) of the 1990 Act. As he put it, at paragraph [70] of his judgment: "Again, as a matter of the construction of the section, I do not think that this is a relevant consideration. . . . [It] seems to me that it has nothing whatsoever to do with the separate operation of s.198(6)(b). All that is required is an actionable nuisance in order to trigger the works to the tree". But he then went on (at paragraph [71]) to accept that the extent of the nuisance was "highly relevant to the precise nature of the cutting down, uprooting, topping or lopping work that it is necessary to carry out to the tree". He accepted that, "on a proper construction of the section, the cutting down, uprooting, topping or lopping had to be the minimum necessary to prevent or abate the nuisance": so, "if the actionable nuisance could have been prevented or abated by some topping or lopping of the branches of the tree, but instead the house owner uprooted the entire tree, then he would have gone outside the exemption provided by s.198(6)(b) and would have committed an offence under s.210".

This appeal

I expressed the view, earlier in this judgment, that this appeal turns on whether the judge was correct in his conclusion that the word "necessary", in the context of section 198(6)(b) of the 1990 Act, governs the extent of the operations to be carried out on the tree and no more. The judge reached that conclusion at paragraph [53] of his judgment. He reached that conclusion on the basis of "the first and obvious point" which he identified in that paragraph. If the judge were correct to reach that conclusion for the reason that he gave in paragraph [53], his conclusion that the existence of alternative engineering solutions was irrelevant does not need whatever support can be obtained from the later paragraphs of his judgment. But, if the reasoning in paragraph [53] is flawed, the conclusion that the existence of alternative engineering solutions was irrelevant cannot, on analysis, be supported by the later paragraphs. It is appropriate, therefore, to begin by examining the reasoning in paragraph [53].

The object and effect of sub-section (6) of section 198 of the 1990 Act is to disapply a tree preservation order made under sub-section (1) in the circumstances described in paragraphs (a) or (b): in particular, to exempt from a prohibition against cutting down, topping, lopping or uprooting a of tree, imposed pursuant to sub-section (3)(a), (a) cases in which the tree is dying or dead or has become dangerous and (b) cases in which the tree is to be cut down, uprooted, topped or lopped (i) in compliance with an obligation imposed by or under an Act of Parliament or (ii) so far as may be necessary for the prevention or abatement of a nuisance.

For convenience I set out paragraph [53] again; numbering the sentences for ease of identification:

"[53] [1] The first and obvious point to make is that [i] the word 'necessary' in s.198(6)(b) provides a simple link between a range of possible works to the tree itself and the prevention or abatement of a nuisance: [ii] if any of those lopping/felling works to the tree are necessary to prevent or abate an actionable nuisance, then such works are permissible because 'no TPO shall apply'. [2] The section does not say that cutting down or lopping must be 'reasonably necessary in all the circumstances' or that lopping or felling must be necessary 'having regard to the nature of the tree, the other available methods of preventing or abating the nuisance, the financial implications of the works, the financial standing of those involved, the nature of the amenity and the degree of the nuisance'. [3] In other words, as a simple matter of construction, the section is concerned only with allowing such cutting down or lopping works as may be necessary to prevent or abate an actionable nuisance. [4] Accordingly, I accept Mr Green's principal submission that 'necessary' here refers to the extent of the cutting down, uprooting, topping or lopping required to abate or prevent the nuisance, and nothing more."

The judge was plainly correct to say, as he did in the first limb of the first sentence of paragraph [53] of his judgment, that "the word 'necessary' in s.198(6)(b) provides a . . . link between a range of possible works to the tree itself and the prevention or abatement of a nuisance". I have omitted the word "simple" from that citation. I find it impossible to discern what, if anything, that word adds to the proposition: in particular I do not read the phrase "a simple link" as having the meaning "simply a link" in that context. One feature of the "link" between the range of possible works to the tree itself and the prevention or abatement of a nuisance is described in the second limb of the first sentence of paragraph [53]: "if any of those lopping/felling works to the tree are necessary to prevent or abate an actionable nuisance, then such works are permissible because 'no TPO shall apply'". Again, as it seems to me, that proposition is plainly correct: but the proposition throws no light on the question whether lopping/felling works to the tree can be said to be "necessary" if there are other works (not involving operations on the tree itself) which would (of themselves) suffice to prevent or abate the nuisance. The judge described a further feature of the link at paragraph [76] of his judgment: "the cutting down, uprooting, topping or lopping of the tree must be the minimum necessary to abate or prevent the nuisance". As he said, that proposition reflected his construction of the word "necessary". There can be no quarrel with that proposition. But, again, the proposition throws no light on the question whether any works to the tree can be said to be necessary if there are other works (not involving operations to the tree itself) which would suffice to prevent or abate

the nuisance.

In the second sentence of paragraph [53] of his judgment the judge pointed out, correctly, that section 198(6)(b) "does not say that cutting down or lopping must be 'reasonably necessary in all the circumstances' or that lopping or felling must be necessary 'having regard to the nature of the tree, the other available methods of preventing or abating the nuisance, the financial implications of the works, the financial standing of those involved, the nature of the amenity and the degree of the nuisance'". Although, at first sight, he might be taken to be drawing a distinction between the phrase "in all the circumstances" and the phrase "having regard to the nature of the tree, the other available methods of preventing or abating the nuisance, the financial implications of the works, the financial standing of those involved, the nature of the amenity and the degree of the nuisance", I do not think that that was the judge's intention. He was, I think, using the latter phrase as illustrative of the circumstances which might fall within the former: having in mind the "whole host of factors" advanced on behalf of the Council which he had just listed at paragraph [51] of his judgment. The real distinction is between "necessary in all the circumstances" and "reasonably necessary in all the circumstances". The reality of that distinction was emphasised by this Court in Pabari v Secretary of State for Work and Pensions ([2004] EWCA Civ 1480, [39], [58]; [2005] 1 All ER 287, 297f, 301g-h), in passages to which the judge had referred at paragraphs [49] and [50] of his judgment.

The judge was plainly correct to note that the test under section 198(6)(b) of the 1990 Act was "necessary", not "reasonably necessary". But the fact that it is the stricter test of necessity (rather than the looser test of reasonable necessity) that must be applied does not lead to the conclusion that, in applying the stricter test, regard is not to be had to all the circumstances: see the observations of Lord Justice Dyson in Pabari (ibid, [55] to [59]; 300j-302b). Nor does that conclusion follow from the fact that the statutory test does not include the phrase "in all the circumstances". The absence of that phrase from the provisions of paragraph 4(1)(a) of Schedule 3 to the Child Support (Maintenance Assessments and Special Cases) Regulations 1992 (SI 1992/1815 – the provisions under consideration by this Court in Pabari - was not regarded as significant and did not inhibit the Court from giving consideration to relevant circumstances (ibid, [57] and [58]; 301e-j). The point to which the judge drew attention in the second sentence of paragraph [53] of his judgment – although of significance in identifying the strictness of the test to be applied - throws no light on the question whether any works to the tree can be said to be necessary if there are other works (not involving operations to the tree itself) which would suffice to prevent or abate the nuisance.

It follows, in my view, that the judge was wrong to think that the point to which he had drawn attention in the second sentence of paragraph [53] of his judgment provided any foundation for the proposition in the third sentence of that paragraph: "In other words, as a simple matter of construction, the section is concerned only with allowing such cutting down or lopping works as may be necessary to prevent or abate an actionable nuisance". There could be no quarrel with the proposition that: "the section is concerned with allowing only such cutting down or lopping works as may be necessary to prevent or abate an actionable nuisance". That is the proposition which the

judge endorsed in the passage at paragraph [77] of his judgment to which I have referred: a passage which was said by the judge himself to reflect his construction of the word "necessary". But it is clear that it was not that latter proposition that the judge had in mind when he expressed himself as he did in the third sentence of paragraph [53]. That can be seen from his conclusion in the fourth sentence of that paragraph: "Accordingly, I accept Mr Green's principal submission that 'necessary' here refers to the extent of the cutting down, uprooting, topping or lopping required to abate or prevent the nuisance, and nothing more" [emphasis added].

For those reasons I would hold that the judge's reasoning in paragraph [53] of his judgment is flawed: that reasoning provides no support for the conclusion that the existence of alternative engineering solutions is irrelevant to the determination of the question whether the cutting down, uprooting, topping or loping of a tree is necessary for the prevention or abatement of a nuisance.

Nor, in my view, can the judge's conclusion be supported on the basis of the later paragraphs of his judgment. In relation to the reasoning in paragraphs [54] and [55] it is unnecessary to say more than that the judge himself based his rejection of the Council's submissions (summarised in those paragraphs) on the conclusion that he had already reached in paragraph [53]. That is made in clear in the opening words of paragraph [54]: "For that reason". It is made clear in the fourth and fifth sentences of that paragraph: "The link in s.198(6)(b) is between the nuisance and the works to the tree itself. I can therefore find no reason why, as a matter of construction, the matters listed by Mr Findlay can be relevant". And it is again made clear in the second sentence of paragraph [55]: "But it seems to me that that argument ignores the fact that s.198(6)(b) only identifies works to the tree: it makes no reference to the possibility of any other works, that do not involve the tree, that might prevent or abate the nuisance". The premise on the basis of which the judge rejected the submissions to which he referred in paragraphs [54] and [55] was that his view of the effect of section 198(6)(b) of the 1990 Act - as a matter of construction – was correct. If that view is not supported by the reasoning in paragraph [53], the reasoning in paragraphs [54] and [55] provides no support for it. To hold otherwise would involve a circularity of reasoning.

The reasoning in paragraph [57] of the judgment provides no support for the judge's conclusion in paragraph [53]. That is because the reasoning in paragraph [57] is itself flawed. The judge pointed out, correctly, in the third sentence of paragraph [57], that section 198(6)(b) of the 1990 Act "is making something lawful that would otherwise be unlawful". He pointed out (again correctly) that the underpinning of the foundations or the installation of a concrete root barrier would be works which the claimants could lawfully carry out on their own land without reliance on section 198(6)(b). So, he concluded, there was "no need for s.198(6)(b) to make mention of the possibility of such work, because it would always be lawful for such work to be carried out". But he went on: "It would make a nonsense of s.198(6)(b) to argue that the works which it was permitting (lopping, felling, etc) could only be carried out following a detailed analysis of the possibility of carrying out other works, which are not mentioned in the Act, which would not directly affect the tree and which were never at any time rendered unlawful by the Act in any event". But non sequitur. Works which do not affect the tree are not prohibited by a tree preservation order: such works are not mentioned in section

198(6)(b) for the obvious reason that they do not require exemption from any prohibition in an order made under section 198(1) or any of its statutory predecessors. It does not follow from the fact that works which do not require exemption are not mentioned in a provision which confers exemption in respect of works which do that the possibility of carrying out the former cannot be relevant in determining whether the latter are, indeed, within the exemption. In particular, it does not follow that the existence of an alternative engineering solution which would or might prevent or abate the nuisance is not relevant in determining whether operations to the tree itself should be taken out of the scope of the tree preservation order as "necessary" in the context of that section.

At paragraphs [57] and [58] the judge accepted the claimants' submission that section 198(6)(b) of the 1990 Act "would be unworkable if a member of the public had to weigh up all the factors listed [in paragraph [51] of his judgment] before coming to a clear view as to whether or not works to the tree were necessary"; and that "the section could not sensibly be applied by those who it is seeking to help if [the Council's] long list of factors all had to be taken into account in determining whether lopping or topping the tree is necessary to abate or prevent a nuisance." That consideration was given additional force (in the judge's view) by the fact that breach of the prohibition in a tree preservation order was an offence. There was a need to interpret section 198(6)(b) in a way which made it simple for a person affected by encroaching roots or branches to decide whether he could cut down a tree which was the subject of a tree preservation order.

For my part I am not persuaded that Parliament intended to encourage those affected by the encroaching roots or branches of trees which were the subject of tree preservation orders to resort to self-help in reliance on section 198(6)(b) of the 1990 Act. It is a striking feature of the section that it does not have the effect of disapplying the prohibition against cutting down, uprooting, topping or lopping a protected tree in a case where the tree is causing damage only to property of the owner of the land on which the tree stands. That is because damage to the property of the tree owner cannot be said to be damage caused by nuisance: in the sense in which that concept is ordinarily understood in English law. So if a protected tree standing in A's garden causes subsidence damage to A's house, A cannot rely on section 198(6)(b): he cannot cut down, uproot, lop or top the tree in order to prevent or abate that damage. The judge was wrong to say, at paragraph [79] of his judgment, that: "There is not . . . any significant difference between the position of a householder whose property is undermined and damaged by roots from a tree that is not the subject of a TPO, and a householder whose property is undermined and damaged by roots from a tree that is protected by a TPO". If the householder is the owner of the tree there is a very significant difference. In the former case he can cut down, uproot, lop or top the tree without consent: in the latter case, he must seek consent from the local planning authority. Absent consent, his only remedy is to claim compensation from the authority.

Section 198(6)(b) of the 1990 Act – so far as material in the present context – is limited in its application to cases in which a protected tree standing on A's land causes damage to the property of his neighbour, B. So, if a protected tree in A's garden causes subsidence damage to B's house, both A and B may (so far as may be necessary for the prevention or abatement of the nuisance suffered by

B, but not further or otherwise) cut down, uproot, top or lop the tree in reliance on section 198(6)(b).

It is pertinent to have in mind that nothing in section 198(6)(b) of the 1990 Act authorises B to go onto A's land for the purpose of preventing or abating a nuisance. Save in exceptional circumstances, B's remedy in self help is limited, under the general law, to cutting roots and branches on his own land: as Lord Cooke of Thorndon pointed out in Delaware Mansions Limited v Westminster City Council [2001] UKHL 55, [12]; [2002] 1 AC 321, 328B-C. In so far as the nuisance cannot be abated or prevented by cutting roots or branches on B's land or (by agreement with A) by operations to the tree on A's land, B's remedies (under the general law) are (i) to seek an injunction requiring A to abate or prevent the nuisance by something done on A's land (which might be the cutting down, uprooting, topping or lopping of the tree), (ii) to seek an order for damages against A in respect of the damage suffered (including the prospective cost of remedial works) or (iii) to carry out remedial or preventative works on his own land and seek to recover the costs of those works from A: see the Delaware Mansions case. Absent the ability to rely on section 198(6)(b) of the 1990 Act, the existence of a tree preservation order may restrict what A can do to the tree on his own land; and so may restrict B's ability to obtain an injunction. But there is nothing in section 198, as it seems to me, which alters B's remedies under heads (ii) or (iii). There is no substance in the argument that, unless section 198(6)(b) of the 1998 Act is interpreted in such a way that it is simple for B to decide whether he can cut down a protected tree, B will be deprived of an effective remedy.

By restricting what A can do to the tree on his own land, a tree preservation order may restrict A's ability to abate or prevent the nuisance on B's land. In that context, it may be said that there is a need for section 198(6)(b) of the 1990 Act to be interpreted in such a way that it is simple for A to decide whether he can cut down a protected tree; so that he can avoid or limit his liability to B for damages under heads (ii) and (iii). But it is necessary to keep in mind that A cannot rely on section 198(6)(b) in order to prevent or abate damage to his own property. It is not difficult to envisage circumstances in which the same protected tree causes subsidence damage both to A's house and to B's house. Parliament plainly intended that, in such a case and subject to obtaining the consent of, or compensation from, the local planning authority, A is left to bear his own loss: a risk which, in the ordinary way, he will cover by insurance. In those circumstances it is not self-evident why Parliament should have wished to encourage A to carry out operations to the tree in order to abate or prevent damage to B's house, so relieving A from his liability in damages. It is difficult to see why – subject (again) to obtaining the consent of, or compensation from, the local planning authority – Parliament was not content that A should be left to bear that loss also: a risk which, again in the ordinary way, he will cover by insurance. So although it may be said that there is a need for section 198(6)(b) to be interpreted in such a way that it is simple for A to decide whether he can cut down a protected tree – and so avoid or limit his liability to B - there is no reason to think that Parliament had that need in mind when enacting section 198(6)(b) of the 1990 Act (and its statutory predecessors) in the terms that it did.

In that context it is to be borne in mind that the expectation that a refusal of consent will give rise to a claim for compensation has been a feature of the legislation since tree preservation orders were first introduced by the 1947 Act: section 28(1)(d) of that Act was the statutory predecessor of

section 203 of the 1990 Act. The restriction on the right to compensation (in the case of trees having an outstanding or special amenity value) must be seen as an exception to the norm under the statutory scheme; and that exception did not survive the introduction of a new model order in the schedule to the Town and Country Planning (Trees) Regulations 1999 (SI 1999/1892). The underlying principle is that a tree preservation order is made for the benefit of the inhabitants of the locality – or, as it is put in the legislation, because "it is expedient in the interests of amenity" – and that it is therefore appropriate that a landowner affected by such an order (whether the tree is on his land or on the land of his neighbour) should be compensated out of public funds.

The better view, as it seems to me, is that Parliament intended that section 198(6)(b) should be interpreted in a manner which gave proper weight to the word "necessary". It intended that a protected tree should remain protected unless there was a real need to lift that protection. Effect is given to that intention by reading the expression "so far as may be necessary for the prevention or abatement of a nuisance" as "if and so far as may be necessary for the prevention or abatement of a nuisance".

For my part I find it difficult to see how the expression can be read in any other way. I posed the question, at the beginning of this judgment: why, if it were appropriate to ask what is the minimum that needs to be done to the tree itself in order to prevent or abate the nuisance, should it be irrelevant to ask whether anything needs to be done to the tree itself. The true meaning of the expression "so far as may be necessary for the prevention or abatement of a nuisance" can be tested by much the same question: how can it be determined what is the minimum that needs to be done to the tree itself in order to prevent or abate the nuisance without first asking whether anything needs to be done to the tree itself. In my view the answer to that question is obvious: it is impossible to determine what is the minimum that needs to be done to the tree without first deciding that something needs to be done. The construction favoured by the judge requires a different answer: it is not necessary to decide that something needs to be done, it is enough that something done to the tree would prevent or abate the nuisance. If satisfied that something done to the tree would prevent or abate the nuisance, then all that is required is to ask what is the minimum which, if done, would prevent or abate the nuisance. That construction, as it seems to me, fails to give proper weight to the word "necessary" in the expression "so far as may be necessary for the prevention or abatement of a nuisance". The statutory test requires that whatever is done to the tree itself is necessary: it is not enough that whatever is done is sufficient.

Conclusion

For those reasons I would allow this appeal and set aside the order of 26 September 2006.

Other matters

It would add, unnecessarily, to the length of this judgment – and serve little or no useful purpose – if I were to address (other than in a summary manner) each of the individual factors mentioned by the judge at paragraphs [60] to [71] of his judgment. But the following observations may be of some

assistance:

(1) I have already made it clear that I differ from the judge as to the relevance of alternative schemes (paragraphs [63] to [66] of his judgment).

(2) I agree with the judge's view (at paragraphs [67] and [68] of his judgment) that, if the existence of alternative schemes is relevant, it is inevitable that account will need to be taken of the costs of such schemes and of the ability of the party on whom those costs will fall to meet them. To state the obvious: if prevention or abatement of a nuisance could be achieved either by operations to the tree itself or by works other than operations to the tree itself and the landowner has the resources to fund the former but not the latter, it may well be that the operations to the tree itself are necessary because the other works cannot, and will not in practice, be done. That approach accords with the observations of Lord Justice Dyson in Pabari (ibid, [58]). But I suspect that will rarely be a determinative factor; given that the costs are likely to fall not on the landowner but on his insurer (subject to whatever claim to compensation there may be).

(3) I agree with the judge's view (at paragraph [70] of his judgment) that it is enough that there exists some nuisance in relation to the prevention or abatement of which it can be said that operations to the tree itself are necessary; although, as I have said, I do not find it necessary to decide whether the nuisance must be actionable. It is, if I may say so, not open to doubt that the extent of the nuisance is relevant to the works that are necessary to prevent or abate it (paragraph [71] of the judgment).

(4) I agree with the judge's view (at paragraph [62]) that it would be unreal to expect "a home owner worried about a serious crack in the side wall of his house and the actionable nuisance being created by a tree in his neighbour's garden, to endeavour to work out a sliding scale in which the level of amenity provided by the tree is balanced against the imminent danger of the collapse of part of his house". But, in practice, it will be for the neighbour (A) rather than the home owner (B) to decide whether to cut down the protected tree; or to pay damages in respect of the costs of remedial or preventative works. I would not rule out the possibility that, in determining whether it was necessary to cut down the tree in a case where there was an alternative engineering solution, the importance of the tree as an amenity for the benefit of the locality could be a relevant factor: I have little doubt that, in deciding between two possible solutions (one of which would cost more than the other), a tree owner would take account of the importance of the tree as an amenity in relation to his own property.

The judge indicated (at paragraphs [28] and [39] of his judgment) that he could see no reason why, as a matter of construction, danger or threat of danger (for the purposes of section 198(6)(a) of the 1990 Act) could not arise in a case where tree roots threatened to damage the foundations of a neighbour's house. That was not a question which he was required to decide by the preliminary issue, as posed. There was no basis, on the assumed facts, for the conclusion that, in this case, the tree in question had "become dangerous" within the meaning of section 198(6)(a). In my view it is not necessary – and would be inappropriate – for this Court to address the question whether section 198(6)(a) is in point in the present case. I should not be taken to accept that it could be.

I hope that it will not be thought discourteous to the judge, whose order of 29 June 2006 had posed the preliminary issue which he then went on to determine, if I say that it seems to me that this was a case in which it would have been wiser to avoid the temptation of seeking to save time and expense by a short cut. The declaration sought by the claimants was that it was necessary to cut down the tree to prevent or abate a nuisance, the existence of which was not admitted. An affirmative answer to the preliminary issue as posed was never likely to avoid a trial. Leaving aside the dispute as to whether the tree was the cause of the damage to 19 Elwes Way, an affirmative answer to the issue as posed – whether in determining whether cutting down, uprooting, topping or lopping of a tree may be necessary for the prevention or abatement of a nuisance, it is irrelevant that there are other possible works that could prevent or abate the same nuisance – would still leave for decision whether it was necessary to cut down the tree (rather than to carry out some lesser operation). So, if the claimants were to have the declaration which they sought, it was always likely to be necessary to have a trial in order to determine whether any (and if so what) operations to the tree itself (short of cutting down) would be effective to prevent or abate the nuisance. It was, if I may say so, an illusion to think that determination of the preliminary issue as posed would avoid investigation of the facts. And, if there were to be an investigation of the facts, with expert evidence, it would – I suspect – add little to the time and expense of such an exercise if all the facts were the subject of that investigation: so that, on an appeal (which, given that the question posed as a preliminary issue was seen by both the Council and the insurers as of general importance was always likely) this Court would have been in a position to resolve the real point which requires decision in this case: whether it was necessary to carry out any operations to the tree itself and (if so) whether those operations stop short of cutting down the tree.

Mr Justice Blackburne

I agree. In deference to the very careful judgment of the judge below, I add a few observations of my own.

The appeal raises a short question of construction of section 198(6)(b) of the Town and Country Planning Act 1990: when determining whether, in respect of a tree which is the subject of a tree preservation order, the cutting down, uprooting, topping or lopping that tree "may be necessary for the prevention or abatement of a nuisance" is it permissible to take into account the fact that there may be ways, other than cutting down, etc, which could prevent or abate the nuisance?

If, as is obviously the case, the underlying purpose of the legislation is to preserve trees which are the subject of tree preservation orders, it would seem counterintuitive to that purpose, when considering what is the minimum necessary that needs to be done in order to prevent or abate a nuisance caused by a tree that is the subject of a tree preservation order, to ignore altogether steps that may be taken other than to the tree itself and, instead, focus simply on works to the tree, albeit that the works to the tree are to be the minimum necessary. Take the case of an overhanging branch which, if it falls, will damage a structure on the neighbour's land. Why should the legislation permit the lopping of the branch which, let it be assumed, is the minimum work to the tree (in the way of cutting down, uprooting, topping or lopping) to prevent or abate the nuisance when, by the use of, for example, a prop which will cause no damage to the tree, the imminent danger can be avoided?

Why should it be permissible to dig down to cut an encroaching root which threate ns to damage buildings foundations on the neighbour's land but impermissible to consider, having dug down to the roots, the insertion of a barrier which would be as effective?

In my judgment, the legislation does not, either expressly or by necessary imp lication, require so restrictive an approach to the operation of section 198(6)(b). I am not persuaded that any perceived need for ease of establishing whether, in any particular circumstances, the exemption provided by the section applies, should determine the circumstances in which it applies. In agreement with the judgment of Sir John Chadwick, I construe the expression "so far as may be necessary for the prevention or abatement of a nuisance" to mean "if and so far as may be necessary for the prevention or abatement of a nuisance".

Wrapped up in the preliminary issue for decision by the judge was what is meant by "a nuisance" in the subsection. For it is the existence of "a nuisance" that triggers the exemption afforded by the subsection from the operation of the tree preservation order. The judge below considered (at paragraph [35]) that it meant a nuisance "where damage has been caused or, if no action is taken to prevent it, will imminently be caused". He described this as "actionable nuisance". This was in contrast to what he described (at paragraph [38]) as "pure encroachment of the branches or roots over or into the adjoining land". There was no appeal against this conclusion. Like Sir John Chadwick, I too entertain doubts about the correctness of this conclusion.

The concept of a nuisance caused by overhanging branches or encroaching tree roots was, of course, very long established by the time Parliament enacted (in 1947) the original statutory predecessor of what is now section 198(6)(b). It is, to say the least, surprising that if Parliament intended that the expression involved some ingredient over and above "pure encroachment" it did not say so, not least when section 198(6)(a) refers to trees "which are dying or dead or have become dangerous" (emphasis added).

Once it is accepted that measures, other than to the tree itself, may be considered to prevent or abate a nuisance caused by the tree, it is certainly arguable that it is no longer necessary to confine the meaning of "nuisance" as used in the section to "actionable nuisance" in the sense indicated by the judge. For, if the nuisance is no more than what the judge referred to as "pure encroachment" and if it is appropriate, as in my view it is, to consider whether it is necessary to under take remedial steps to the tree at all, and if so, what minimum steps are necessary, it may be thought that in the case of "pure encroachment", the exemption provided by the section is most unlikely to be available. However, as the point was not argued, it would not be appropriate to say more on the point.

Lord Justice Wall