Neutral Citation Number:

Case No: HQ14 P05328

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
Date:

Before:

SIR ALISTAIR MACDUFF

Between:

Andrew Cavanagh — **Claimant**

- and -

1 Witley Parish Council — **Defendants**

2 D Kevin Shepherd (t/a Shepherd Tree Surgeons and Forestry Contractors)

Paul Bleasdale QC (instructed by ...) for the **CLAIMANT**

Michael Pooles QC (instructed by ...) for the **FIRST DEFENDANT**

George Woodhead (instructed by ...) for the **SECOND DEFENDANT**

Hearing dates: .....

Judgment Approved by the court for handing down (subject to editorial corrections)

If this Judgment has been emailed to you it is to be treated as 'read-only'. You should send any suggested amendments as a separate Word document. This judgment is not to be disclosed other than to the parties until it has been formally handed down.

1 Background

1. This is a claim for damages for personal injuries and consequential losses sustained by the Claimant by reason of the alleged negligence of the Defendants. On 3rd January 2012 the Claimant was driving a single deck motorbus along the A283 Petworth Road in Witley in the county of Surrey when a large lime tree fell across the road and onto the bus causing him to suffer severe personal injury. This is the trial of the issue of liability. I am not concerned at this stage with the quantification of damages.

2. It is common ground that the tree was on land belonging to the First Defendant and was their responsibility; that they owed a duty of care to act as a reasonable and prudent land owner, which included acting to avoid apparent danger and with a duty to undertake regular inspections. There is a significant dispute between the parties as to how frequently inspections should have been reasonably undertaken in the circumstances of this case. The First Defendant operated a system of inspection every three years. The Claimant alleges that there should have been more frequent inspection.

3. The Second Defendant is the tree surgeon instructed by the First Defendant to inspect and report on the condition of the tree in both 2006 and 2009.

4. It is also common ground that the cause of the failure of the tree was severe and extensive decay in the root system extending into the base of the trunk, with high winds being a contributory factor or "trigger". The tree was a mature lime tree; probably well past one half its life span, over 20 metres high, leaning towards the road and, to cursory observation, in healthy condition.

2 Brief summary of the respective cases:

5. It is the Claimant's case that the decay in the tree would have been detected by inspection by a competent arboriculturist at any time during the previous four to five years. At the time of failure, there was a fungal bracket some 300mm above ground level as well as some fruiting bodies clearly visible at the rear of the tree.

The bracket would have been in its infancy some four or five years earlier and would have been visible (and should have been detected) during the 2009 survey. The presence of a fungal bracket at or near the base of a tree is a sure sign of impending failure and would have mandated emergency treatment; most likely felling of the tree. The First Defendant was allegedly negligent in employing the Second Defendant to do the work because (i) he did not have the appropriate qualifications or expertise for tree inspection work and (ii) they had failed to ensure that he had adequate liability insurance. Also the First Defendant was negligent in operating a policy of inspecting every three years. There should have been routine inspection every 18 months to two years. The First Defendant had also failed to follow up a specific inquiry, directed to the Second Defendant about the particular lime tree. (In the invitation to tender he had been asked to report specifically on this tree and he had failed to do so.)

6. The First Defendant's case may be summarised as follows. A three-year inspection cycle was perfectly reasonable. It had instructed the Second Defendant who was a competent contractor. It had relied upon his inspection and report, in which he had expressly stated that no works were required to the lime tree. This was reasonably understood to mean that he had inspected and found no defects. It was under no obligation to check his insurance position, particularly as he had represented in correspondence that he had insurance for £5 million. It was also a part of the First Defendant's case that the fungal bracket did not begin to grow until the autumn of 2009 and would thus not have been seen in the 2009 survey.

7. The Second Defendant's case rested almost entirely upon an assertion that he had not inspected the tree in 2009 in spite of accepting instructions to do so. He had made it clear from the outset that he wanted plans / maps of all trees within the parish which were to be inspected. In spite of frequent attempts to secure such maps, they were not forthcoming and he had made it clear that he would not inspect any trees which were in areas of which maps had not been provided. After the survey he informed the First Defendant that, for this reason, he had not inspected a number of trees, including the relevant lime tree. The trees which

were not inspected were marked down in the survey as requiring "no works". He did not assert that the bracket was not there to be seen in 2009. The expert witness called on his behalf, Mr Holmes, agreed with the Claimant's expert, Dr O'Callaghan, that the bracket had been developing over a longer period than 3 years.

3 Issues for determination

8. The principal issues for determination are these: (i) Did Mr Shepherd inspect the lime tree in 2009? (ii) Whether he did or not, was the fungal bracket present and visible to proper expert inspection in 2009? Whether or not Mr Shepherd is liable will depend upon the answers to those questions. (iii) Was the First Defendant negligent in instructing Mr Shepherd having regard to his expertise, qualifications and insurance position? And (iv) was a 3-year inspection cycle adequate or should a 2-year (or better) inspection regime have been in place? Before considering these issues, however, I need to consider the history in more detail.

4 The 2006 survey

9. In 2006 Mr Groves, then clerk to Witley Parish Council, invited tenders for a "*full tree survey*" of trees within the parish (volume 1, page 45; hereafter 1/45). Mr Shepherd's quotation was accepted (1/83). Of note Mr Shepherd expressly stated, "*the survey will be for 24 months*" (1/47 and 1/48). The price was £840 plus VAT plus 20p per tag. Trees requiring work would be tagged. The results of the survey tree by tree may be found at 1/49-78. At the same time Mr Shepherd quoted for doing the necessary works. 134 trees were tagged as requiring work. The relevant lime tree was tagged with the number 801 (1/49). The recommended work (*remove deadwood and thin by 20%*) would cost £660, by far the most expensive tagged tree in the survey. The tree was said to be healthy. An unknown hand has written next to this entry (1/49) "*Observation*" (or is it "*conservation*"?) and, separately "*exact specification*". Almost certainly this wording emanates from an inquiry sent by Mr Groves to Mr Shepherd on 19th September 2006 (1/91) requesting more detail of the work in respect of this tree as well as two others. But the handwriting is unrecognised.

10. The works were agreed (1/92) and once again the lime tree was singled out for mention. The works were done by Mr Shepherd and invoiced (1/93, 98, and 99).

5 The 2009 survey

11. As already mentioned, the First Defendant had a policy of three-yearly tree surveys. Thus, in June 2009 there were again invitations to tender (1/144). By this time, there was a new parish clerk, Ms Rae Evans. The letter was specific about the works to be done – identifying hazardous trees; identifying trees with numbered tags; detailing age species and structural condition; making management recommendations; detailing work priority; as well as making comments or observations about height, diameter, life expectancy. The invitation went out to a number of potential contractors, including Mr Shepherd. Maps accompanied the letter as well as a document (1/145) headed "*Witley Parish Council Tree Survey*" in which the parish-owned sites were identified. The lime tree was the single tree to have a special mention: "*We own the land and the bench adjacent to the bus stop. Your view of the tree between the benches is required please*".

12. There is a further copy of the letter of 11th June at 1/152. This is a copy of the letter received by Mr Shepherd and, as may be seen, he made his own hand written changes. These alterations were translated into his letter of 07.07.09 in which he tendered for the work (1/157), albeit on somewhat different terms from those which had been requested by the Parish Council.

13. This letter coincided with yet another change in Parish Clerk. On 9th July 2009, Ms Evans retired and was replaced by Ms Fiona Fox. Ms Fox was introduced to Councillors at a Committee meeting on that same day (09.07.09) and the Committee resolved to accept Mr Shepherd's tender at a cost of £2950 (1/158 at 1/160). The new clerk notified that decision to Mr Shepherd on 17.07.09 (1/162)

14. Thereafter Mr Shepherd did the work and the Council received his survey (1/164 - 171) on 10th October. Tree positions were marked on maps (1/172 – 183). As

done three years earlier Mr Shepherd tendered for the necessary works (right hand column 1/164 – 171). However, on this occasion, he did not do the works. There was another tendering exercise and the works were done by contractors Dryad Tree Specialists Ltd, who were appointed to do the work on 05.08.11. In the meantime, however, the First Defendant asked Mr Shepherd to do some of the work considered to be urgent (3/1048).

15. It is now necessary to look at the survey in slightly more detail. On this occasion, 81 trees were tagged as requiring work. The survey provided much information in eight columns, but it is not necessary for me to consider all of that information in any detail.

16. The lime tree was, as already noted, in Petworth Road. It had been singled out for special mention in the invitation to tender ("*your view of the tree between the benches is required please*"). However, far from expressing a view about the tree, Mr Shepherd's survey contains the following entry; "*Petworth Road Witley; No works*" (1/166). Naturally enough, those who considered this survey made the assumption that the tree had been inspected and required no work. There were similar entries elsewhere requiring "*no works*" for example at Wheeler Lane (1/167 and 171) and Dorcott and Chandler School (1/171). The First Defendant did not follow up on the specific request in respect of the lime tree. The suggestion was made (on behalf of the Claimant) that this may have been the result of the change of personnel at that time and that, if Ms Evans had stayed in post, the omission would have been noted and a further specific request would have been sent. (When she gave evidence, Ms Evans said she would have been satisfied with the "*no works*" response. That would have told her that Mr Shepherd had inspected and found no defect.)

17. It was Mr Shepherd's case that "*no works*" meant, in effect, "*no inspection*" and that he was putting the Council on notice that he had not inspected the lime tree. He had made it a condition of his survey that he required full maps on which to plot every tree (see his tender letter at 1/157 penultimate paragraph). Maps were

not provided in spite of repeated requests and reminders from him and thus he did not survey those trees for which he had no map. This included the lime tree. The Claimant and the First Defendant did not accept this explanation. "*No works*" meant that no works were required and if he had not inspected he would have said so.

6 The accident

18. The accident happened on 3rd January 2012. The lime tree, which was immediately adjacent to a bus stop and bus shelter on the Petworth Road, toppled into the road at the very moment when the bus was passing. It crushed the cab with the Claimant within. It also caused extensive damage to the upper part of a house on the opposite side of the road. There is a plan of the locus at 2/393 and there are numerous photographs. Post accident photographs are at 3/394 -401 and photographs showing the immediate aftermath between 3/474 and 3/485. There are also photographs taken of the tree before the accident; the one at 3/472, taken from Google Maps in 2009 suffices. This gives a good impression of size and position. As already stated the tree was a mature lime, over 20 metres high, leaning towards the road. It was obvious to even the non-expert eye that, if it should fail, it would fall into and across the road.

19. It is not necessary to consider the nature of the disease that infected the tree and was responsible for its collapse. The weather at the time was extremely windy, but not of sufficient severity to cause a healthy tree to fall. The experts who inspected the tree were in broad agreement; there were fungi and wet rot in the roots and base of the trunk. It is also common ground that there were no obvious signs of ill health to a "*drive past*" inspection; nothing to alert a competent arboricultural inspector that the tree was or might be unhealthy. However, a proper and competent ground level survey, of the sort for which Mr Shepherd contracted in 2006 and 2009 would have detected a well-advanced fungal bracket.

7 Expert Evidence

20. I heard evidence from three arboricultural experts; Dr Dealga O'Callaghan, on behalf of the Claimant; Mr Jeremy Barrell on behalf of Witley; and Mr Simon

Holmes on behalf of Mr Shepherd. In fact, with two exceptions, there was very little between them – certainly Dr O'Callaghan and Mr Barrell were in agreement on most things. For reasons which I will presently explain, I found Mr Holmes's evidence to be unsatisfactory in a number of ways. On the other hand I was greatly impressed by both Dr O'Callaghan and Mr Barrell; both are clearly highly expert in this field and are well known and well respected. It is the nature of expert evidence that there will be, from time to time, genuine differences of opinion. I will need to resolve only two matters where their evidence differed.

21. I can start with the joint statement (2/746 – 7510) where the three experts set out areas of agreement and disagreement.

22. As to the nature of the tree and the cause of failure (paragraphs 1 -3), they were all in agreement. The cause of failure is summarised earlier in this Judgment and I do not need to say anything further about it. There is no disagreement about the part the weather played in this event; as stated earlier, the wind was a likely trigger and would have been insufficient to bring down a healthy lime tree.

23. The experts were also in agreement as to the literature available to land owners providing guidance as to safe practice. There are four relevant documents: (i) Department of Transport (2005) Well Maintained Highways – Code of Practice; (ii) HSE Sector Information Minute (SIM) (2007) Management of the Risk from Falling Trees; (iii) Forestry Commission Practice Guide (2000) Hazards from Trees; and (iv) Department of the Environment Circular Roads 52/75 Inspection of Highway Trees. These are four important documents and will play a significant part in my decision in this case. For ease of reference I will refer to them respectively as (i) the DoT Code, (ii) the HSE SIM (iii) the FC Guide; and (iv) the DoE Circular.

24. *Paragraph 6 of the joint statement*: "*We … agree that … an inspection frequency of three to four years is reasonable for this type of location.*" This had ever been

the opinion of Mr Barrell. However, in his report, (2/551 para 4.5.4) Dr O'Callaghan had expressed a different opinion. It is worth setting out in full.

> *"The location of the 25-30-metre high lime tree adjacent to a bus stop and two benches where people and vehicles are frequently present places the lime tree in a high-risk zone and on that basis it should have been inspected more frequently than every three years. Annual inspections would have been ideal but on an 18-month inspection interval would have been acceptable as on this basis the tree would have been inspected alternately in leaf and out of leaf. A competent tree inspector would have advised Witley Parish Council accordingly. An inspection of a single tree on an 18-month interval is not in my opinion disproportionate, as it takes no more than four hours to undertake the inspection and prepare a brief report on the condition of the lime tree."*

25. His concession in the joint statement (that 3 to 4 years was acceptable) was seized on by Mr Pooles QC on behalf or Witley. However, when he gave evidence in chief Dr O'Callaghan supported his original opinion. Then, when cross-examined, he agreed with Mr Pooles that this tree was not a defective tree ***within the HSE advice*** (my emphasis). He also agree that he would have expected Witley to continue with triennial reports and that, if it required no work he would agree that Witley could be expected to next inspect in 2012.

26. On this basis, Mr Pooles submits with force that the claimant has failed to make out his case that there should have been more frequent inspections. At this stage, I add only this: In re-examination Dr O'Callaghan told me that he had always intended to stand by his original opinion; that he remained of the view that there should have been more frequent inspection for the reasons which he gave. In due course, I will have to decide what I make of this part of the evidence. On the one hand Dr O'Callaghan apparently making concessions but returning to his original opinion; on the other hand Mr Barrell keeping to the agreement in the joint report.

27. *Paragraphs 8 and 9;* This part of the joint statement is concerned with whether the tree was in a so-called "*high-risk zone*" or zone of "*frequent public access*" and whether it was an "*obvious high-risk category tree*". In evidence Dr O'Callaghan accepted that he was mistaken in referring to this as a high-risk category tree (see his opinion in paragraph 9 first bullet point). When they gave evidence both experts (I exclude Mr Holmes for the time being) were agreed that there are two elements. Whatever the language (and "*high risk zone*" is not a

phrase used in the literature) there is (a) the nature of the tree and (b) the location. A tree does not become a "*high risk*" tree unless and until it is identified as having some disease or condition making it more liable to fail. The second element is its position and the possible damage it may cause if it does fail. In this case, the experts agreed that the tree itself was not high risk; it looked healthy to all normal inspection. It would not be classified as high-risk unless and until inspection showed it to be unhealthy. But it was in a high-risk position, immediately adjacent to a relatively busy A road (A283) alongside a bus stop. In terms of what one might call "*tree risk*" all that could be said is that it was large, heavy and was leaning out towards the road. When the literature comes to be considered, this tree should not be treated as a high-risk tree; but it was in a high-risk location.

28. This may be a good time to mention Mr Holmes. At paragraph 9: "*Mr Holmes considers that the tree was in a frequently visited zone and that a quick visual check was inappropriate because the tree was a high risk due to colonisation by decay pathogens; and furthermore that detailed and frequent assessments of the tree were required.*" I do not wish to prolong this Judgment by analysing this part of the evidence and his explanation of it. It took a short adjournment and several attempts before he was able to come up with a sensible alternative and he was subjected to very effective cross-examination. At one stage it appeared that he had confused the 2006 and 2009 surveys. Except where Mr Holmes agrees with Mr Barrell and Dr O'Callaghan, I would find it difficult to rely upon his evidence.

29. Some of the other apparent differences of opinion between the experts disappeared during the oral evidence. Paragraphs 13 and 14 were concerned with whether Mr Shepherd was competent to undertake this inspection and whether the survey was fit for purpose. In the event the differences between the experts melted away. The contract had been for a visual inspection and Mr Shepherd was competent to carry out that task and had done so. Dr O'Callaghan made concessions and the opinions expressed by him in paragraph 14 did not survive.

30. *Paragraph 15*: I propose to leave the remainder of the joint statement with the single exception of paragraph 15. The issue here is when the fungal bracket first came into being and whether it would have been there and discoverable by inspection at the time of Mr Shepherd's 2009 survey. The starting point is that Mr Barrell had seen the actual bracket. Dr O'Callaghan and Mr Holmes had to work from photographs.

31. Mr Barrell visited the site in November 2012. By this time, of course, the tree had been removed and only the stump remained. Mr Barrell describes his findings at the site at paragraph 3 of his report (2/616). Some 20 – 30 cm above the original ground level was the bracket. Photographs were taken (2/618 and 619). Of most interest is the photograph figure 4 at 2/619 where Mr Barrell has shown three annual growth increments. From this inspection he was able to express the opinion that there were three years of growth. Having regard to the growth "season" (beginning in late summer) the bracket would first have started to form in the latter part of 2009 and would not have been found by an inspection until the autumn of that year at the earliest. If that is correct, the bracket would not have been found at the time of Mr Shepherd's survey. Dr O'Callaghan and Mr Holmes did not see the actual bracket but, working from photographs, Dr O'Callaghan considered that the bracket would have been there for between 4 and 6 years. Mr Holmes had expressed the opinion in his report that it may have been there for up to 8 years; but in the joint report he was not prepared to make any comment.

32. It is a matter of some concern that the fungal bracket had been removed prior to examination (Mr Holmes visited on 9th May 2016) notwithstanding that it had been preserved for expert examination. It is not known who removed it or for what purpose, and I do not propose to speculate. In the result, Mr Barrell had the advantage of seeing the real object rather than a photograph. If the bracket had been retained, it could have been subjected to analysis and microscopic inspection and its age determined with some accuracy.

33. There are thus two issues arising from all of this. Was a three-year inspection cycle adequate and reasonable? And would the bracket have been found on proper visual inspection at the time of the survey (which was undertaken between late July and early October)?

34. I can now move on to consider the issues in the case and make my findings.

8 Issue: Did Mr Shepherd inspect the tree in 2009?

35. Mr Shepherd had represented to Witley that he had £5 million insurance and he believed that to be the case. He did have a £5 million insurance policy but it did not provide him with protection against liability for this accident. It is not necessary for me to consider that any further. It is sufficient to note that, when a claim was first made against him (by Witley), he notified his insurers and, for a time, he was represented by solicitors (Messrs Morgan-Cole) appointed by them. First, however, he wrote to Messrs Greenwoods (solicitors for the First Defendant) in January 2013 (1/ 1043).

> *"The tree was part of a works inspection in 2009 ... the tree in question was in full health and slight works were required ... There was no sign of disease or fungi at the time of viewing."*

36. In July 2013 Messrs Greenwoods inquired by e-mail for the date of the inspection and received the reply from Sarah Fanthorpe of Morgan-Cole (4/ 49):

> *"Mr Shepherd cannot confirm the exact date but it was sometime in July/ August 2009."*

37. It was not until the insurers had declined cover and a defence was filed that Mr Shepherd denied that he had inspected the tree.

38. I can interpolate this. When cross-examined about the Morgan-Cole response from Ms Fanthorpe, he had no answer, except to say that she was not his solicitor but represented the insurers. He had no sensible explanation as to how she came to give that allegedly false information.

39. In his witness statement (taken in the usual way to be his evidence in chief) (3/ 1213 at pages 1216 – 7) Mr Shepherd said: (i) that he had recommended sonic

testing and root investigations on the trees in potentially hazardous locations. He believed this had been said to Ms Evans; (ii) that he was provided with only a few maps and he telephoned Witley offices a number of times requesting the missing maps; some of these were provided in a piecemeal fashion but many were not forthcoming; (iii) that at the end of the day he and his assistant (Mr Balham) would call into the office to get more maps, but with varying success; (iv) that he made it clear in conversations at the office and on the telephone that he would not survey trees in areas where he had no maps; (v) for those missing areas he wrote the words "*no works*" which was intended to convey that he had been unable to survey those trees; and (vi) that he personally delivered the completed survey at the Witley office (*"I believe it was Rae Evans that I saw*"). He went through the survey with her and explained that he had not surveyed those areas for want of maps and that he had marked those areas with the words "no works". In short, he had pestered the Parish Council time and time again for maps – but with little success.

40. I can pause to note that Witley no longer employed Rae Evans when the survey was completed so, insofar as he met anyone, it was not she. I am afraid that I completely reject this evidence and find that Mr Shepherd was deliberately untruthful about all of this. He was aided and abetted in this dishonesty by his wife who also gave evidence. This is a finding, which I can make on an overwhelming balance of probability.

41. There are many reasons why I reject this evidence. Apart from a full-time groundsman, Witley Parish Council had only 3 part time employees; a parish clerk, (working 30 hours per week) a second employee who acted as assistant clerk and also as finance manager (25 hours) and an administrative assistant (a mere 6 hours). The clerk was first Ms Evans and second Ms Fox. Both gave evidence that they were unaware of having met Mr Shepherd; they knew nothing about requests for maps. If there had been requests, maps could have been provided. Far from being pestered about this (the impression given by Mr Shepherd) they knew nothing about it. A statement from Patricia Jameson, the assistant clerk at the time, was admitted in evidence (2/ 1197). Ms Jameson had

no recollection of there being requests for maps. It is just inconceivable that (whoever out of this small cohort of people Mr Shepherd saw) the news of his request would not filter back to the one person who needed to know, namely the clerk. This was not a large organisation where messages may be lost in transit. And Mr Shepherd could produce no written request or any other tangible corroborative evidence.

42. Mr Balham, who was Mr Shepherd's assistant, also gave evidence. His statement is to be found at 2/ 1209. At paragraph 14 on page 1210:

> *"When we went to request the maps we would go inside D1's office and Kevin would ask whoever was in the office for the maps. We kept trying to get the rest of the maps whenever we were out surveying. Sometimes Kevin would telephone D1's offices and ask for the maps while we were actually out surveying."*

43. In the witness box he also said that they would visit in the afternoon at the end of the working day. But, as both Rae Evans and Fiona Fox told the court, the office was only open until lunchtime.

44. I had no hesitation in accepting the evidence called on behalf of the First Defendant and I find that these requests for maps are a complete work of fiction. Neither of the two clerks had heard of sonic testing. That is an additional piece of embroidery, made up by Mr Shepherd, in an attempt to bolster his position. In any event the lime tree was well known to Mr Shepherd. He had surveyed it before. Its position had been identified in the invitation to tender (between the two benches) and there was no reason for him to exclude it from his survey. His reply both in person and later through his solicitor in the early exchanges confirmed that he had inspected this tree and it was not until he panicked (on learning that he was not insured) that this fiction was created.

45. Sadly it does not end there. I have already made reference to the letter of 20th January 2013 (2/ 1043). There is another copy at 1/ 380. There is a further letter at 1/ 381 dated 21st January 2013 typed by Mrs Shepherd on her husband's behalf. It was not part of the disclosed material in this case and did not arrive at Greenwood's and find its way into their files. It has been produced fraudulently, as I find, at a much later stage. It purports (obviously) to explain away the

admission that the tree had been inspected in 2009. The letter at 1/ 130 had been sent as an e-mail attachment as well as through the post. Having sent that e-mail, the Shepherds told me that they realised the mistake and so the next letter was written immediately. They had no explanation as to why that letter also was not attached to an e-mail to correct the error urgently. This document was created many months or years later in order to help deceive the court.

46. I find that Mr Shepherd did inspect the tree as part of his survey in 2009. He clearly failed to find the fungal bracket. When he knew that the tree had fallen by reason of this root decay – and that there was a clearly visible fungal bracket – he made the reasonable assumption that he had missed it. I suspect that he may well have been able to remember how he had inspected the tree; that he gave it a most cursory examination and had every expectation that he would be found to have been negligent. He was not to know that (at least according to one of the experts) the fungal bracket would not have been detected in the autumn of 2009. And so he lied in an attempt to escape liability. If he had been insured, he would have continued to accept – as he did at the outset – that this tree fell within his survey and that the words "*no works*" meant – as anybody might reasonably think – that he had surveyed and that no works were needed.

9 Issue: What was the age of the fungal bracket? Was it there to be found in the late summer of 2009?

47. I can deal with this issue briefly. Mr Barrell had the undoubted advantage of viewing the actual bracket in situ. His analysis was well reasoned and the photograph upon which he has himself drawn the lines between the annual increments (2/ 619) speaks for itself. He brought to court an example of a fungal bracket and was able to demonstrate to me how the growth stops and starts during the autumn and winter period, leaving tell tale dividing lines. By the time he came to court, Mr Holmes was not prepared to commit himself and Dr O'Callaghan failed to convince me that his view of the photographs could be as trustworthy as a proper view of the actual live bracket. On this issue, I find that Mr Barrell's evidence is to be preferred. The bracket was just beginning to form in

the late summer of 2009 and, if Mr Shepherd had inspected fully and properly (which he almost certainly did not) he would not have discovered it.

10 Issue: Was the First Defendant negligent in any of the respects pleaded?

48. Insofar as Mr Bleasdale QC on behalf of the Claimant continued to pursue his allegations that Mr Shepherd was not adequately qualified to undertake the survey and that Witley had been negligent in appointing him, the question is now an academic one, given my finding about the age of the bracket. Such negligence if proved would not be causative of the accident. Similarly, the allegation that there was a duty on Witley to take further steps to ensure that he was adequately insured against liability. However, I can say that I would most certainly not condemn Witley in negligence in those respects. There was a representation that Mr Shepherd had valid insurance and I am entirely persuaded that there is no further obligation in that respect. I am also satisfied that Mr Shepherd had the necessary experience and expertise to undertake a survey of this kind – and this was something that was effectively conceded by Dr O'Callaghan.

49. But was Witley negligent in adopting a policy of inspecting the tree stock on a three-year cycle?

50. There are various pieces of evidence which Mr Bleasdale suggests point to a shorter time frame. He relies principally upon the literature and the four documents to which I referred in para 23 above and to which I will return later in this Judgment. But he draws also on other pieces of evidence.

51. Mr Shepherd, the expert instructed to do the survey, had himself urged a two-year time frame. I have rejected much of Mr Shepherd's evidence, but I can accept his evidence about this, given that it is reflected in his letter of 2nd July 2006 ("*the survey will be for 24 months*" 1/ 47 and 1/ 48). It is submitted that there is an obligation to act on expert advice. Here Witley's own appointed expert was the person tendering this advice.

52. The minutes of a meeting of Witley Parish Council on 4th March 2010 (1/ 224) contain the following (at 225):

> *"WBC's Tree Officer confirmed that trees located within their borough are zoned into high/ medium and low risk areas and their tree survey is phased accordingly. High risk is assessed annually; medium/ high 2/3/4 years; low five years plus."*

53. WBC is Waverley Borough Council. It may be noted that a one-year inspection cycle was being operated at the relevant time by Waverley in respect of trees in high-risk ***areas*** (my emphasis). The high risk is the area and not the tree. This was confirmed by Mr Arno Spaarkogle (3/ 1190 – 1194) who was called to give evidence on behalf of Witley. Mr Spaarkogle is the tree officer in question, a qualified arboriculturist, employed by WBC. Within his evidence he said this (3/ 1191):

> "In 2009 we operated a policy of trying to inspect trees in high-risk areas every year and to inspect other trees every 2 to 5 years in zones of less risk. We found this aim impossible to achieve with the resources available to us given the scale of the task. In recent years the guidelines have changed following court decisions and advice from the National Tree Safety Group and since 2013 we have adjusted our approach and adopted a three-year inspection regime for high-risk zones."

54. Mr Bleasdale submits that here was more advice ignored by the First Defendant. A significantly larger public body, acting on guidelines in force at the time, adopted a policy of once a year inspections for trees in high-risk areas, and this applied to apparently healthy trees. WBC has a great number of trees (as Mr Spaarkogle told me). When it changed its policy in 2013, a driving force was the lack of resources (not something that Witley has prayed in aid) and changing guidelines and perceptions. But the fact remains that, at that time (2010) that was the policy being followed. Some two years before Mr Cavanagh's accident, Witley had taken the trouble to consult a more expert body (with its own qualified arboriculturist) had received the advice and had ignored it.

55. It is an unfortunate fact that a 3-year gap failed to prevent this accident. It was coincidental that the 2009 survey coincided with the first signs of the bracket and it was another unfortunate fact that the accident occurred on the very eve of the 2012 survey. Mr Bleasdale relies upon the evidence of what happened next. The 2012 survey was done by Mr Andrew Pinchin, a chartered arboriculturist. The letter accompanying his report (1/ 359) dated 22nd October 2012 contains this:

"All of the sites have been classified as high-risk sites and I have recommended that the trees be re-inspected in two years time."

56. Once again the recommendation is based upon the nature of the site. Where there is a high-risk site, all trees within that site should be inspected every two years. On this occasion the First Defendant adopted that policy and high-risk sites are now inspected on a 2-year cycle. Mr Bleasdale accepts that hindsight can be a dangerous weapon and that it is trite law that a new improved policy after an accident is not to be taken as an acceptance that there was pre-accident negligence. Nevertheless, it was Mr Pinchin's opinion (as it had been Mr Shepherd's and Mr Spaarkogle's) that a two-year cycle was appropriate.

57. I now propose to look at the literature. As mentioned earlier in this Judgment, there are four potentially relevant documents to which I have been referred. They are: 'The DoT Code' (2/668); 'HSE SIM" (2/ 652-657); 'FC Guide' (2/ 602 & 658); and 'DoE Circular' (extract at 2/ 669).

58. *The DoT Code (extract at 2/668);* It is agreed by the experts that the DoT Code is a relevant reference as a starting point for assessing the frequency of inspection required for checking roadside trees; see 2/747. This provides (2/ 668) that;

> "*Most trees should ideally have an arboricultural inspection every five years but this period may be reduced* ***on the advice of an arboriculturist****. Default intervals ... every five years*" (my emphasis).

59. I pause to note that two arboriculturists had recommended a two year interval (Mr Shepherd and Mr Spaarkogle of WBC). I also note the agreement that this is but a "*starting point*".

60. *The HSE SIM (2/652-657):* The experts agree that the HSE SIM is a relevant reference for determining the type of inspection required for checking roadside trees; see 2/ 747.

61. Of relevance to this case are paragraphs 6, 7 and 10. This document has a target audience of FOD Inspectors and Enforcement Officers. It is not aimed at what it calls "*duty holders*". It is not intended to advise persons such as landowners with trees adjacent to a highway. There is no mention of "*high risk*" zone; only (i)

areas of frequent public access and (ii) areas where trees are not subject to frequent public access (para 10.i). There is a need in the former zone for periodic inspection. This need only involve a "*quick visual check*" for "*obvious signs*" that a tree is likely to be unstable. This need not be by an arboricultural specialist but by a person with a working knowledge of trees (para 10.ii). It is only when trees are identified as having a structural fault presenting an elevated risk that a competent arboriculturist is required (para 10.vii); and "*inspection of individual trees will only be necessary where the tree is in, or adjacent to an area of high public use, has structural faults that are likely to make it unstable and the decision has been made to retain the tree with these faults.*" (para 10.viii)

62. It is not clear to me that this document has any real relevance to this case (notwithstanding the experts' agreement) and I will need to revert to this in due course. At this stage I only mention that paragraphs 6 and 7 are of great significance.

63. *The FC Guide (extracts at 2/ 602-5 & 2/658-60);* This document is described as a "general guide" and, of significance here, contains the following:

    i. *In the case of hazard management it is necessary to take reasonable steps to identify trees which represent a significant risk to people or property and to deal with them accordingly;* 2/ 659
    ii. *The need for a particular tree or group of trees to be inspected depends upon the usage of the area within their potential falling distance. Inspection is unquestionably necessary within zones where people or high-value items of property are continuously or frequently present close to trees which are capable of being hazardous. Clearly however there are remote areas where tree failures are very unlikely to cause injury or damage; 2/603*
    iii. *The key consideration is foreseeability; if it can be reasonably foreseen that anyone (guest or trespasser) could be at risk, the occupier has a duty of care to reduce the risk within reason;* 2/ 604
    iv. *Hazards from large old trees sometimes develop quite rapidly, for which reason an inspection frequency of one year or more is generally advisable where such trees occur on high-usage sites;* 2/604
    v. *A ... zone, representing a need for inspection to be carried out more frequently may be appropriate for the strip along the public road. The need for such a zone applies especially if the road is busy and if the trees are large or old enough to represent a significant potential hazard;* 2/605

64. *DoE Circular (2/ 669 - 70):* In respect of this document, the experts agree that the DoE circular is relevant for identifying the tree conditions that should be looked for, and the competence levels required when carrying out inspections (2/ 748). As the experts then go on to agree that a competent inspector should have a working knowledge of trees as a minimum, and as there is no help on frequency of inspection, I do not need to consider this document any further.

65. What do I make of this literature? I am content to accept that the DoT Code is of assistance in divining a ***starting point*** for assessing the frequency of inspection required in any particular situation (my emphasis) and I agree fully with the notion that a landowner should take account of advice given by an arboriculturist, as the Code suggests. This document provides no more than a starting point. The HSE SIM, on the other hand, is of little or no value in this case. It was written for FOD Inspectors and Enforcement Officers with a view to taking enforcement action under the criminal law. This is made clear by paragraphs 6 and 7. It is only concerned with criminal enforcement. It sets out standards below which a duty holder (such as Witley) would have to fall in order to be subjected to criminal enforcement or prosecution. If this document had relevance to duty holders, no tree would ever be required to undergo anything more than a quick visual check by a relatively inexperienced person on a periodic basis, even in an area of high public access; areas which would include which might be described as high risk.

66. The short point is this. The HSE SIM sets standards which a land owner (duty holder in its language) must meet in order to avoid prosecution. It does not claim to set the levels of a duty of care required by the prudent land owner within the civil jurisdiction. If it pretended to do so, it would be significantly at odds with that which the FC Guide recommends; and it would contradict many a decision of the courts.

67. The document from which I receive most assistance is the FC Guide. I distil the following principles: Where a tree (or group of trees) is within an area (one may say a high-risk area but the language is unimportant) where people or high value property are within their falling distance, inspection is necessary. If it can be reasonably foreseen that there is a risk of serious injury / damage a duty arises to

minimise that risk; this is particularly the case alongside a public road, more so if it is busy and more so if the relevant tree(s) is / are large or old. It is known that trees (particularly older trees) can become diseased and unstable within a relatively short time frame.

68. In my judgment, this lime tree, alongside a relatively busy public road was in a high-risk position. It required regular inspection. It may not in itself have been a high-risk tree (insofar as no tree is to be deemed high-risk unless and until inspection shows it to be in difficulties). But it presented a higher risk than a smaller tree; than a younger tree; than a tree leaning away from the road. And there was another feature. If it failed it would undoubtedly cause severe damage, even if it fell when there was no vehicular of pedestrian traffic. The house opposite the tree was in direct line and was in fact damaged. It was saved from more severe damage by Mr Cavanagh's bus. If the bus had not broken the fall of the tree, anyone in the upper storey would have been liable to suffer serious injury.

69. I have reached the firm conclusion that this tree, in this position, should have been inspected more frequently than every three years. I can refer to the first bullet point in paragraph 9 of the Joint Experts' Report (2/ 748). Dr O'Callaghan accepted that he was wrong to call this tree an "*obvious high risk category tree*". But he was clearly correct in saying that it posed a risk of causing damage to people and property; also that it was in a high-risk category zone. In my judgment it was also part way to being a "*high risk category tree*". It was large. It was mature on the cusp of being old. It was heavy. It was leaning in the wrong direction. True, it appeared healthy to all but a detailed visual inspection; there was no excessive dead wood or lack of foliage. But it was clearly a higher risk than a smaller tree; than a younger tree; than a lighter tree; than a tree leaning the other way. And it was in a position of extreme high risk where, if it came down it was liable (as it did) to cause severe injury and / or other damage. Like all trees it could be struck with disease at any time. Latent root rot might be developing but not showing. A three-year period of neglect could be crucial – as indeed it turned out to be. I wholly concur with Dr O'Callaghan's statement that "*more detailed assessments of the tree were required as the Forestry Commission*

advises". In opposition to that statement (second bullet point para 9 2/ 748) Mr Barrell "*considers that the HSE SIM advice set out in 10 (ii) is relevant ...*" For the reasons I have already given the HSE SIM advice is of minimal value when assessing the extent of the duty of care in a civil action. I disagree with Mr Barrell's opinion.

70. I add three further things:

i. When Ms Rae Evans asked for tenders for the 2009 survey, she specifically asked for an individual report on this particular tree. This was to be a survey of all trees within the parish. This lime tree was singled out. Why was that? It could only be because of its position and potential for harm. In itself that is recognition of the need for especial care.

ii. On behalf of his client, Mr Pooles submitted that it had exceeded its duty. It did not operate a zoning policy (although it does now). It treated all trees with the same care and subjected them to a three-year inspection regime. That, I fear, is a part of the problem. This lime tree was treated to the same inspection regime as all other trees, including young saplings in areas far from the madding crowd. Of course, I have not been educated on the full tree stock, but I suspect that there may be a small handful of trees within the parish which might have merited more frequent inspection. I suspect that there was none that had more potential for causing harm than this lime tree. What was required here was a distinction. If the vast majority of the tree stock had been inspected (as it could well have been) on a much more infrequent basis (and perhaps left to the groundsman for occasional pruning etc) a proper and more rigorous system of inspection could have been instigated in respect of the small number of trees which merited especial care; trees which were large, heavy, old / mature, and in places where they could cause serious damage. On the application of simple negligence principles (taking account of the risk of failure together with the risk of serious damage) the material lime tree should have been inspected at least every two years. If I had been required to say so, I would have found that an 18-month cycle (inspection in and out of leaf) would have been reasonable. I am further satisfied that the FC Practice Guide is the most relevant piece of literature and that it fully supports this finding. It is also of great significance that, prior to the accident, this was

the advice being given to Witley by arboriculturists (Mr Shepherd and Mr Spaarkogle).

iii. In the course of this trial I was told (I think) that Witley Parish is some 11 square kilometres in size. It has a good number of trees, but the vast majority are either not along the road side or are not of a size and weight where they would cause severe injury or damage if they were to fail. I do understand (and have directed myself) that the First Defendant is not an insurer and that resources are finite. It has not been suggested that the inspection policy has been influenced by a lack of funds. But, in any event, the recently instituted zoning policy enables resources to be channelled to a more frequent inspection of some trees, with savings made in zones where there is little or no risk and where less frequent inspections can be made. This would ever have been a more sensible and economic policy.

11 Final summary and result

71. I find (i) that Mr Shepherd inspected the tree as part of the 2009 survey; (ii) that he failed to find any fungal bracket; (iii) that he has dishonestly claimed that he did not inspect; (iv) that the fungal bracket would have started to form at or about the same time as he inspected and would not have been found, whether his inspection was cursory or careful; (v) that, on the balance of probability, Mr Shepherd's inspection was carried out negligently; but that (vi) such negligence was not causative of the accident in which the Claimant was injured; (vii) that Witley's policy of inspection of the lime tree on a three yearly cycle was inadequate; (viii) that a reasonable inspection regime would have been no less than every two years (ix) that a two-yearly inspection would have discovered that the tree was diseased well in advance of the accident; (x) that the tree would have been felled or otherwise made safe and the accident would not have occurred; (xi) that Witley were not negligent in any other of the respects pleaded against them; (xii) that there should be judgment in favour of the Claimant against the First Defendant; and (xiii) that the claim against the second Defendant should be dismissed and that there should be judgment in his favour.

Alistair MacDuff 14th February 2017