

Tree Roots, Property Damage and the Law: an Update

Keywords

Trees, Subsidence, Damage, Case-law

Abstract

The case law regarding liability for subsidence damage following encroachment by tree roots from neighbouring land is presented in the context of the recent House of Lords judgment in the case of *Delaware Mansions Ltd v The City of Westminster*.

Introduction

In the past decade the insurance industry has paid an average of £304 million annually in claims for subsidence damage to domestic property. The minimum annual figure during this period was £125 million (Association of British Insurers, 2001). A major factor is desiccation caused by removal of water via tree roots (Driscoll, 1983).

Technical guidance is provided, *inter alia*, by BRE (1999) and NHBC (2000).

Williams (1999) examined legal liability for damage caused by tree root encroachment onto neighbouring property. The latest case considered by Williams was *Delaware Mansions Ltd and Others v Westminster City Council* which had just been the subject of a case in the Official Referees court. That case has subsequently been taken to the Court of Appeal and the House of Lords. The House of Lords judgment has provided a

useful summary of much of the law concerning root encroachment and damage. .

Whilst it is likely that this case will be the subject of an entry in one of the standard law report journals, this current short paper is intended to present a summary of the Delaware judgment in a form suitable to support the technical papers on subsidence frequently found in this journal. The emphasis is on providing a summary of the identified legal principles in a logical sequence. The facts of the earlier cases, though interesting, have generally already been outlined in the earlier paper by Williams (1999). Considering the cost to insurers of subsidence damage and the often important role of roots, it is interesting to note the comment by Lord Cooke of Thorndon in the delivery of his House of Lords judgment that there is only a handful of reported cases decided in England on damages for root encroachment.

Liability for Damage

The principle of the neighbour being held responsible for damage caused by soil shrinkage through moisture abstraction following root penetration was established in *Butler v Standard Telephones and Cables Ltd* [1940].

Restraint on Continuing Nuisance

In *Sedleigh-Denfield v O'Callaghan* [1940] the House of Lords held that an occupier of land “continues” a nuisance if, with knowledge or presumed knowledge, he fails to take reasonable means to bring it to an end when he has reasonable time to do so. It was

held in *McCombe v Read* [1955] that an injunction could be issued against continuing nuisance to property caused by tree root encroachment.

Planted or Self Sown?

The defendant in *Davey v Harrow Corporation* [1958] put forward the argument that there was no liability in respect of damage caused by the encroachment of roots of trees that had self-sown rather than been planted. This argument was rejected by the court.

Knowledge and Foreseeability of Damage

It was established in the New Zealand case *Morgan v Khyatt* [1964] and subsequently in the English case *Greenwood v Portwood* [1985] that liability for the tort of nuisance requires knowledge of the damage being caused. This requirement for knowledge unfortunately encourages “shutting the stable door after the horse has bolted” since there is no direct encouragement to take precautions in advance of the damage.

In *Solloway v Hampshire County Council* [1981] the question of foreseeability of the damage by tree roots was considered. Following the principle established in *Leakey v National Trust* [1980], the defendant council argued that to be found liable there must have been a reasonably foreseeable risk of damage by root encroachment. This approach was accepted by the court.

Cost and Inconvenience of Investigation

The court in *Solloway v Hampshire County Council* also considered the cost to the county council and inconvenience to householders in carrying out investigations throughout the county to establish whether conditions likely to result in root encroachment and damage were likely to exist.

Changed Ownership of the Damaged Property

In *Masters v Brent London Borough Council* [1978] the leasehold ownership of the property damaged by the encroaching roots was transferred after the defendant council had accepted that an actionable nuisance had occurred. The damage continued after the transfer of the lease. The council argued that they could not be held liable to the new lessee for damage that occurred before the transfer of the lease. This argument was rejected by the judge who said “Where there is a continuing nuisance inflicting damage upon premises those who are in the possession of the interest may recover losses which they have borne whether the loss began before the acquisition of the interest, or whether it began after the acquisition of the interest. The test is: what is the loss which the owner of the land has to meet in respect of the continuing nuisance affecting his land?”

The *Delaware Mansions* case also hinged on the effects of a transfer of ownership of properties: in this case from the Church Commissioners, who developed the properties early in the 20th century, to a management company established by the residents of the properties. A plane tree owned by Westminster had caused damage to the properties

prior to the transfer of their ownership. Westminster argued that only the previous owner could sue for damages in spite of the decision in *Masters*. This argument was accepted [1998] by the original trial judge but reversed by the Court of Appeal [2000] which saw the situation as that of a continuing nuisance. The House of Lords confirmed the Court of Appeal decision.

Reasonable Notice to Tree Owner and Opportunity to Carry Out Remedial Work

In *Delaware Mansions*, Lord Cooke sees *Solloway v Hampshire County Council* “as important as a salutary warning against imposing unreasonable and unacceptable burdens on local authorities or other tree owners. If reasonableness between neighbours is the key to the solution of problems in this field, it cannot be right to visit the authority or owner responsible for a tree with a large bill for underpinning without giving them notice of the damage and the opportunity of avoiding further damage by removal of the tree.” In this case it was judged that Westminster had been given ample notice and time. Presumably the judge’s words “removal of the tree” could be replaced by words describing any action that avoided further damage.

Conclusion

The House of Lords judgment in *Delaware Mansions v City of Westminster* is not only valuable in its own right but also for the useful compilation of previous cases concerning damage caused by encroaching tree roots. In this paper the information has

been presented in a different format to that usually encountered in a law report to make it of more immediate utility to those involved with the technical aspects of subsidence damage.

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List of Cases

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