IN THE COUNTY COURT AT COVENTRY **C32YP685**

(sitting in WALSALL)

Before His Honour Judge Mithani QC

B E T W E E N:

Ryandeep Colar

Paul Singh

Claimants

and

Highways England Company Ltd

Defendant

Mr Ian Pennock (instructed by **Morrish Solicitors LLP**) for the **Claimants**

Mr Simon Murray (instructed by **Government Legal Department**) for the **Defendant**

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

……..

His Honour Judge Mithani QC

Date: 25 September 2019

THE CLAIM

1 This is a claim in which the Claimants, Ryandeep Colar and Paul Singh, claim damages for personal injury caused as a result of a tree that fell over in the path of a car on the A45 Trunk Road which was being driven by the Second Claimant. The First Claimant, who is the Second Claimant's son, was a front-seat passenger in the car. There was also another passenger in the car, a Mr Jasveer Singh, who was the brother of the Second Claimant. He too made a claim in these proceedings. However, he has since discontinued the claim.

2 The stretch of the A45 in question was a dual carriageway with a central reservation which was lined with tall mature trees planted by the Defendant.

3 Both claimants suffered injury. The First Claimant, then aged 19, was seriously injured in the crash. The Second Claimant suffered less serious injury.

4 The Defendant disputes that it is liable to compensate the Claimants for their injury. By an order dated 17 January 2018, made in these proceedings, Deputy District Judge Mullen directed that the issue of liability in the claim be dealt with as a preliminary issue. The trial of that issue took place before me over a number of days. This is my judgment on the issue.

THE FACTS

5 As the circumstances of the accident are agreed, they only need brief mention by me.

6 The accident occurred along the A45 dual carriageway between Rugby and the Stretton roundabout in the direction of Rugby. The central reservation of the stretch of road in question was lined with tall mature trees planted by the Defendant. A number of the trees were lime trees. They included a tree, described in the papers as a *T1: European Lime; Tilia X Europaeas Tilaceae*, which was approximately 17 metres tall, with a 10-metre crown spread and 540 mm stem diameter at the base ("the Tree").

7 The Second Claimant was driving his motor vehicle (a Peugeot 307, registration number LX08 SBV) along this stretch of the road at around 6 pm on 18 December 2013. The First Claimant was a front seat passenger in the car. His uncle, the Second Claimant's brother, was in the rear passenger seat, sat behind the First Claimant.

8 There was no street lighting along this stretch of the road. The Second Claimant was driving in the offside lane of the dual carriageway with the barrier for the central reservation to his right. He was driving at a speed of approximately 50 mph when the Tree fell on to the carriageway into the path of his motor vehicle. The motor vehicle collided with the Tree at speed and, as I have indicated, both claimants were injured as a result of the accident, the First Claimant having sustained very serious injury. I should make it clear at the outset that while the injury suffered by the First Claimant would undoubtedly engender the sympathy of the Court, that fact should be disregarded completely when deciding whether the case of the Claimants on the issue of liability is made out.

9 Although in its Defence, the Defendant alleged that the Second Claimant had been guilty of contributory negligence, that allegation is no longer relied on. The only issue for the court, therefore, is whether

the Claimants have been able to demonstrate that the Defendant is liable for the accident.

THE BASIS OF THE CLAIM

10 The basis upon which it is alleged by the Claimants that the Defendant is liable to them for the injury which they suffered is set out at paragraph 11 of the Particulars of Claim.

11 It is not in dispute that the Defendant is a highway authority and that, in that capacity, it is responsible for maintaining the stretch of the road where the accident took place. The Claimants allege that the accident was caused as a result of the breach of the duty of the Defendant to maintain the highway pursuant to its obligation under section 41 of the Highways Act 1980 or as a result of its common law duties in nuisance and negligence. Specifically, the Claimants allege that the Tree was (and had for some time been) in a dangerous condition and by failing to remove the Tree, when it had, for some time, been in that condition, the Defendant had failed to comply with its obligation under section 41. Alternatively, if, as the Defendant contends, the obligation in section 41 does not extend to the Tree, the Defendant was in breach of its common law duties in negligence or nuisance by failing to take all appropriate and proper steps to remove the Tree in order to guard the public against the risk of an accident occurring from the possibility that the Tree might fall at some point in time.

12 The position of the Defendant may be summarised in a few short points: (a) it accepts that the Tree was in a dangerous condition at the time of the accident. The Tree had fallen because it had been infected by a wood decay fungus known as *Kretzschmaria Deusta* or, as it has been described in the papers, *K. Deusta*. However, the Defendant disputes that the maintenance and upkeep of the Tree formed part of its duty under section 41; (b) even if the maintenance and upkeep of the Tree was part of its obligation to repair the highway under section 41, it has a complete defence to the Claimants' claim under section 58

of the Highways Act 1980 because there was a reasonable and regular system in place for the inspection and maintenance of the carriageway and the trees along the relevant stretch of the carriageway, and the Defendant fully complied with that system through the subcontractors which it employed, Amey LG Limited ("Amey"); (c) the claim for breach of the common law duty alleged by the Claimants cannot be made out because of the reason referred to in (b), above, i.e. because there was a reasonable and regular system in place for the inspection and maintenance of the trees along that stretch of the carriageway, which the Defendant fully complied with; and (d) the Claimants cannot prove that the accident was caused by the Defendant's negligent acts or omissions. That is because the Tree was inspected on 19 February 2013, some ten months before the accident, by an arboriculturalist employed or instructed by Amey and it was not found to have needed any attention.

THE LAW

13 A number of issues have arisen between the parties concerning the legal principles which govern the present claim.

14 The principal legal issue which arises between them is whether the present claim is governed by section 41 of the Highways Act 1980. The Defendant disputes that it is. If the claim is governed by section 41, the Claimants contend that they need only prove that the Tree was in a dangerous condition. If they can do that – and they plainly can because it is common ground between the parties that at the time of the accident, the Tree was in a dangerous condition – the Defendant must be liable for the accident and can only escape that liability if it can avail itself of the statutory defence set out in section 58 of the Highways Act 1980.

15 Moreover, the Claimants contend that if the Defendant cannot make out the defence in section 58, they are entitled to succeed without having to prove causation. They rely upon the judgment of Toulson LJ

(as he then was) in *Wilkinson v The City of York Council* [2011] EWCA Civ 207 at [38] in support of that proposition:

> "Subparagraph b) in the passage cited from the judgment of Steyn LJ [in *Mills v Barnsley Metropolitan Borough Council* [1992] PIQR 291] reflects the need for the claimant to show that the danger was due to a failure to maintain in the absolute sense explained by Lord Denning [in *Haydon v Kent County Council* [1978] QB 343)], but no more than that. Properly understood, it provides no foundation for the argument put forward by Mr Limb [counsel for the defendant in that case]. Mr Limb's argument amounts to saying that section 58 makes it now incumbent on a claimant in every case of this kind to prove that there was not merely a breach of the duty to maintain but a negligent breach of the duty to maintain. That proposition was rejected by this court in *Griffiths v Liverpool Corporation*, which Lord Denning cited. In that case, Diplock LJ said at 390–391: 'sub section 2 [of section 1 of the Highways (Miscellaneous Provisions) Act 1961, which is now section 58 of the 1980 Act] does not in my opinion make proof of lack of reasonable care on the part of a highway authority a necessary element in the cause of action of a plaintiff who has been injured by danger on the highway. What it does is to enable the highway authority to rely upon the fact that it has taken reasonable care as a defence — the onus of establishing this resting upon it. A convenient way of expressing the effect of the subsection is that it does not qualify the legal character of the duty imposed by subsection (1) but provides the highway authority with a statutory excuse for not performing it … Unless the highway authority proves that it did take reasonable care the statutory defence under subsection (2) is not available to it. Nor is it a defence for the highway authority to show that even if it had taken all reasonable care this might not have prevented the damage which caused the incident.'" (My underlining).

16 The Claimants say that it will not be a defence to an allegation of breach of duty under section 41 (where the statutory defence in section 58 is not available) for a defendant to establish that taking reasonable care would not have made any difference because it would not have avoided the accident taking place. They say that this reflects the "absolute" nature of the duty under section 41 and enshrines the fundamental principle of liability under that provision that a highway authority is liable for any accident which arises from a highway being in a dangerous condition unless it can avail itself of the defence in section 58. They refer to the following observations of Toulson LJ in *Wilkinson*, at [11], in support of that proposition:

> "The common law duty owed by the inhabitants at large and, more latterly, their statutory successors for keeping the highway in repair has been replaced by what is now section 41 of the 1980 Act. Within its limits it is an absolute duty, but civil liability for injury caused by its breach is limited by section 58."

17 I agree with Mr Pennock that the words of Toulson LJ in paragraph [38], and the words in paragraph [11] of Toulson LJ's judgment, enable the Claimants to avoid having to establish causation if their

claim is governed by section 41. That much is also clear from paragraphs [36]-[37] of Toulson LJ's judgment, in which he said:

> "36 There remains the issue of causation, which has been advanced as an additional line of defence on this appeal. Mr Limb submitted that the burden was on the claimant to show that the pothole had arisen prior to the latest date when the authority ought reasonably to have inspected the road. There was no evidence as to when the pothole first developed. Accordingly he submitted that there was a fatal gap in the claimant's evidence. He based that submission on the following passage in the judgment of Steyn LJ in Mills v *Barnsley Metropolitan Borough Council* [1992] PIQR 291: 'The principles laid down are clear. In order for a plaintiff to succeed against a highway authority in a claim for personal injury for failure to maintain or repair the highway, the plaintiff must prove that a) the highway was in such a condition that it was dangerous to traffic or pedestrians in the sense that, in the ordinary course of human affairs, danger may reasonably have been anticipated from its continued use by the public; b) the dangerous condition was created by the failure to maintain or repair the highway; and c) the injury or damage resulted from such a failure. Only if the plaintiff proves these facta probanda does it become necessary to turn to the highway authority's reliance on the special defence under section 58(1).
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> 37 Mr Limb argued that it follows from the second requirement that the claimant has to show not only that the accident resulted from a defect in the highway of a kind which was liable to cause an accident, but also that the defect resulted from a failure by the highway authority other than the mere non-repair of the highway. In my judgment the argument is fallacious. It has to be remembered that it is not every dangerous condition of a highway which results from a breach of the highway authority's maintenance duty. This was made clear by Lord Denning at page 357:
>
> > "The duty to 'maintain' in the sense of repair and keep in repair is an absolute duty. This was emphasised by Diplock LJ in *Griffiths v Liverpool Corporation [1967] 1 QB 374 at 389* where he said: 'It was an absolute duty to maintain, not merely a duty to take reasonable care to maintain … 'In this respect it is like the duty to fence under the Factory Act. If a machine is not securely fenced, the occupier of the factory is liable even though he has not been negligent at all. So also if a highway is out of repair there is a failure to maintain, even though the highway authority has not been negligent at all. But this absolute duty is confined to a duty to repair and keep in repair. It was so stated by Diplock LJ himself later in *Burnside v Emerson [1968] 1 WLR 1490 at 1497* when he said: 'The duty of maintenance of a highway which was, by section 38.1 of the Highways Act 1959 , removed from the inhabitants at large in the area and by section 44(1) of the same Act was placed on the highway authority, is a duty not merely to keep a highway in such a state of repair as it is at any particular time, but to put it in such good repair as renders it reasonably passable for the ordinary traffic of a neighbourhood at all the seasons of the year without danger caused by its physical condition'." Lord Denning continued: "Maintain does not, however, include the removal of obstructions, except when the obstruction damages the surface of the highway and makes it necessary to remove the obstruction so as to execute repairs."

18 Mr Pennock described the nature of the duty under section 41 as being "absolute". I do not believe that the duty is "absolute" in the way I understand the meaning of that expression. It is only absolute in the sense explained by Lord Denning in *Haydon*, as stated by Toulson LJ in *Wilkinson* in the passage of his judgment [2011] EWCA Civ 207 at [38], cited above. However, in the final analysis, it does not seem to me that it matters if the duty is "absolute" in the way Mr Pennock appeared to suggest. That is because even if it is, when combined with section 58, it allows a highway authority to escape liability if the highway authority can demonstrate that it took "such care as in all the circumstances was reasonably required to secure that the part of the highway to which the action relates was not dangerous for traffic." However, I do agree with Mr Pennock that where a claim is governed by section 41, the effect of the observations of Toulson LJ is to eschew the usual principles of causation. It follows that if I come to the conclusion that section 41 applies in this case, I accept that would not be a defence for the Defendant to show that even if it had taken all reasonable care to ensure that the Tree was safe, it would not have prevented the accident from occurring.

19 Is the present claim governed by section 41 of the Highways Act 1980? The relevant provisions of section 41, for the purpose of the present claim, are to be found in sub-section (1) of section 41, which states[1]:

[1] It is also appropriate to set out the relevant provisions of section 58 of the Highways Act 1980. They are as follows: "(1) In an action against a highway authority in respect of damage resulting from their failure to maintain a highway maintainable at the public expense it is a defence (without prejudice to any other defence or the application of the law relating to contributory negligence) to prove that the authority had taken such care as in all the circumstances was reasonably required to secure that the part of the highway to which the action relates was not dangerous for traffic; (2) For the purposes of a defence under subsection (1) above, the court shall in particular have regard to the following matters: (a) the character of the highway, and the traffic which was reasonably to be expected to use it; (b) the standard of maintenance appropriate for a highway of that character and used by such traffic; (c) the state of repair in which a reasonable person would have expected to find the highway; (d) whether the highway authority knew, or could reasonably have been expected to know, that the condition of the part of the highway to which the action relates was likely to cause danger to users of the highway; (e) where the highway authority could not reasonably have been expected to repair that part of the highway before the cause of action arose, what warning notices of its condition had been displayed; but for the purposes of such a defence it is not relevant to prove that the highway authority had arranged for a competent person to carry out or supervise the maintenance of the part of the highway to which the action relates unless it

> "The authority who are for the time being the highway authority for a highway maintainable at the public expense are under a duty, subject to subsections (2) and (4) below, to maintain the highway."

20 There is no issue that the Defendant is the relevant highway authority responsible for maintaining the stretch of the A45 where the accident took place. However, the Defendant contends that the statutory duty in section 41(1) only applies to the maintenance of the structure of the highway (which includes the fabric of the highway and the drains associated with it) but not the trees in the central reservation area of the highway. That does not, of course, mean that it is not responsible for the upkeep and maintenance of the trees in the central reservation area. Plainly it is, but that duty arises under the usual common law principles which apply in negligence and nuisance.

21 There is no specific authority which deals with whether the duty in section 41(1) extends to a tree planted in the central reservation area. However, the Defendant relies upon several authorities which it contends makes it clear that the duty under section 41(1) does not extend to such a tree. They include the following: *Goodes v East Sussex CC* [2000] 1 W.L.R. 1356, *Hereford and Worcester County Council v Newman* [1975] 1 W.L.R. 901, *Shine v London Borough of Tower Hamlets* [2006] EWCA Civ 852 and *Stovin v Wise* [1996] A.C. 923.

22 I do not propose analysing those authorities. None of them has any, or any, direct relevance to the facts which arise in this case. In addition, on the basis that, as set out below, I find liability in negligence and/or nuisance proved in this case, I do not consider it necessary for me to do so. However, it might be appropriate for me to mention *Shine v London Borough of Tower Hamlets*, which encapsulates the principles that the Defendant sought to draw from the other authorities. In that case, the Court of Appeal held that section 66 of the Highways Act 1980 did not impose any liability on a highway

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is also proved that the authority had given him proper instructions with regard to the maintenance of the highway and that he had carried out the instructions."

authority for personal injury caused by defective barriers, including bollards, on a public highway. Nor did section 41 apply in such a case. If any liability arose in such a case, it arose in negligence. In the words of Buxton LJ (with whom Scott Baker and Richards LJJ agreed) at [13]:

> "It was argued that the defect in this case was in fact the existence of the insufficient hole in the highway into which the bollard had been placed and which caused the bollard to be insecure. I cannot accept that analysis, which it seems to me on the facts is highly artificial. The complaint in this case is that the bollard itself was insecure. That is a complaint about the street furniture. It is not a complaint about the nature of the highway. Much less is it a complaint in respect of failure to maintain the highway. The highway has already been interfered with by the placing of the bollard; that, as I have said, is why the power under section 66 is all that may be required. But the fact that the hole is inappropriate for the reception of the bollard is not a failure to maintain; it is a failure properly to ensure that the bollard is safe and upright."

23 Mr Pennock, on behalf of the Claimants, makes what I consider to be extremely powerful points in support of the contention that the duty of the Defendant under section 41 encompassed the Tree. He says that the authorities relied upon by the Defendant can be explained by the fact that they all related to acts of "misfeasance", rather than "non-feasance", i.e. they related to matters such as the negligent installation of a bollard on the highway, which was not, and never became, part of the fabric of the highway, as opposed to the maintenance of the fabric of the highway itself, which he says must extend to the Tree, stating in his closing submissions that "[t]he Tree was part of the fabric of the highway just as much as the grass verges etc and the Defendant failed in their s.41 obligation to maintain the tree so that it was safe for the passage of highway users." He draws attention to the fact that the highway in question was wide and comprised two carriageways, one in each direction, separated by farmers' fields to either side of the highway, which delineated the boundary-line between the highway and the fields, supported by the erection of fences. The Tree was not only in the middle of the highway (in the 'central reservation' part of the highway) but appeared to have been part of the highway for many years. He states that the proposition that the Tree was not part of the highway is "is quite surreal. It is like saying that an earth embankment at the side of a tarmac carriageway, and within the boundary fences of the highway,

was not part of the highway" and that the duty to maintain the highway applies only to the 'hard' 'constructed' part of the highway and not the grass verges etc. Yet the Defendant cannot explain how or why Highway Authorities were and are responsible for the maintenance of highways before the advent of tarmac or concrete when such highways were effectively compacted dirt roads[2]."

24 As I have indicated above, on the facts which apply in the present case, it matters little whether the claim is brought under section 41 or in negligence and/or nuisance. That is because, for the reasons referred to below, I find liability to be established by the Claimants in negligence and/or nuisance. However, in my view, the question whether trees planted in the central reservation area are, or become, part of a highway depends primarily on whether they can properly be seen to be an extension, integration or assimilation of the fabric of the highway or whether it is clear from their presentation, features, characteristics and extent that they can properly be said to be part of the "soft estate" owned or controlled by the highway authority. Grass verges and the like will usually be part of the fabric of the highway. In contrast, where the central reservation comprises hundreds of trees, those trees will be part of the highway authority's soft estate, rather than part of the fabric of the highway. The best depiction of the trees planted in the central reservation of this stretch of the A45 comes from the photographs which are included in the bundle. It is clear to me from the presentation, features, characteristics and extent of the trees in those photographs that they cannot properly be said to be part of the fabric of the highway. They can only properly be regarded as part of the soft estate owned or controlled by the Defendant.

25 It follows that I accept the contention advanced by the Defendant that the Tree does not fall within the scope of the Defendant's statutory duty under section 41.

[2] See paragraphs 8 and 9 of Mr Pennock's closing submissions.

26 Other than on the issue of causation, the question whether section 41 applies to the present claim has only one real practical significance. If section 41 applies then, because the Defendant accepts that the Tree was in a dangerous condition, it has to prove, to the civil standard of proof, that the defence in section 58 is made out. If section 41 does not apply, it becomes necessary for the Claimants to prove the ingredients necessary to establish their claim in negligence or nuisance against the Defendant. This involves the Claimants essentially having to prove either that there was no adequate system in place for the upkeep and maintenance of the trees in the stretch of the A45 where the accident took place or, if there was, the inspection was either not carried out in accordance with that system or not carried out properly.

27 The Claimants must also prove that the accident was caused as a result of the Defendant's breach of duty in negligence or nuisance. They must prove both breach of duty and causation to the usual civil standard of proof – i.e. the balance of probabilities. Breach of duty and causation must be established by the Claimants to that standard of proof if they are able to establish liability against the Defendant.

28 The principles which govern the common law duties, to which a landowner is subject, relating to upkeep and maintenance of trees are summarised paragraph [26] of the judgment of Flaux LJ (with whom the other members of the Court of Appeal agreed) in *Witley Parish Council v Andrew Cavanagh* [2018] EWCA 2232 by reference to the judgment of Coulson J (as he then was) in *Stagecoach South Western Trains v Hind* [2014] EWHC 1891 (TCC):

> "It was common ground before this Court that the relevant legal principles are correctly summarised by Coulson J as he then was in *Stagecoach South Western Trains v Hind [2014] EWHC 1891 (TCC)* at [68] (omitting references to earlier cases):
>
> > 'Accordingly, I consider that the principles relating to a landowner's duty in respect of trees can be summarised as follows:
> >
> > (a) The owner of a tree owes a duty to act as a reasonable and prudent landowner;

(b) Such a duty must not amount to an unreasonable burden or force the landowner to act as the insurer of nature. But he has a duty to act where there is a danger which is apparent to him and which he can see with his own eyes;

(c) A reasonable and prudent landowner should carry out preliminary/informal inspections or observations on a regular basis;

(d) In certain circumstances, the landowner should arrange for fuller inspections by arboriculturalists. This will usually be because preliminary/informal inspections or observations have revealed a potential problem, although it could also arise because of a lack of knowledge or capacity on the part of the landowner to carry out preliminary/informal inspections. A general approach that requires a close/formal inspection only if there is some form of 'trigger' is also in accordance with the published guidance referred to in paragraphs 53-55 above.

(e) The resources available to the householder may have a relevance to the way in which the duty is discharged.'"

29 In *Witley Parish Council*, the Court of Appeal held that the trial judge had been entitled to find, on the evidence, that a local authority should have inspected a large, mature tree next to a main road at least every two years, rather than every three years, as had been its practice. The judge's finding that the tree (which fell after a storm and seriously injured a bus driver) – had been in a high-risk zone and presented a significant potential hazard – was consistent with the expert opinion and Forestry Commission guidance, and could not properly be interfered with by the Court of Appeal.

30 The decisions in *Witley Parish Council* and *Stagecoach* make it clear that the regularity of inspections will depend upon the facts and circumstances of each individual case. As regards the regularity of inspections, the principal factor to take into account will be the risk which a tree poses to the members of the public and the appropriate interval between inspections will vary depending upon how that risk is managed.

31 The Claimants contend that the Defendant should have inspected this stretch of the A45 annually. Mr Roderick Benzies, who was called by the Claimants to give expert evidence, sets out at paragraphs 3.3 and 3.4 of his original report why this should be so. I am not sure whether Mr Julian Forbes-Laird, who was called by the Defendant to give expert

evidence, accepts this. He agrees that inspections at yearly intervals may have been desirable. He also appeared to accept that annual inspections were necessary but his evidence on the point was not entirely clear given what he said in his report: see page 72 of the transcript of the evidence on 13 June 2019. I do not know whether the Defendant accepts what Mr Benzies had to say. Whether or not it does, it contends that an inspection took place on 19 February 2013, less than a year before the date of the accident, and that that inspection did not conclude that the Tree required any attention. Accordingly, it contends that even if the court concludes that inspections should have been carried out at less than three years or even annually, the failure to carry them out at those intervals cannot be said to be causative of the accident. In addition, that stretch of the highway was subject to regular monthly, slow, 'in-vehicle inspections', with one having been carried out on 17 December 2013, the day before the accident. Those inspections did not identify that there was any problem with the Tree.

32 It is a fallacy to think that a survey that is carried out at intervals which are sufficient, and by suitably-qualified staff, will always pick up every defect with the condition of a road or of a tree. There will be defects which may be missed even where the inspection is carried out competently and at intervals which are appropriate. The focus of the inspection (and of the court when evaluating the evidence concerning the inspection) must be on whether there was an adequate system of inspection by reference to a risk-assessment or other document which identified what an inspector should look for, whether that document complied with national or local standards, whether suitably qualified staff were employed to carry it out and the regularity of such inspections. That does not mean that if these criteria are satisfied, the court must assume that the inspection has been properly carried out. There will be cases where it will be obvious (for example, from contemporaneous photographs) that a defect was so large and so obviously requiring attention that it could, or should, not conceivably have been missed by the inspector or there may be cases where so many obvious defects have been missed that it cannot said that the

inspection was carried out competently. Nor, usually, can it be said that a defendant is liable for an accident caused by a defect identified as requiring a particular level of response, which is subsequently found to be erroneous, if the level of response was implemented in compliance with appropriate national or local standards: see, for example, *Bowen v National Trust* [2011] EWHC 1992 (QB), especially, at [7] and [16] and [43].

REGULARITY OF INSPECTIONS

33 As I have indicated above, regardless of what the experts say, I am not sure whether the Defendant contends that it was sufficient for the trees planted in this stretch of the highway to be inspected at intervals of three years.

34 At paragraphs 3.3.3 and 3.4.1 of his original report, Mr Roderick Benzies, who provided expert evidence on behalf of the Claimants, states that the "location of the central reservation of the A45 would be a very high-risk location and frequency of inspections should be increased accordingly" and that, in his opinion, the inspections should be carried out annually. The expert instructed by the Defendant, Mr Julian Forbes-Laird, accepted that the Tree was in a high-risk location. Paragraph 21 of the joint statement which the experts prepared, states that the "experts disagree whether the inspection regime in place was suitable, though agree that annual inspections would have been desirable. JBL [i.e. Mr Forbes-Laird] considers that that triennial arboricultural inspection, supported by routine surveillance is a widely practised standard for highway trees." As I have indicated above, when giving evidence, Mr Forbes-Laird appeared to accept that an annual inspection was appropriate, though I am not sure that he was stating that it was necessary in this case.

35 I do not agree that a three-year cycle of inspection for this stretch of the highway was adequate.

36 The factors which make it clear to me that a three-year cycle of inspection was not sufficient for this stretch of the highway include the following: (a) the Tree was located in the central reservation area of the main A45 carriageway where, if it fell, it could readily fall across the carriageway. It was on a busy stretch of the highway where there was a lot of vehicular traffic – and where vehicles would have been travelling at speed, as the Second Claimant's vehicle was on the day of the accident[3]; (b) the stretch of the highway was poorly lit; (c) as happened in this case, the ability of vehicles when they were travelling at such speed to stop if an obstruction suddenly appeared in their path, particularly after the hours of darkness; (d) the Tree was both large and old and was liable to become diseased and unstable within a relatively short time frame – something which Mr Julian Forbes-Laird, himself alludes to at paragraph 5.1.4 onwards of his original written report; (e) if the Tree fell, it was liable to cause serious injury, as happened in the present case, or worse; and (f) while, of course, the demands made upon the resources of all public authorities are extremely high, it cannot be said that the defendant lacked the resources to carry out inspection on this stretch of the highway more regularly than every three years. However, the high demands on public resources is a factor which can never be underestimated.

37 In the absence of a risk-assessment carried out about whether the three-yearly cycle of inspection specified at paragraph 2.16.5 of the extract produced from the *Highways England Performance Requirements* appended to Mr Forbes-Laird's original report was appropriate given all the matters to which I have referred, I am unable to find that three-yearly inspections were adequate.

38 Just as the trial judge in *Witley Parish Council* did, I reach the firm conclusion that in the position in which the Tree was, it should have been inspected more frequently than every three years. It was in a

[3] I make it clear that the Second Claimant's vehicle was travelling at speed. It was not speeding.

position of extreme high risk and was liable to cause (and did cause) serious injury if it fell.

39 In the absence of a proper risk-assessment addressing the matters which I have identified as arising from the decision in *Stagecoach*, which was approved in *Witley Parish Council*, I conclude that inspection of the trees along that stretch of the highway should have been undertaken at intervals of at least eighteen months, but preferably every twelve months. However, although this finding would support a finding that the Defendant was in breach of its duty in negligence or nuisance to the Claimants, it does not provide an answer to the case of the Claimants on causation. That is because the Defendant's soft estate along this stretch of the road was inspected less than 12 months before the Tree fell.

THE ALLEGED INSPECTION IN 2012 AND THE INSPECTION ON 19 FEBRUARY 2013

40 A hugely unsatisfactory feature of the defence of this claim by the Defendant is that it has sought to defend this claim at all cost. It has taken every conceivable point available to it in its defence of the claim and has failed in its duty to provide proper disclosure to the Claimants of documents which are material to this case.

41 As a public authority, I would expect the Defendant to present to the court a balanced view of the evidence with a view to the court deciding whether the claim against it is made out. That – what I call a duty to act fairly against the Claimants – means that the Defendant should supply all the material which may be relevant in this case to the Claimants and not seek to pick and choose what material it should make available to them. It also means that if it is possible for it to call a witness (such as Ms Ellen Tune) who may be in a position to give relevant evidence to the court, it should, at least, make information (such as the contact details of the witness) relating to that evidence available to the Claimants because the Claimants' solicitors are not

readily likely to have that information available to them, though, in the present case, the Claimants' solicitors do not appear to have made any enquiries themselves about Ms Tune (until after the adjournment I granted to enable proper disclosure to be given by the Defendant to the Claimants) when it might have been possible (and was) without much effort to trace her.

42 When I enquired why Ms Tune had not provided any written evidence, I was informed that even if she were called, she is unlikely to remember anything about the inspection which she carried out and that, in any event, efforts made to trace her had proved to be fruitless.

43 I do not consider either point to have any substance.

44 Just as I would not expect a highway inspector in a case involving section 41 of the Highways Act 1980 to remember how he conducted the inspection which is the subject of the claim, I would not expect Ms Tune to remember anything about the inspection she carried out on 19 February 2013, still less to remember anything about the presentation of the Tree when she undertook the inspection. But just as I would expect a highway inspector to tell me how he normally conducted an inspection – specifically by reference to the criteria he applied (whether contained in nationally or locally promulgated guidelines or otherwise) – I would have expected Ms Tune, if she had been able to give evidence, to provide relevant information about her inspection on that date. She might have been able to tell me, among other things, what instructions she received to enable her to conduct the inspection, whether she was conducting the inspection by reference to any risk-assessment or any other document, the general and specific matters she was instructed to look out for, how the inspection was carried out, what criteria she would use to identify a tree which required attention, whether there was a tiered system of intervention, what the entries she made meant, what items she would not (or not be expected to record) in the inspection records, the role

that she and her colleague (who went on the inspection with her) undertook, the areas of the central reservation which she walked along, how long the inspection lasted, what precise area it covered and whether there was a possibility that she might have missed an area which was part of the inspection (and, if so, why that might be).

45 The evidence of Mrs Catherine Brookes, the regional director of the Midlands Operations area of the Defendant, purported to deal with some of these matters. However, she could provide very little information about that or any previous inspection conducted by, or on behalf of, the Defendant. She had only assumed her present role in October 2016 and, therefore, had no direct knowledge of any inspection prior to October 2016. Her entire evidence was based on what she assumed Ms Tune would do.

46 The relevant parts of her short witness statement were to the following effect (with underlined emphasis from me):

> "3 During the relevant parts of 2009-2014, the Highways Agency contracted out the maintenance of the SRN in its Area 9 [which includes the stretch of the A45 where the accident took place] to… Amey.
>
> 4 One of the contractual duties of Amey was to carry out safety inspections on the A45 sections included within Area 9… These were carried out every 28 days and there was one such inspection on 17 December 2013, the day before the accident.
>
> 5 The method of inspection was in-vehicle, with an operative driving, travelling at slow speeds with a colleague visibly inspecting the highways and its surrounds and recording their observations electronically.
>
> 6 The summary inspection records appear at pages 1 to 11 of Exhibit CB1. Based on those, there was no obvious warning sign or indicator (e.g. fallen trees) that the [T]ree… was in a dangerous condition…
>
> 7 Another of Amey's duties was to assess and record the condition of the 'soft estate', i.e. the natural part of the highway estate…part of this duty included the conduct of surveys of the trees along the SRN in Area 9, for which purpose they employed qualified arboculturalists. One of these was Ms Ellen Tune who, in 2011, was awarded an ABC Level 3 Technician's Certificate in Arboriculture.
>
> 8 Pursuant to Amey's contractual duties, Ms Tune and colleagues carried out inspections along [the relevant area]. At the time, the contract with Amey provided that surveys needed to be done a minimum of every 3 years, but in fact surveys were conducted in both 2012 and 2013.
>
> 9 Between 4 February and 27 February 2013, Ms Tune and her colleagues inspected the trees along the relevant stretch…[which] would have included the Tree…I refer to the records of inspection … only two lime trees

> are identified…This does not refer to the [Tree], which was nearby, at 272912 N and 442540 E. Only trees that require removal or treatment are recorded. Therefore the absence of an entry indicates that Ms Tune found no significant disease of other problem with the [T]ree]."

47 In her oral evidence, Mrs Brookes expanded upon her written evidence. The substance of what she said was this:

(a) The Defendant's contractual relationship with Amey was governed by what she called a "managing agent contract". When she was asked why a full copy of the contract had not been supplied by the Defendant to the Claimants, she claimed that it was extremely voluminous, but the Defendant had supplied the relevant parts of the contract to the Claimants[4]. That does not comply with the obligation of the Defendant to provide proper disclosure. It is not for the Defendant to decide whether disclosure of a relevant document should be given. It should provide proper disclosure of all relevant documents. If there is good reason for withholding the inspection of a document, or any part of it, it is for the court, in the absence of agreement between the parties, to decide whether that reason is justified. However, to refuse disclosure of a document on the ground that it is voluminous is wrong. How, it has to be questioned, is the court able to assess, without having the full document (or the relevant parts of the document, as agreed between the parties), what requirements relating to inspection were imposed by the Defendant on Amey and whether those requirements were carried out in full. Without having seen the full contractual document, I am not sure how Mr Forbes-Laird can state in paragraph 2.7 of his original written report that "the Defendant arranges for maintenance of the soft estate to be included in its specifications for highway maintenance, being the required management regime that

[4] Page 22 of the transcript of the evidence of Mrs Brookes.

managing agents are contracted and required to follow." He saw no documentation to suggest that this was so.

(b) Mrs Brookes mentioned that the Defendant stated its requirements to Amey but did not tell Amey how to carry out those requirements. It provided Amey with a "landscape management plan" and retained some sort of monitoring role over how Amey went about fulfilling those requirements. She was unable to produce any document to support that claim, saying that the document was not in the bundle. The relevant exchanges are set out in the following exchanges at pages 5 to 6 of the transcript of her evidence:

> "Q. Well, you spoke and you answered it in a way but it wasn't a difficult question simply, you've elaborated; you've said basically, you place outcome requirements upon Amey. You leave it to them as to how to achieve it and you don't have first- hand knowledge of how they set about achieving that outcome. Is that correct?
>
> A. I didn't say we leave it to them. So, we tend not to tell them how to do things; however, typically what would happen is when the contract starts, they produce a series of documents. So, for example, in the landscape management plan is a requirement of the standards of the contract. The environmental management plan is a requirement of the contract. They produce that; they set out how they propose to comply with our requirements and we check and ensure that we believe that's going to give us the right outcome. They don't have complete carte blanche to do as they please.
>
> Q. And have you produced that document to the Court?
>
> A. It is not in the bundle
>
> JUDGE MITHANI: Why not?
>
> MR MURRAY: It is not there.
>
> JUDGE MITHANI: Why not? At the start of the relationship between the defendant and Amey, the requirements of Amey seem to be absolutely [inaudible].
>
> MR MURRAY: Well, no, Your Honour, because the contract is expressed in such a term that the- so, what the examples the witness was giving related to landscape management.
>
> JUDGE MITHANI: Yes.
>
> MR MURRAY: That's not- she was merely giving an example. These aren't anything specific-
>
> MR PENNOCK: Well, let me ask a- 23

MR MURRAY: such as the tree inspection regime was disclosed.

JUDGE MITHANI: I do not want to know in terms of the contract between Amey and the defendants but what the landscape requirements are, what the environmental management plan is, but perhaps I can ask you a question which I hope will be pertinent. You would expect Amey to carry out inspection according to recognised standards

A. Indeed, and

JUDGE MITHANI: and there is simply something in your contract with Amey that makes it clear that you expect that because only that sort of requirement can produce the outcomes that you are looking for. Would that not be in your contract?

A. So, yes it would, absolutely, and I will try to find the relevant page now. Just to explain first

JUDGE MITHANI: There is something in the bundle, is that right?

A. Indeed, in one of the appendices to Mr Forbes-Laird's statement [i.e. his original report], we have listed the requirements and the standards that must be complied with." [My underlining].

Pausing there for a moment, it is wrong to say the appendices to Mr Forbes-Laird's original report included any contractual or other document relating to the Defendant's contract with Amey. The document Mrs Brookes was referring to was simply the generic guidance (principally by reference to the *Highways England Performance Requirements* and the Health and Safety Executive's guidance entitled *Management of the risk from falling trees*) which Mr Forbes-Laird had included in that report about how he contended tree-inspections should be carried out. There is no evidence that this was the guidance which the Defendant had agreed with Amey that Amey should apply. I should add that even if it had been, I would have still have found that there was no adequate system in place for the upkeep and maintenance of the trees in the stretch of the A45 where the accident took place or, if there was, the inspection was not carried in accordance with that system or carried out properly.

Continuing with the exchanges:

"Q. You said Amey provided you with a document as to how they were going to go about it, a method of work document. That's the document we're asking about – not the contractual requirements.

Where is Amey's document, given to you, telling you how they would go about the tree inspections?

A. Apologies, Mr Pennock. I was answering His Honour's question around how we the documents in our contracts that make sure we get what we're looking for and that's the question I was trying to answer. If it's not helpful for me to refer to those documents.

JUDGE MITHANI: Do not worry. It is very helpful. Let us just look at the documents, then.

A. Okay.

MR PENNOCK: Well, before we do, Your Honour, the witness hasn't answered my question.

JUDGE MITHANI: Yes.

Q. Where is the document Amey gave to Highways engineering, the Highway Agency – forgive my calling them the wrong name – where's the document Amey gave you to you say how they would carry out the tree inspections?

A. It will be on file from 2009 at the start of their contract.

Q. That's a point, Your Honour.

A. I don't have it with me today.

Q. So, why hasn't- you look at these documents, why did you not think that was pertinent to disclose under the defendant's disclosure obligations?

MR MURRAY: Well, you're asking the wrong witness.

MR PENNOCK: Well, she's

JUDGE MITHANI: Perfectly entitled to ask the question and-

MR PENNOCK: Yes, thank you.

JUDGE MITHANI: if the response is, 'Well, I do not know', well that is the response, but that is a perfectly legitimate question.

MR PENNOCK: No. I was just giving the… I'll accept it, Your Honour. I was just giving the defendant every opportunity to explain this massive black hole in the evidence they've disclosed, or should I say not disclosed."

(c) She gave an explanation about the area over which Ms Tune is likely to have covered by reference to the coordinates referred to in paragraph 9 of her witness statements and the photograph at page 97 and the inspection records – see page 16 *et seq* of the transcript of her evidence. The most she could say was that Ms Tune is likely to have walked within a few hundred metres of the Tree. There is no evidence that

she walked within a sufficient vicinity of the Tree to see how it presented itself to her – see page 17 *et seq* of the transcript of her evidence.

(d) She was asked about the existence of the documentation relating to the inspection allegedly carried out in 2012. She said that there was none. She explained the procedure about how the Defendant sought information from Amey relating to inspections. It involved sending an electronic request on a pro-forma form, which Amey then completed and returned to the Defendant. She, or someone on behalf of the Defendant, completed such a form for the 2012 inspection and it elicited a response by email from Amey in which it was suggested that Amey did the inspection despite the fact that neither Amey nor the Defendant has provided any documentation for that inspection. The inspection was done because the Defendant also happened to be doing other works in the carriageway where the Tree was located. The relevant exchanges are set out in the following exchanges at pages 24 to 25 of the transcript of her evidence:

Mrs Brookes:	So, we have- if I can just clarify that. So, we have an environmental information system which we call ENVIS, which contains certain fields of information which we require them to populate under their contract. In addition to that, they tend to have more detailed systems that they use on a day-to-day basis, so the inspection records included in the bundle are from their records.
Q.	But nobody thought to make the request about 2012, or is in the case that you made a request and it just drew a blank?
A.	We asked when inspections were carried out along a stretch and they responded by email that an inspection- an additional over-inspection was carried out in 2012 because we were doing work on the network, and in that region and so, they simply took the opportunity to do an additional inspection. We don't- I don't have the records for that.
Q.	But you do not know who went, whether it was a person as qualified as Ms Tune or less qualified, or even more qualified.

A. It was a tree inspection rather than a safety patrol or a-

Q. Yes, so one assumes from that that it might have been somebody like Ms Tune.

A. Yes, yes."

(e) The Defendant had deliberately omitted to provide even the email which it had from Amey about the information it gave the Defendant relating to the inspection. That was because Mrs Brookes claimed that the email was a matter between it and Amey and had nothing to do with the Claimants – see page 8 of the transcript of her evidence:

"Mr Pennock: Yes, but that wasn't the question I asked. I asked you have you asked Amey for the documentation to prove the 2012 tree inspection took place.

A. I personally have not.

Q. No. Where's the email from Amey?

A. We chose not to put it in the disclosure bundle because we believed it was a matter between us and our contractor."

That position was wholly inappropriate for the Defendant to have taken. It should have made all the records relating to that alleged inspection available to the Claimants. If it contended that any of those documents were covered by privilege, it should have refused to provide copies of those documents and left it to the court to decide whether privilege should apply to them.

48 It is plain to me that the obligation on the part of the Defendant to provide disclosure fell well short of the standards expected of a party to give disclosure. As a result, I acceded to the application of the Claimants for an adjournment in order that proper disclosure of these, and any other relevant documents, could be given by the Defendant to the Claimants. I indicated that if there was any privilege which the Defendant claimed to any document, it could be determined by me in

the absence of agreement being reached between the parties in the matter.

49 The exercise which arose from the adjournment did not result in any additional documents relating to the alleged inspection in 2012 being available. It is extraordinary that the Defendant has not been able to produce a single document which relates to the works that it alleges were undertaken to this stretch of the carriageway in 2012.

50 However, prior to the adjourned hearing, an email was received from Ms Tune dated 12 June 2019 relating to the inspection on 19 February 2013, the relevant parts of which are as follows:

> "The surveys… involved in were driven surveys where an arboricultarist was driven around the network to identify any issues that were visible. I did not inspect each tree… [My emphasis].
>
> Trees identified as needing remedial work were on the list attached. If the tree was not identified on the list, it was not identified as needing work in this survey…
>
> I cannot pass comment on the Google images and do not know of anything else I can contribute as a witness...
>
> I have provided information when requested in 2015 and cannot recall what I was asked more recently."

51 The email from Ms Tune raised more questions than it answered. In the first place, there is only reference to the surveys having been "driven surveys". She makes no reference to "walked inspections". As Mr Pennock observed, if the visual inspection involved a "driven survey" on this stretch of the A45, it is difficult to see what the inspector would have seen. In addition, Ms Tune refers to the person who conducted the inspection with her being an arboricultarist and that he was "driven around" to undertake the inspection which suggests that the visual inspection did not just involve Ms Tune but (assuming she could be described as an arboricultarist), another arboricultarist. As I have observed above, there is no information about how the survey was carried out and how the work relating to the survey was divided between her and the other arboricultarist.

52 But the Defendant says that it must be obvious from the records of the inspection that the inspection on the part of Ms Tune must have involved a walked inspection – how else, it questions, can the information relating to the coordinates specified in those records, and some of the entries in the records (such as on page 57 which states "fell dying trees, heavily covered in ivy" and the reference to "make safe") be explained. In addition, if the inspections had been driven only, it would have been over in a short period of time, which does not appear to be supported by the documents included in those and other documents in the bundle.

53 I wholly disagree. I cannot see that a purported reconstruction by an employee of the Defendant (Mrs Brookes) of how an inspection may have been carried out by Ms Tune, based on the inspection records, would lead to the inescapable conclusion that the inspection was a walked inspection. No evidence whatsoever has been produced to support that proposition. Although the Defendant can legitimately question whether any significant weight can be attached to the email from Ms Tune (which does not refer to a walked inspection having taken place), it is certainly of greater weight than the evidence of Mrs Brookes, which was based entirely on speculating about what Ms Tune is likely to have done. There is nothing in the point that some of the entries are consistent with a walked inspection. Nor is there any substance in the assertion that the time it took Ms Tune to undertake the inspection is consistent with a walked inspection. The inspection records contain no information about the time it took her to get from one location to another or the time it took her to complete the inspection.

54 I am unable, therefore, to accept that the inspection was a walked inspection and, in coming to this conclusion, I disregard entirely the deductions which Mr Pennock invited me to make from the attendance note of the conversation which his instructing solicitor, Mr Morrison, had with Ms Tune. However, even if I am wrong about that, for the

reasons indicated below, I do not consider that this inspection was adequate.

55 I should also mention the exchanges I had with Mr Murray, counsel for the Defendant, when I questioned why Ms Tune had not provided a witness statement or been called upon to provide oral evidence. I indicated that this could result in an adverse inference being made against the Defendant, though if I had not made it clear in my initial exchanges with Mr Murray, I quickly made it clear to him subsequently that it would only be appropriate for me to consider this once I had heard all the evidence and submissions.

56 This exchange resulted in a witness statement being signed by Peter Williams of the Government Legal Department on behalf of the Defendant, in which he explained why it was not possible to have Ms Tune give written or oral evidence. I make no comment upon that statement, save to say two things: first, it is, as I have pointed out above, a misconception, to think that I would expect her to remember her inspection of the Tree. The purpose of having her evidence would have been to address the matters to which I have made specific mention at various places in this judgment; second, I had made it clear that whether I should draw an adverse inference was a matter which would have to wait until all the evidence was completed and I had received the parties' written and oral submissions. That has now been done.

57 I deal below with the question of whether it may be appropriate for me to make an adverse inference.

MY FINDINGS ABOUT THE ALLEGED INSPECTION IN 2012

58 I refer above to the burden and standard of proof. I consider it necessary to refer to it again. That is because in the course of my exchanges with Mr Murray while he was questioning Mr Benzies, he reminded me that the burden was on the Claimants to prove their

case. The relevant exchanges are at pages 22-23 of the transcript of the evidence on 9 July 2019 and are in the following terms:

> Q. Well, that's my next question. I'm suggesting to you that we can't know at this remove, because we don't have the records, whether or not it was pruned, but that it was entirely reasonable for the highways inspector, when she saw the tree at tree 5, to treat it as a pruned tree?
>
> JUDGE MITHANI: This really is bordering on speculation.
>
> MR MURRAY: But it's a matter of expert evidence.
>
> JUDGE MITHANI: It's not; it's a matter of conjecture.
>
> MR PENNOCK: He should've had Ellen Tune here.
>
> JUDGE MITHANI: We don't know what Miss Tune would've made of a tree which presented itself in that way, and I'm afraid I'm not going to infer from any answer which this witness gives that that was what Miss Tune would've said. The question of whether there was an inspection or not, and whether there is the possibility that the tree was pruned, is purely factual.
>
> MR MURRAY: Can I remind Your Honour that the burden isn't on the defendant.
>
> JUDGE MITHANI: Mr Murray, I have been a judge practising in the civil courts for the last 30 years; I am well aware of what the burden of proof is.
>
> MR MURRAY: Well, Your Honour approached that question, with respect, saying "You haven't proved", and it's not for us ---
>
> JUDGE MITHANI: I haven't said that at all, Mr Murray. What I've said to you is that the question about whether there was an inspection in 2012 is a purely factual issue. I'm not suggesting for a minute that in deciding that factual issue I should ignore or disregard the expert evidence. Of course, I would, but then I'd have to look at all the evidence in the round, and I am not sure that seeking to have this witness make concessions is going to be of any great significance in terms of my evaluation of the evidence.

59 I had done nothing to suggest that the burden of proving the claim was on the Defendant. A judge cannot be expected to use the exactitude of words necessary for a pleading when he asks a question of a witness, which, in the present case, I needed to do in order to better understand what he was saying.

60 I, therefore, reiterate the position concerning the burden and standard of proof. The burden of proving the facts and matters upon which the Claimants rely in making good their claim against the Defendant rests fairly and squarely on the Claimants. The standard of proof is the usual civil standard of proof: the balance of probabilities. However, it is appropriate for me to mention one further point about the burden of proof, though in the present context, that point, for the reasons I

mention below, is wholly academic. That was the point alluded to by Mr Pennock. Although the primary burden of proof will always lie with a claimant, there may be situations where the onus of proving certain facts and matters on which reliance was placed by a defendant would lie upon the defendant and would need to be proved on the balance of probabilities. I believe that it was the following statement of principle, summarised in *Halsbury's Laws of England*[5], which Mr Pennock had in mind:

> "The evidential burden (or the burden of adducing evidence) requires the party bearing the burden to produce evidence capable of supporting but not necessarily proving a fact in issue; the burden rests upon the party who would fail if no evidence at all, or no further evidence, as the case may be, was adduced by either side. It has been said that the evidential burden shifts from one party to another as the trial progresses according to the balance of evidence given at any particular stage, but it may be more accurate to say that it is the need to respond to the other party's case that changes …The evidential burden (or the burden of adducing evidence) will rest initially upon the party bearing the legal burden. However, rather than referring to a shifting burden, it may be more accurate to say that it is the need to respond to the other party's case that changes as the trial progresses according to the balance of evidence given by each party at any particular stage. If the party bearing the legal burden fails to adduce evidence, he has failed to discharge his burden and there will be no need for the other party to respond; however, if the party bearing the legal burden brings evidence tending to prove his claim, the other party may in response wish to raise an issue and must then bear the burden of adducing evidence in respect of all material facts.''

An example of such a situation would be where the claimant was able to establish that a prima facie case was made out on the evidence relied upon by the claimant for breach of duty against the defendant. In such a case, it would be for the defendant to controvert that evidence and to prove, on the balance of probabilities, that the evidence relied upon by the claimant could not support any breach of duty against him. It is possible that this applies in the present case, as regards the alleged 2012 inspection, and that it is for the Defendant to establish that there was an inspection in that year. In postulating that possibility, I am not saying that this principle applies because this is a section 41 case and it is for the Defendant to establish the section 58 defence. I have already indicated that those provisions do not apply to the present case. However, it may apply because the presentation of

[5] 5th Edition, Volume 12, 2015, Civil Procedure, paras 702 and 704.

the Tree in the "Bing" images suggests that the Tree was diseased; and if the Defendant wishes to establish that this was not the case, it is up to it to establish that there were other causes for its presentation, such as the pruning of the Tree in 2012. However, for the reasons which are referred to below, my decision is not based on the niceties of whether the burden lies with the defendant to establish that there was an inspection in 2012, and whether that burden has been discharged, but on the basis that wherever it lies, the assertion of the Defendant that there was an inspection in 2012 is simply not correct.

61 I reject the evidence of the Defendant that there was any inspection in 2012. No documentation whatsoever has been produced concerning that inspection. The only suggestion that there might have been an inspection is an indication from Amey that it took place. No actual date, or even a month, in 2012 is given for the inspection and not even the email from Amey saying that the inspection took place has been produced. How and why that inspection was carried out is a complete mystery. Nor, as I have indicated above, has a single document been produced about the works which the Defendant alleges Amey were carrying out to this stretch of the carriageway in 2012 which led to the inspection of the soft estate along that carriageway. It is unbelievable that neither Mrs Brookes nor anyone else seemed to know what those works involved. It is stretching credibility to the limit for the Defendant to say that works were carried out on the highway but not to know what those works were.

62 If an inspection was carried out, one would have expected to see some documentation relating to it, particularly given that information about inspections is inputted electronically. If, as Mrs Brookes says, the Defendant exercised some level of monitoring about the conduct of inspections, one would have expected to find documents in the Defendant's possession relating to it. There is none. But, more importantly, there is no explanation about why Amey would not have any documentation about it, or at least some information about what works were carried out on that stretch of the highway in 2012. Neither

Mrs Brookes nor Mr Forbes-Laird was able to provide any satisfactory explanation about this. Mr Forbes-Laird seemed content to skate round the issue. It is extraordinary that having set out in his original report such a substantial amount of information about the carrying out of arboricultural inspections, Mr Forbes-Laird failed to provide any information about why there was no documentation in existence at all about the 2012 inspection (including the works carried out on the carriageway), and how that would affect some of the conclusions he came to, particularly given that he had been a highway tree inspector for some 3 to 4 years in the past and was able to comment on how inspection records were completed and how readily they could be produced by a highway authority; yet, he was prepared to proceed on the basis that there had been one in 2012 and that that pruning had to account for the presentation of the Tree in the state in which it was shown in the Bing images which were produced by Mr Benzies at the adjourned hearing of the trial. When Mr Benzies was recalled to give evidence, he questioned how, if the Defendant suggested that the Tree had been pruned in 2012 or at any point in time, it could be possible that there was no record of the 2012 inspection or of the Tree having been pruned (and why it was pruned) as there might be of the type produced for the 2013 inspection. These were the exchanges which took place (my emphasised underlining)[6]:

"Q. I suggest to you that you didn't even consider the possibility of pruning when you prepared this report, did you?

A. I did consider the - I did consider that, however ---

Q. Where in your report ---

MR PENNOCK: Let him finish.

JUDGE MITHANI: Hang on, Mr Murray; you've got to allow him to finish the answer.

A. However, I dismissed that because of the location of the tree, in that what we can see here, if it were pruning, is a very minor operation in terms of how much wood is being removed. Taken in isolation, what we'd have to do to accomplish that is road closures, we'd have to move in heavy equipment, we'd have to have tree surgeons, trained operatives, up the tree, pruning that tree. If that were the case, the tree is extremely poorly pruned, from my experience as a tree surgeon. Also, "Why would they do it?" in terms of, "What led to their intention to prune the tree?"; there must have been some reason if that were the case. One of the reasons for carrying out a reduction, if that's what you're saying this is, would be

[6] See pages 11-12 of the transcript of the hearing on 9 July 2019.

that the tree is diseased. I also find it improbable that they would only carry out that work and not carry out any other further work, like removing the epicormic growth from around all the trees in the vicinity. So, I didn't mention that in my evidence because I found it very implausible that that would be the case.

Q. The maintenance that the tree may or may not have received in the previous year would have generated growth of about that amplitude, wouldn't it?"

Then later on in the transcript, Mr Benzies says[7]:

A. As I have said previously, the reason why you would prune a tree, if that's what it is, is to remove deadwood from a seemingly diseased tree. So, in order for that to have happened, somebody would've had to have flagged up that there's a problem with this tree, and recommended a reduction of the branches that we can see. The reason for doing that is to promote young growth, or try to put some more vigour back in a less vigorous tree; I think this is - and this situation isn't plausible, because, if that were the case, then surely it would've been more cost-effective just to remove the tree. This is an ineffective - crown-reducing the tree is used in veteran trees if they have dieback; this is not a veteran tree, this is a tree in a central reservation. The only reason for doing pruning would be if there's any problems with that tree: if there were any problems with that, I would maintain that it would be simpler just to remove the tree, especially considering the amount of resources you would need to employ in order to get men and machines around that tree. It would probably actually cost more to actually prune the tree than actually remove it. There has to be a reason why, if pruning - if that is pruning, there has to be a reason why it was done, there has to be a recommendation as to why; a reason for it.

Q. Mr Benzies, that's all to miss the point of my question. We know we don't have any records, so if you're reverting to that, there it is: we can't tell you why the tree was pruned. But you suggest that trees are never pruned: well, that's not consistent with the evidence that we have from the tree survey reports, because we can see that in 2013, in the survey conducted by Miss Toon, she recommends various trees for pruning, for pollarding, for crown reduction. You agree with all of that, don't you?

A. But we don't know whether it was done or not."

63 If works were carried out to the carriageway (or an inspection of the soft estate along the carriageway) in 2012, I would have expected Amey to have notified the Defendant before the works took place that they were going undertake those works or, at the very least, notify the Defendant after they had taken place, what works were carried out, what they involved and when they were undertaken. As pointed out above, it seems that no one at the Defendant company knew what works, or inspections, had been carried out until Mrs Brookes made a request for information following the intimation or instigation of these proceedings. It is remarkable that, for example, invoices which may have been raised for the works carried out by Amey (depending on the terms upon which they were retained) have not been produced or

[7] See page 15 of the transcript of the hearing on 9 July 2019.

details of the dates of payment made by the Defendant to Amey, which must be readily available from its records, have not been disclosed.

64 If I am wrong, and some sort of inspection was carried out in 2012, it is only likely to have been a superficial inspection, nowhere near as thorough as the type of inspection which is necessary to identify defects in trees comprised in the Defendant's soft estate – the type which even the Defendant would say, on its case, should have been carried out. This must be clear from the explanation which Mrs Brookes herself gave about it in her evidence (my underlined emphasis) – see also paragraph 45 *et seq*, above:

> "Mrs Brookes: We asked when inspections were carried out along a stretch and they responded by email that an inspection- an additional over-inspection was carried out in 2012 because we were doing work on the network, and in that region and so, they simply took the opportunity to do an additional inspection. We don't- I don't have the records for that."

65 Pausing there for a moment, as pointed out above, it seems clear from this statement that Mrs Brookes did not even herself know that an inspection had been carried out in 2012 until she asked Amey when inspections were carried out. I find that extraordinary. How the Defendant can possibly maintain that it monitored what Amey did is quite beyond my comprehension.

66 The exchange continued:

> "Q. But you do not know who went, whether it was a person as qualified as Ms Tune or less qualified, or even more qualified.
>
> A. It was a tree inspection rather than a safety patrol or a-
>
> Q. Yes, so one assumes from that that it might have been somebody like Ms Tune.
>
> A. Yes, yes."

67 So, if an inspection was carried out, it may have involved an inspector who was less qualified than Ms Tune, it may have involved a driven survey but, most importantly, there are no records of what the

inspector found. It is difficult to see how the alleged survey would have been anything more than just a superficial one. The evidence of Mrs Brookes and Mr Forbes-Laird on every aspect of this issue is based on pure conjecture.

68 However, the conclusion I come to is that no inspection took place in 2012. The Defendant's assertion on this issue amounts to little more than saying that "an inspection was carried out because we say it was."

MY FINDINGS ABOUT THE INSPECTION ON 19 FEBRUARY 2013

69 My overall conclusion about the inspections which Amey undertook on behalf of the Defendant, by reference solely to the inspection on 19 February 2013, is that it was not carried out by reference to any recognised guidelines, not even the guidelines set out in the documents appended to Mr Forbes-Laird's original report.

70 I should start by saying that I am unable to accept that the Defendant undertook any monitoring role in relation to the carrying out of inspections by Amey. It is clear to me that it delegated the entirety of its statutory function of conducting regular inspections in order to comply with its common law obligations to keep the public free from falling trees to Amey. How a highway authority conducts its activities, and the extent to which it should delegate them to a third party, is not for me to comment upon, and I do not do so. However, I find it astonishing that a highway authority can think it appropriate to delegate the entirety of its obligations to a subcontractor without retaining any monitoring control over that function.

71 No document has been produced by the Defendant about the instructions which Amey gave to its employees or subcontractors (and Mrs Brookes could not say whether Ms Tune was an employee or subcontractor of Amey) setting out how inspections needed to be carried out and what they needed to look for. Despite the indication

given in Mrs Brookes' evidence that Amey complied with their contractual obligations by reference to the Highways England Performance Requirements which Mr Forbes-Laird exhibits to his original report (and I have serious misgivings about that part of her evidence because no underlying documentation has been produced to support that statement), it is not at all clear whether Ms Tune even had that document and was working from it in the course of undertaking her inspection. Even if Ms Tune had the document, it would not be sufficient, by itself, to satisfy me that the inspection was adequate. The parts relied upon by the Defendant (for example, paragraphs 2.16.1 and 2.16.2) merely set out the objectives of an inspection. The same is true of paragraphs 2.16.4, 2.16.5 and 3.13 to which I was specifically referred. Those paragraphs do not specify how an inspection may be carried out to ensure that the objectives specified in them are achieved. It is possible that a person with Ms Tune's qualifications would not have to be told what to do but that proposition is based on pure conjecture. The equivalent highway officer who is tasked to inspect the fabric of a highway has detailed national or local guidelines to work from. However, more importantly, if the Defendant's agreement with Amey provided some indication of how they would carry out an inspection (whether by reference to a "landscape management plan", "environmental plan" or any other document), as Mrs Brooke alleged, it is, to say the least, extremely surprising, that those documents have not been produced. Nor has any indication been given in the email from Ms Tune that she conducted her inspection by reference to those documents. Even Mrs Brookes' evidence, based entirely on conjecture, did not extend to believing that Ms Tune (as an individual), as opposed to Amey (as a corporate organisation), was aware that she had to work in line with those documents – see paragraph 45 *et seq*, above.

72 In addition, no documentation has been produced about the terms of Ms Tune's retainer, i.e. no contract of employment or other document has been produced setting out the terms upon which she was engaged to undertake inspections and no explanation given about why those

documents are not available. The documents may have contained important information about what she needed to do in order to comply with her contractual obligations with Amey.

73 If, as Mrs Brookes asserts, she has limited information about the works which Amey did, it is extraordinary that the Defendant was unable to obtain witnesses from Amey who might have been able to give evidence about the precise nature of their instructions and the means they deployed to comply with them, including the terms upon which they engaged employees or sub-contacting staff to carry them out.

74 Is it appropriate for me to make an adverse inference about the failure of the Defendant to call Ms Tune or a representative from Amey?

75 The principles which govern when a court may make an adverse inference arising from the failure of a party to produce a witness which it was possible for that party to produce is set out in a number of cases. They include *Wiszniewski v Central Manchester HA [1998]* P.I.Q.R. P324, *Riva Properties Ltd and others v Foster + Partners Ltd* [2017] EWHC 2574 (TCC), *Benham Ltd v Kythira Investments Ltd* [2003] EWCA Civ 1794 and *EnergySolutions EU Limited v Nuclear Commissioning* [2016] EWHC 1988.

76 The best exposition of those principles is contained in the judgment of Brooke LJ in *Wiszniewski* at p 340:

> "(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is

> some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

77 I have already made it clear that I would not expect Ms Tune to remember this or any other inspection which she carried out. However, she is likely to have been able to give evidence about how an inspection which she was instructed to undertake was carried out – was it a walked inspection or only driven 'visual' inspection? She carried out the inspection with a colleague. What role did each of them play in connection with the inspection? Was her role simply recording what her colleague had told her or did she also play a part in the inspection? Who was her colleague? Might he have been able to provide evidence or information about what was involved? Was he "employed" by Amey? Is he still employed by Amey or does he work for them? Would someone from Amey have been able to provide information about how they expected tree inspectors to carry out an inspection? Mrs Brookes' evidence was based entirely, or largely, on what Ms Tune is likely to have done when conducting her inspection. If Ms Tune was reluctant to provide a witness statement, why, it has to be questioned, could the Defendant not have compelled her to attend court to give evidence by the issue of a witness summons. If the Defendant needed to prepare a witness summary of the oral evidence which it would expect Ms Tune to give to the court under CPR 32.9, it would have been able (and obtain the permission of the court) to do so without difficulty. The fact that Ms Tune had an unpleasant experience as a witness in a criminal trial (with which I have every sympathy) does not absolve her from attending court in a civil trial as important as this. The Defendant contends that the Claimants could just as easily have taken that course of action. I disagree. It would have been an extremely unattractive course of action for the Claimants to have sought to compel Ms Tune to attend court to give evidence (when they knew that her evidence was relied upon by the Defendant to support its defence) and then treat her as a hostile witness when she was called to give evidence.

78 These are matters about which it would be important for me to have evidence or information. I consider that it is entirely appropriate for me to make an adverse inference about the failure of the Defendant to call Ms Tune to give evidence. However, the failures of the Defendant go much further. They extend to failing to obtain documents from Amey which were material to the claim. They also include not obtaining witnesses from Amey who might have been able to give evidence in connection with the claim in the manner I have stated above. The court is entitled to make an adverse inference in relation to those matters, and I do so. It is plain to me that the absence of crucial evidence (in the form of documents and witnesses) is likely to be down to the fact that the case of the Defendant on breach of duty is unlikely to have withstood proper scrutiny by the court. That said, it is important that I point out that I would have come to the same factual findings even I had decided not to make adverse findings of any sort against the Defendant.

79 I can summarise my findings about the 19 February 2013 inspection as follows:

(a) It was carried out by a person who was suitably qualified to do so – there is no dispute between the parties about this;

(b) It was a "driven inspection". It is incomprehensible how such an inspection could be said to have involved a "walked" inspection. Mr Pennock questioned how anything but the absolute obvious could be discovered from a motor vehicle which was travelling on the A45 at 50 mph. Mr Murray suggested that that remark was based on pure speculation. The speed at which the car was being driven might amount to speculation but there is a great amount of common sense in what Mr Pennock was saying. Even at a very low speed, it is difficult to see what, apart from the obvious, would be discovered on such an inspection. In this context, it is

important to observe how Mr Forbes-Laird says he would have expected that inspection to be conducted[8]:

> "Q. The inspections normally carried out by highway authorities are in a large, well-marked van, with amber lights flashing, at no more than 15 miles per hour, aren't they?
>
> A. That describes almost precisely what I used to do when I was a highway tree inspector, and I would then dismount and look at specific trees."

There is not a single document which demonstrates that this was what was done by Ms Tune and her colleague. However, it is right to point out that once a tree-inspector dismounted from the car, as Mr Forbes-Laird says, I would expect him (or in this case, her and/or her colleague) to conduct an inspection which involved at least looking at the proper presentation of the trees. This was simply not done by Ms Tune.

(c) It was not carried out in a manner which was either competent or adequate and I refer to what I have said above. There is no evidence that Ms Tune even had those documents which have found their way in the bundle that give generic guidance about what an inspector should look out for, still less had documents which set out how the inspection should be carried out. That is because no such documents have been produced by the Defendant. That is not to say that she did not identify some trees which required attention. Plainly, she did. But there is no evidence either that the inspection was thorough or that she would have picked up any defects other than those which were obvious from a "visual" inspection of the trees from the car. There is no indication about how she came to the conclusion, for example, that a tree showed evidence of fungal disease, which she refers to in some of the entries she made, though,

[8] Page 41 of the transcript of the evidence on 9 July 2019.

it appears, they relate mainly to other areas of her inspection;

(d) The suggestion that inspection of the highway, which was carried out monthly, and was last carried out on the day before the accident, assists the Defendant in any way is a complete misconception. Given the manner in which that inspection was carried out, the speed with which it was carried out and the personnel who carried it out, the most such an inspection would have done was to identify the odd branch which had fallen off a tree from the highway. There is no basis for suggesting that it would have put a highway inspector on enquiry that there was something wrong in the area where the trees were planted. There is no evidence at all that a fallen branch had resulted in an inspection being carried out about the state and condition of the soft estate in the past – not surprisingly because that would not be an obvious deduction for a highway inspector to make. The position might be different if a tree had fallen on a highway but even in such a case, no evidence has been produced by the Defendant which suggests that it resulted in the past in even a cursory inspection of the soft estate within the area where the tree had fallen. The Defendant appears to me to be raising conflicting arguments on this issue: on the one hand, it states that there was a walked inspection of the soft estate because a driven-only inspection would not have been adequate; on the other, it states that there were driven-only inspections on the carriageway, which would have identified any defective trees.

(e) The Defendant had abrogated its responsibility for the upkeep and maintenance of its soft estate in the area where the Tree had fallen completely to Amey. Whilst a highway authority is perfectly entitled to delegate its duties to conduct inspections to a suitably-qualified independent contractor, it must exercise a sufficient amount of monitoring of the

contractor to ensure that those duties are discharged. The Defendant exercised no such monitoring in this case. That responsibility was not, therefore, discharged properly by the Defendant;

(f) Even if the inspection by Ms Tune was a walked, or partly walked, inspection undertaken in the manner stated by Mr Forbes-Laird (which I do not accept), it was carried out inadequately. That is because it is difficult to see how she could conceivably have failed to notice the Tree in the state in which it is depicted in the Bing images. In addition, even if one accepts the entirety of the evidence of Mrs Brookes on this point, the most she can say is that Ms Tune had walked the distance from 800 metres to one side of the Tree to around a kilometre to the other side (switching from the left-hand verge on the eastbound side to the central reservation on the westbound side); and thus would at one stage have been directly opposite the Tree. However, at no point can it be said that she was within a sufficient distance of the location of the Tree to enable her to undertake a proper visual inspection of the Tree. If she had observed the Tree as it was presented in the "Bing" images, it is inconceivable, if she was undertaking a proper inspection, that it would not have put her on enquiry that it needed more detailed attention – see under "Causation", below. It is plain that the presentation of the Tree so obviously required attention that it could, or should, not conceivably have been missed by the inspector unless, of course, it was pruned, which, for the reasons I explain in this judgment, I am satisfied it was not.

(g) The inspection was little more than an empty formality. Plainly, some inspection of the soft estate was undertaken and some defects in trees discovered. However, by and large, it was not near as adequate as to make it possible for likely defects which ought properly to have been discovered to be identified as needing attention. I cannot see the relevance of

Bolam v Friern Barnet Hospital Management Committee [1957] 1 W.L.R. 582 in this context. It seems to me that the only relevance of that case is on whether Ms Tune carried out an inspection based on the "industry norm", as opposed to "best practice" or "good practice". I take the firm view that even if the inspection involved the industry norm, it was inadequate; and, in any event, it has to be remembered that where it applies, *Bolam* does not justify the application of a lower standard of care. The standard which has to be applied in a case such as this has to take into account the risk posed to the public from a falling tree based on the observations made in *Witley Parish Council* and *Stagecoach*.

80 In coming to my findings on breach of duty, I have taken into account fully the provisions of section 1 of the Compensation Act 2009 which provides that a court "considering a claim in negligence or breach of statutory duty may, in determining whether the defendant should have taken particular steps to meet a standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might (a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or (b) discourage persons from undertaking functions in connection with a desirable activity." There are compelling biodiversity and aesthetic reasons to have our main carriageways lined up with trees. The courts should not seek to interpret the duties to which a highway, or any other public, authority is subject in a way which may undermine the importance of those reasons. While this "public-interest" consideration must always be in a judge's mind, so must the principle that these duties are important duties, designed to protect the public. They must be performed and discharged properly and while, of course, they are delegable, there must be an element of monitoring retained by the highway authority to ensure that they are discharged properly. That did not occur here.

81 It is also important that one should be alert to the dangers of hindsight and should not adopt an unrealistic analysis of what Ms Tune could and should have done. When conducting any critical evaluation of a person's decisions, the court must avoid falling into the trap of being too wise after the event. However, in the present case, the terms upon which Ms Tune was instructed to undertake the inspection are not at all clear; and, whatever the terms, the manner in which the inspection was carried out was seriously defective.

82 In short, therefore, I conclude that there was no adequate system in place for the upkeep and maintenance of the trees in the stretch of the A45 where the accident took place. However, even if there was, the inspection was not carried out in accordance with that system or carried out properly.

83 I, therefore, come to the unhesitating conclusion that breach of duty is proved by the Claimants.

CAUSATION

84 On the basis that I have found that the inspection carried out by Ms Tune was inadequate, it is very difficult for me to know how the Tree presented itself to her, if she ever got to see it, at the date of the inspection.

85 The expert evidence is based primarily on how the Tree would have presented itself at the date of the inspection on 19 February 2013.

86 I start first with the expert evidence of Mr Forbes-Laird. In the "Conclusions" section of his original report, Mr Forbes-Laird states:

> "6.3 The base of the [T]ree was heavily clad in shoots, in the typical manner of the species (common lime). This would have prevented or substantially reduced visual inspection of the stem base. The lack of a recommendation to enable full inspection, or to return for a further inspection when the condition of the foliage could be assessed, falls below the standard I would have employed. I am not persuaded that such action would conform to

industry norm, though it would have been best practice or, possibly, good practice.

6.4 The [T]ree was inspected by [Mr Benzies], in sectioned form, after the accident in April 2014. At the time of this inspection, the lower section of the [T]ree bore fruitbodies in the juvenile… state of *[K.] deusta*… [Mr Benzies] photographed but apparently failed to notice the fruitbodies, though correctly identified that *K.deusta* had infected the [T]ree, from observation both of the decay and of the fracture surface , the latter being indicative of 'ceramic plate fracture' which is typical of the type of brittle decay caused by the pathogen concerned.

6.5 Specific characteristics of the fungus confirm that these or any other fruitbodies would not have been present at the time of the [T]ree's inspection by Amey's arboricultarist in February 2013. Equally, the nature of the decay and its effects on an infected tree prevent the development of tell-tale signs of weakening, known as 'adaptive growth'. It follows that in the absence of fruitbodies, infection by *K.deusta* leaves no visible trace until the tree's active vascular system becomes compromised. The active vascular system is located in the outermost region of the stem, whereas *K.deusta* typically commences in the structural roots and the stem/root interface within the centre of the stem.

6.6 The Claimants allege that the [T]ree can be seen in ill-health in Google StreetView photographs taken in 2009. I have examined these photographs and disagree. I consider that the most that can be said is that they are inconclusive. Be that as it may, they do not, so it seems to me, provide evidence of ill health in 2009.

6.7 When [Mr Benzies] inspected the [T]ree in April 2014… he found the [T]ree's vascular system was alive. Although areas of discolouration were present in this region of the stem, these are associated with activity by the [T]ree's myco-inhibitor defences, rather decay as such. It is not right to infer from staining in the active vascular region that crown symptoms would have been present (although this is possible).

6.8 Although I concluded that the visual inspection of February 2013 was hindered by the basal shoots, I also conclude that, even if these removed, visual inspection of the tree would probably not have identified the presence of decay. There is no evidence that supports the presence of crown symptoms prior to the [T]ree's failure (though it is possible that symptoms were present, in the sense that this cannot be excluded). It follows that the defect was internal to the [T]ree and so hidden from visual inspection."

87 It almost goes without saying that if Ms Tune had inspected the Tree, the question for her would not be whether it was infected with *K.Deusta* (which would have been impossible for her or anyone else to tell without a forensic examination into a sample of the Tree being conducted) or with any other fungal disease but whether its presentation was such as to put her on enquiry that the Tree needed attention.

88 The experts initially both referred to how the Tree would have presented itself to Ms Tune by reference to the 2009 Google

StreetView images, which Mr Benzies produced as part of his original expert's report. However, that position was largely superseded by the "Bing" images which Mr Benzies produced after both he and Mr Forbes-Laird had given evidence. Despite strong opposition from the Defendant, I allowed the Bing images to be relied upon by the parties and permitted both experts to be recalled to give further evidence by reference to the new evidence which had been discovered.

89 Although the 2009 Google StreetView images are now largely superseded by the Bing images, it is right that I make these points, based on the former images and what Mr Forbes-Laird said in his original report, before he prepared his addendum report:

(a) I carefully examined the 2009 Google StreetView images. Of course, it is impossible to say with certainty that the presentation of the Tree based on the 2009 Google StreetView images, by themselves, would lead to the sure conclusion that tree number 5 (i.e. the Tree) needed attention, but it is clear to me from the thinness of the crown compared to the adjacent trees of the same species, the large dead branches and the difference in colour between the Tree and others and the shoot growth around the base that the Tree should have been the subject of a close examination. It is not clear whether it was identified for attention in any inspection conducted prior to the 2013 inspection because no records have been produced for any such inspection, and, as I have found, no inspection took place in 2012. It may not have been obvious to the layman that there was something wrong with that tree, but it should have been obvious to Ms Tune, if she had examined it properly, that it needed attention.

(b) In paragraph 6.3 of his original report, Mr Forbes-Laird agreed that, at the time of the inspection on 19 February 2013, the base of the Tree was heavily clad in shoots and

that this would have prevented, or substantially reduced, any visual inspection of the stem base. He then went on to say that "lack of a recommendation to enable full inspection, or to return for a further inspection when the condition of the foliage could be assessed, falls below the standard I would have employed. I am not persuaded that such action would conform to industry norm, though it would have been best practice or, possibly, good practice." I wholly disagree with that statement. He provides no evidence in support of this proposition. Whatever he, or Mr Benzies, means by the expression "industry norm", I am unable to accept that the "best practice" or "good practice" should not have been implemented in this case. He provides no basis for the opinion that the inspection in this case should not have been conducted in accordance with best or good practice, simply a bare statement that it was not appropriate to do so. As I have indicated above, the Tree was in a position of extreme high risk and was liable to (and did) cause serious injury if it fell. I can think of no more appropriate situation where best or good practice should have been adopted. As Mr Benzies says at paragraph 4.5 of his original written report, it is "good practice in a very high-risk location [which this location was] to remove the prolific shoot growth at the base of the Lime trees and other hindrances to inspection such as Ivy…" He also notes, in that paragraph, that there was at least 8 years of shoot growth on the tree and that the shoot growth last appeared to have been removed some 7 years previously in 2006. It has to be questioned how an inspection can be said to have been properly undertaken if shoot growth is going to impede a proper inspection. If Mr Forbes-Laird would have employed best or good practice, why, it has to be questioned, would he set a lower bar for the Defendant. He provided no indication of when best or good practice might be provided in a given situation, as opposed to the "industry norm". It was not that this question was not specifically put

to him. It was but his response was evasive and unhelpful as the following excerpts of the transcript of the hearing on 13 June 2019 demonstrate:

Page 35-6 of the transcript

"Q: So why do you studiously avoid the use of the concept of reasonable care in your report, particularly on page 396 at 5.3.2 – why do you use terms unfathomable to most people of desirable practice; best practice; good practice; industry norm – why don't you turn your attention specifically to what - what is reasonable care in the circumstances? Page 396, your Honour, paragraph 5.3.2. Why do you avoid the use of the test the court has to apply – reasonable care?

A: Well, there are two reasons: firstly because, like many experts, I have been on the wrong end of judicial criticism in the past. In one case, I was told I set unreasonably high standards so I try and avoid setting such standards now having learned from Holgate LJ. And the other is that experts, I think, need to be wary about anything that might seek to – or appear to seek to usurp the function of the court and whether a reasonable standard of care was applied, I think is probably over a line I would be happy to cross. So I set it out, I think, quite fairly in 5.3.2, what the ranges would be and explain how they operate and interrelate.

Q: Surely you know as a witness, you're prepared – you're able to give your expert opinion on the – for example, the context of trees – as to what your opinion would be as with regard to what would or would not be reasonable care in regards to inspection. That's not difficult for you to give that, is it?

A: I think if one reads my report, I make it quite clear that the standard of inspection which was in place in terms of its frequency was less than I would recommend but in terms of that which was done on the day, was sufficient.

Q: Right. Now, let's turn to a visual tree assessment. Would you accept that in a visual tree assessment, one has to stop and look at the tree and see what signs one can observe?

A: There are a number of ways of undertaking tree inspections which are acceptable - within acceptable – regarded as acceptable industry practice. They don't necessarily all require stopping and looking at the tree so I'm not going to agree with your proposition."

Pages 75-76 of the transcript

"Q. Okay, can you just explain what you mean by industry norm because I've never understood this concept?

A. The way things are typically done.

Q. Ah, when you say typically - typically, in what context?

A. That ---

Q In a context of - of the functions of The Highway Authority and the context of the function of somebody who has a large house with a - with - with a huge garden at the back of his house with trees which are liable to fall ---

A. Public auth ---

Q. A farmer who has a great number of trees which ---

A. Public authorities ---

Q. I see, that's ---

A. Public auth - public authorities, your Honour.

Q. Yes - yes.

A. So, highway authorities and councils, and the like.

Q. Where do I find a reference to the industry norm?

A. Un - unfortunately, your Honour, despite my best efforts over the past eight years to persuade the British Standards Institution to commission a British Standard on tree safety inspection, there is no such single point of contact for an enquiry of the nature you - you raise. And I think we are the poorer for it, as an industry.

Q. But you say that you would have encouraged good practice or even best practice but you don't criticise the fact that this was just an industry norm?

A. I - I don't and the reason that I don't, I set out in my report ---

Q. Yes, you do.

A. --- is because no such thing as a free lunch, but if you remove all of the vegetation around trees to inspect them, you'll have a whole series of consequences attaching to that.

Q. I entirely understand that, and you've put, it seems to me, the one side of the equation which militates against the best practice being applied. But isn't the other side of the equation this, that this is a tree which is exposed to the risk of serious injury and perhaps even a fatality. And as against that, that one has to measure the fact there is that risk. So where do I find in your report that by saying this is the in - industry norm is what you would recommend, and having assessed the red - the – the plain inconvenience of huge resources, the fact that that sort of detailed analysis exposes employees of Amey to the risk of the possibility of something untoward happening. Where do you assess - where do you bring into the equation the possibility that it may cause an injury, as it did in this case, the defendants?

A. I - I - I don't, but in fairness on page 396 within my report - the bundle - in paragraph 532.

Q. 532?

A. Sorry, 5.3.2.

Q. Oh, yes.

A. Paragraph number 5 - on page 396, I say that removal of the basal growth is certainly desirable ---

Q. Yes.

A. It might represent best practice. It is not the industry norm as it is rarely done. I would probably have asked for shoot removal to be done in this case."

The questions which Mr Pennock asked were perfectly straightforward. He wished to know whether the standards applied by the Defendant complied with the standards expected from highway authorities, and others, whose management of a soft estate could expose members of the public to the risk of injury. He wished to obtain Mr Forbes-Laird's views about whether the Defendant had taken all reasonable and practicable steps to make the public safe by reference to the observations made in *Witley Parish Council* and *Stagecoach*. Mr Forbes-Laird's evidence was completely unhelpful about whether the Defendant complied with those standards. He seemed throughout simply to be advancing the Defendant's case.

(c) There is no convincing reason why the base of the Tree should not have been cleared to enable a proper inspection of it to be undertaken with a view to Ms Tune identifying whether the Tree needed attention. If the principles in *Witley Parish Council* and *Stagecoach* are observed, there is no good reason why best practice, not even just good practice, should not be applied to the inspection of trees which were located in a high-risk area on a highway authority's soft estate that had the potential to cause serious injury or even a fatality on a highway. While the matters to which Mr Forbes-Laird refers at paragraphs 5.3.2 and 5.3.3 of his original report are matters which would undoubtedly need to be considered in deciding whether best or good practice of inspection is adopted, the countervailing consideration has to be the potential to cause damage or injury which trees in a high-risk area is likely to pose to the public. In the circumstances which apply in the present case, a consideration of all the factors would favour the adoption of best practice. If the observations of Mr Forbes-Laird were taken to their logical conclusion, it would mean that highway authorities could

simply disregard latent defects in trees caused by conditions such as *K.Deusta*, which could infect a tree within a relatively short period of time and cause it to fall. It is not the case that *K.Deusta* is a rare disease which is impossible to detect under any circumstances. The document at page 440 of the bundle (the extract from Schwarze's, "*Diagnosis and Prognosis of the Development of Wood Decay in Urban Trees*") states that it is the third most common wood-decay fungus associated with structural failure.

(d) I am unable to accept that a proper inspection of the Tree would not have put Ms Tune on enquiry that it needed to be investigated further. I consider that it would and this is clear to me from a combination of a number of factors: first, the presentation of the Tree in 2009, which is not likely to have improved when she inspected it in February 2013; second, the presentation of fruitbodies above the soil line, as shown by the photographs at p 394 onwards of the Bundle. Whether or not Mr Forbes-Laird is correct in the analysis which he makes at paragraphs 5.1.3 and 5.1.4 of his original report, it is not the presence of the signs of *K.Deusta* that I would expect Ms Tune to have identified – simply some sufficient evidence that the Tree needed attention and this should have been possible for her to do without any great difficulty. That there may be such signs is clear from the extract from Schwarze's, "*Diagnosis and Prognosis of the Development of Wood Decay in Urban Trees*" at page 440 which states that "*K.deusta* can cause crown thinness by impairing root function, but this may be slight until an advanced stage…. It often produces fruit bodies near ground level … but they are rather small and inconspicuous. These rather cryptic signs can often be missed during initial safety inspections, when the objective is to identify any trees that require expert and detailed assessment. In the absence of obvious signs of fungal attack, such trees are sometimes recognised by

structural symptoms… In particular if weakening because of decay has increased flexure of the main stem, there may be an abnormal bulging growth of the wood or distortion of the bark." That was what I believe Mr Benzies was getting at when he suggested that it might have been appropriate for Ms Tune to be knocking on the bark of the Tree in order to ascertain whether there was something wrong with it. Although not mentioned in his original report, I do not consider what he said to be as bizarre as Mr Murray suggested in the course of his questioning of Mr Benzies. As the document at page 440 goes on to say: "Provided the tree colonised by *K.deusta* is identified in the first instance, a detailed assessment of its safety can be made using various techniques." I would not even have expected Ms Tune to identify the possibility that the Tree was infected by *K.deusta* – simply that there were sufficient signs of concern to warrant a more detailed examination. I would then have expected a more detailed examination of the Tree to take place in order to decide what action should be taken to make it safe; even Mr Forbes-Laird had to accept that a proper inspection could have identified signs of decay with the Tree. I find that it would have done.

90 Accordingly, even if I had refused to permit the Claimants to rely on the Bing images, I would have come to the conclusion that the Claimants had proved causation. This case is different from *Micklewright v Surrey County Council* [2011] EWCA Civ 922. In that case, a large branch from an Oak tree fell without warning and killed the person standing beneath. The defendant accepted that its system of tree inspection was inadequate. Accordingly, the court had to consider whether a proper system of inspection would have revealed any defect in the tree. The judge at first instance had held that the appropriate inspection was: "a quick visual inspection carried out by a person with a working knowledge of trees as defined by the HSE." The judge accepted evidence from the defendant's tree inspector that,

when he looked at the branch after the accident, there was no obvious sign of decay indicating that a failure of the branch had been imminent. The Court of Appeal considered that the Judge was entitled to make his findings based on this evidence and was not prepared to interfere with his decision that, even if an adequate system of inspection had been carried out, it would not have revealed that failure of the branch was imminent. The position in this case is wholly different. Ms Tune would, and should, if a proper inspection of the Tree had been conducted have been able to identify that the Tree needed attention. The Defendant should then have taken steps to identify that defect and decide how it should be dealt with, presumably by the Tree being felled. If the Defendant had done so, the defect would have been identified and the Tree felled. Unlike *Micklewright*, the defect in this case was there to be identified and the failure to take proper steps in order to do so by Ms Tune was inexcusable.

The "Bing" images

91 The Bing images are dated 14 March 2013. They were obtained by Mr Benzies after the evidence had been completed. They show the Tree some nine months before the accident and approximately a month after the February 2013 inspection. They are considerably more recent than the Google StreetView images. On the basis that Ms Tune did not include the Tree as requiring action in her inspection records, the images provide the best evidence of the presentation of the Tree at the time when Ms Tune undertook her inspection.

92 The circumstances in which the Bing images came to the attention of Mr Benzies are set out in his addendum report dated 17 June 2019. It was suggested to Mr Benzies that he had only sought to discover additional information about this case after the evidence had been completed because he wished to advance the Claimant's case before me, rather than act as a true expert and assist the court. There is no substance in that suggestion. It should have been up to both experts

– Mr Benzies and Mr Forbes-Laird – to take steps to obtain, and make available, the best evidence about the presentation of the Tree before it fell, to the court.

93 The appearance of the Tree in the Bing images could be attributed to various reasons. They included the following three main reasons:

(a) the pruning of the Tree at some point in time before the date of the Bing images;

(b) the possibility that the Tree was affected by road-side poisoning due to the use of de-icing salt used on roads; or

(c) the possibility that at that stage the Tree was infected by *K. Deusta*, which had reached an advanced stage.

94 I am unable to accept that the images show the Tree as having been pruned in the purported 2012 inspection. That is because, there was, as I have found, no such inspection. Nor am I able to find that it was pruned subsequently (i.e. after the alleged 2012 inspection but before it fell), though I do not believe that it was ever suggested that it had been. The opinion given by Mr Forbes-Laird was based purely on his interpretation of the Bing images and the information contained in the tree-inspection records prepared by Ms Tune. Even on Mr Forbes-Laird's analysis, there were at least three principal reasons for the presentation of the Tree in that state in the Bing images, something which he accepts in paragraph 2.2.3 of his addendum report, although he states in paragraph 2.2.5 that the pruning of the Tree was the most likely explanation. However, I consider that the alleged pruning of the Tree is the least likely of the possible causes of the presentation of the Tree in the Bing images. There is nothing in the tree-inspection records prepared by Ms Tune about the Tree, so that source of information is of little assistance in determining what Ms Tune saw when she undertook her inspection. There may be features of the presentation of the Tree which show signs of pruning but to conclude,

as Mr Forbes-Laird did, that this was the most likely explanation is to proceed on the basis that the Tree was pruned in 2012, which I have found simply could not have been the case. It is almost impossible for me to see how Mr Forbes-Laird could have come to that conclusion based on the presentation of the Tree in the Bing images only.

95 I also found that, rather than give true expert evidence on the point, Mr Forbes-Laird appeared primarily to be advancing the Defendant's case – or as Mr Murray accused Mr Benzies of doing on behalf of the Claimants – acting as counsel for the Defendant. Whether or not Mr Benzies appreciated his true duties as an expert when he signed his original report, the fact is that, in the course of giving oral evidence, it was Mr Forbes-Laird who did not appreciate his proper functions when presenting his expert evidence to the court. Although discarding the proposition that the Tree was "unlikely" to be infected with *K. Deusta* at paragraph 2.2.5 of his addendum report, he was quite prepared to go much further saying that it was "highly unlikely"[9] or "highly improbable"[10] that it was. His opinion, as the following exchange demonstrates (my underlined emphasis), was premised on the basis that it was clear to him from the evidence which he had heard that there had been an inspection of the Tree in 2012[11]:

> "Q. If this tree had been pruned, say, the previous year, and one knows from the other evidence that there was a tree inspection regime in 2012 ---
>
> MR PENNOCK: Well, again ---
>
> JUDGE MITHANI: I will make my findings in relation to that."

Similarly, later on[12], there is the following exchange between Mr Forbes-Laird and Mr Pennock (again my underlined emphasis):

> "Q. Walking? As far as we know, she was driven past at 50 miles an hour, Mr Forbes-Laird; what do you say now in relation to that?

[9] See page 32 of the transcript of the hearing on 9 July 2019.
[10] See page 34 of the transcript of the hearing on 9 July 2019.
[11] See page14 of the transcript of the hearing on 9 July 2019.
[12] See pages 35-36 of the transcript of the hearing on 9 July 2019.

A. I say that I was in court when Miss Brookes gave her evidence, and I heard her say that the evidence from the inspection record identifies the inspector to have been present on the ground, either side of the tree, and in all probability walked past it. Is it possible she drove past it? I suppose so, but do we know this? We do not. But Miss Brookes gave evidence, and we heard it.

Q. That is not your area of expert evidence, and I will not go into with it you, and just ---

A. Well, I'm sorry, it is my area of expert evidence, because I functioned as a highway tree inspector for three years.

Q. Your Honour, I'm putting a marker down: I'm not going to challenge him on this; it's not his area of expert evidence; he's acting as an advocate now, rather than an expert witness.

A. I'm not; I simply heard what Miss Brookes said in court.

Q. If you're not an expert on it, it's a matter for the judge to weigh up the evidence, Mr Forbes-Laird, not for you to make submissions on behalf of the defendant; I would ask you to remember that. Now, we have the tree presenting in March 2013 with signs and symptoms, one of the possibilities of which is disease; why should an inspector ignore that?"

I agree wholly with Mr Pennock. It was no part of Mr Forbes-Laird's function as an expert to trespass into the territory of the judge by accepting, for the purpose of presenting his expert evidence, that the account of a witness had to be correct. It is not that he did not know that Mrs Brookes' account was subject to serious challenge. He did and, in the event, I have found it to be largely unreliable. He should have presented his evidence on the likely scenarios based on the rival positions advanced by the parties, leaving it to the court to determine any factual issues which arose. He might legitimately have said that the most likely explanation of the presentation of the Tree in the Bing images was that it had been pruned and that it was likely to have been pruned at some stage before the date of the Bing images in March 2013. However, to accept as a fact that the pruning took place in 2012, was not for him to say.

96 I can largely discard the possibility that the Tree was affected by roadside poisoning due to the use of de-icing salt used on roads. This premise is based entirely, or largely, on speculation. There is no evidence whatsoever to support this proposition. Mr Benzies' evidence on this point (as regards whether he had thought about this issue in

his reports) was, as Mr Murray points out in paragraphs 59 and 60 of his skeleton argument, unsatisfactory because he appeared to suggest that he had considered the point and had not realised that it had not been included in his report. However, I am unable to accept that it undermined the substance of the evidence summarised in his addendum report. I wholly agree with Mr Benzies that there would have to be a substantial amount of salt needed to cause damage to a tree in the way Mr Forbes-Laird contended, and it has to be questioned why this tree (i.e. the Tree) was affected when there is no evidence of other, nearby trees, being similarly affected. On the substantive issue of the likelihood of this, I cannot disagree with what Mr Benzies had to say[13]:

> "A: Are you saying - is it superficial salt damage due to spray, burning of the leaves and causing minute dieback, or are you talking about large amounts of salt in the soil over time?
>
> Q. I'm talking about considerable amounts of salt that are causing - go through to the roots, and are a possibility for causing a tree to exhibit signs of ill health, and then, when the de-icing salt stops, the tree can recover. This is well-known; I don't think I'm saying anything radical in terms of arboricultural ---
>
> A. I would say that there has to be an awful lot of salt in order to cause those symptoms. The type of - amount of salt that you're talking about is a large dump in the vicinity of the tree; something that does happen, but I would suggest is implausible in a central reservation of the A45, to be used as a salt store for de-icing.
>
> Q. Well, I'm sure that Mr Forbes-Laird will be able to take the court through how that will work, but I suggest to you that that was another option that your report simply failed to consider?"

97 Mr Forbes-Laird's evidence on that point, in his addendum report, was only brief – see paragraph 2.3.5 of his addendum report – and there is no reference to this point in the conclusions contained in his original report – though he did deal with the point in his oral evidence, both when he first gave evidence and also when he was recalled. But both this reason, and the possibility that the Tree was affected by drought, were based on speculation. Mr Forbes-Laird might have thought of a host of other, speculative, possibilities about how the Tree presented

[13] See page 19 of the transcript of the hearing on 9 July 2019.

itself in the Bing images. But he seemed easily to discard the one possibility which it must have been obvious to any expert about the presentation of the Tree – that it was infected with some type of fungal disease which needed investigation.

98 Just as McKay J found in *Bowen* that his confidence in Mr Forbes-Laird as an expert in that case was diminished because Mr Forbes-Laird could not present his expert evidence in a dispassionate manner, I come to the same conclusion about him in this case. He seemed, at every possible point, to be advancing the case of the Defendant before me and had lost all sense of what his true functions were. His evidence was not impartial. He was very careful in the words he chose when giving evidence, and sounded very impressive when he did so. However, he was not prepared to give answers to straightforward questions which were put to him.

99 I asked Mr Forbes-Laird that given, on his hypothesis, Ms Tune would not have discovered the signs of *K. Deusta*, when she conducted her inspection nine months before the Tree fell, was there a point in time when she might have been able to identify, at least, the sign of disease that caused her to raise an enquiry about the state of the Tree and about how to deal with it if it was found on subsequent enquiry to be diseased. He refused to provide any, or any meaningful, response to that question. The following excerpt of my exchanges with him demonstrates this (my underlined emphasis)[14]:

> "Q. Right, let's stick with the point that I'm - we're trying to get out of you. That immediately before this tree fell, right, if you were to stick a probe into the base of the tree or one of the major roots coming off it, you will have discovered, on the balance of probabilities, rotten wood, wouldn't you?
>
> A. I can't say. Some way below ground one might have found it.
>
> JUDGE MITHANI: Take it back - just help the witness please, I - I - when would your probe have - let's put it this way - perhaps work backwards. When would your probe - at what stage before the tree fell would your probe have discovered that there was something amiss? How - when would you say, six months before it fell, nine months before? Because you seem to be so clear that it's highly unlikely ---

[14] See p 51 *et seq* of the transcript of the hearing on 13 June 2019.

A. I can see - your Honour, I can see from the photographs that some of the below ground parts of the tree are soft.

Q. Yes.

A. If I had, before the tree fell, been able to get my steel rod deep enough below ground to poke those parts of the tree ---

Q. Yes.

A. I would have found soft wood.

Q. And when would that have been?

A. That would have been, I'm guessing, a year perhaps before the tree fell, maybe, but it is - it is a guess and that as I say, would have required a relatively lucky strike ---

Q. Ok, right, let's - let's - let's ---

A. --- and it would have required me to be able to probe below ground.

Q. Let - let, please, it's very important that we find this out because there is a wide spectrum of ifs and buts. We know the tree fell in 2013.

A. Yes.

Q. We know that your evidence is that the time when it was inspected, it is like - unlikely to have shown signs by the use of a probe which suggested that something was drastically wrong with it, so we know that. That's your evidence, as I understand it. Now, what I'm asking you is at what stage between that first two dates, the February 2000 and - the 2013 inspection and the date when the tree fell. Would you be able to turn round and say to me, because I'm relying on your expert evidence and say, "Well, three months before the tree fell, if I'd actually have put a probe in, you know, hurrah, or - or worse," I mean, obviously ---

A. Yes, I - I - I understand, I understand ---

Q. --- that's what I - I mean, I - I ---

A. --- I understand precisely the case.

Q. I just want you to tell me that, please.

A. So ---

MR MURRAY: I need to ---

JUDGE MITHANI: When, on a balance of probabilities ---

A. Yes.

Q. --- would you say?

MR MURRAY: And you said a year.

A. So, if I may answer the judge's question.

JUDGE MITHANI: Sure - sure, absolutely, Mr - Mr Pennock, I interrupted.

A. It has been put to me, this concept of probing through the soil to the base of the tree which really is not something that I would do or - or find efficacious. If I was concerned about root disease, your Honour, I would have got out the trowel that I carry in my bag and I would have dug around the base of the tree to try and dig down to the main structural roots, perhaps going down below ground a foot or so, to see if I could find indications of - of decay.

Q. Ok, when would you do that?

A. And - and I would do that if I felt that there were visual inspection of the tree gave me cause for concern.

Q. Well, I note all that and I - and I hope I'm not asking a question that's daft because I'm prone to and I apologise in advance if I am and I'll be stopped if I'm asking too many questions but I do need to get this round my head properly. What inspection, and when carried out, would enable you to say, "There is something wrong here." We know that you say it wouldn't have been at the last inspection before the tree fell, would it be days before the tree fell, hours before the tree fell, months before the tree fell? That's all I want to know.

A. I would have expected to be able to find decay by digging round the base of the tree within six months, minimum, maybe as long as 18 months, possibly even two years, but that would require digging down amongst the roots of some of the tree.

Q. When would it have been possible for you to have been able to do it without being lucky, as you put it, in a - it looks a bit - it looks a bit awkward and there you are. That's what I'm asking, would it have been three months before?

A. I don't know I would have found it at all with a probe.

Q. Right.

A. But my - my modus operandum would have been in that case, to - to dig and by digging down, I would probably have found the decay.

Q. (Inaudible).

A. Six, eight - 18 months, something like that, maybe two years."

100 I pause there. The question I was attempting to obtain an answer to from Mr Forbes-Laird was when an inspector would have been put on enquiry that there was something wrong with a tree such as to make it appropriate for further enquiries and investigations to be conducted in relation to it. In the course of those exchanges, Mr Forbes-Laird said:

"I don't know I would have found it at all with a probe."

101 I presume he meant to say "without a probe". I am unable to accept what Mr Forbes-Laird had to say because it is inconsistent with what he had to say when he was recalled to give evidence. But even if he is right about that, it would be an unacceptable risk to expose the public to the risk of a falling tree when it was not possible on a visual inspection to know until it actually fell (i.e. not to know at any time before it fell) that it might be infected with a disease which may cause it to fall, particularly if it is a disease which is as common *as K.*

Deusta, i.e. the third most common wood-decay fungus associated with structural failure.

102 Mr Forbes-Laird was asked on a number of occasions when he was recalled about whether, if the Tree had not been pruned in 2012, it would have been possible without a significant amount of difficulty to ascertain if it was infected with a fungal disease. Mr Forbes-Laird reluctantly admitted that it would have been possible to do so (but not without a great amount of pushing and probing from Mr Pennock, as the exchanges at page 36 *et seq* of the transcript of the proceedings on 9 July 2019 demonstrate):

> "Q. The phrase is "reasonable care", Mr Forbes-Laird. Mr Benzies is of the opinion that this tree, in March 2013, showed signs of disease; you do not disagree with him: you say, "That's potentially correct, however I think it may be pruning". Now, "reasonable care" in this very high-risk area would've involved a further investigation of this tree, having seen it present in this fashion, potentially diseased: she ought to have dismounted from the car, gone to the tree, removed the epicormic growth if one could, but dug down with her trowel, as you say, and she'd have found the disease, wouldn't she?
>
> A. If that invasive or semi-invasive below-ground investigation had been undertaken, I think the disease would probably have been found.
>
> Q. Thank you."

Then at page 44 of that transcript:

> "Q. Now, in relation to the 2009 photographs, you said, "I would not have signed the tree off in 2009 without further investigation". Based on that photograph alone from March 2013, you wouldn't sign that off as safe and healthy without further investigation, would you?
>
> A. No, and that is precisely the terminology that I used in 2009 when I was looking at the photograph. But, because my evidence is that what I see in the 2013 photographs looks more like a tree that has been pruned than anything else, if that is what I found on the ground, I would have no further concerns.
>
> Q. And if it was not what you found on the ground and you didn't see signs of pruning?
>
> A. Then I would have regard for two factors: where the tree is and whether there are explanations for its condition, what those explanations are, and I would then respond accordingly. If I had seen that on the ground, and if I had seen the tree had not been pruned, I might well have said it needed further investigation."

103 It almost goes without saying that even on Mr Forbes-Laird's analysis, if, as I find, there was no pruning of the Tree in 2012, and no de-icing

poisoning or drought, then Ms Tune should have identified from the state of the presentation of the Tree when she inspected it on 19 February 2013 that it needed looking into to ascertain whether it was diseased and what should have been done about it. So far as he suggests otherwise, I reject what he says.

104 It is right that I deal briefly with another point which Mr Forbes-Laird mentioned in his evidence. He stated that dead wood would only drop from the crown of the tree on a significant scale if the tree's vascular system had been fundamentally compromised, whereas only approximately 5% of the Tree's vascular system had been affected *by K. Deusta*. As he said in his addendum report:

> "My final observation on Mr Benzies' images is that if they show the tree in a poor condition due to the disease, this would have only resulted from invasion of the outermost annual rings by the fungus. As I explained during oral evidence with reference to the stem cross sectional photograph, marked up by me to show the extent of vascular dysfunction, it is clear that the area of hydraulically active tissue lost to the disease is of the order of 5% of the whole. In no way could this account for crown-wide dieback of the sort promoted by Mr Benzies: quite simply, the required mechanism is not apparent in the evidence."

105 I am unable to accept that this conclusion is obvious, or even likely, from the photograph of the base of the Tree which was inspected by Mr Benzies on 8 April 2014. The photograph shows a very substantial area of the tree to be affected – the suggestion that it was 40% was not disputed by Mr Forbes-Laird. How Mr Forbes-Laird can deduce from this photograph alone that only 5% of the active tissue lost could be attributed to the disease is quite beyond my comprehension. But the important point here is this: if, as I have found, this is the manner in which the Tree presented itself on 19 February 2013, and that it could not be down to pruning or poisoning, it does not take any great amount of ingenuity to work out that it could only be down to disease.

106 I am unable to accept the criticisms made by Mr Murray about the addendum report of Mr Benzies and the oral evidence he gave when he was recalled to give evidence. Whether or not he had appreciated the significance of the declarations which should have been included in his original report, he did his best to assist the court. It is alleged by

Mr Murray that Mr Benzies was indulging in speculation. I do not consider that he was. He was asked questions by Mr Murray which involved speculating about the Defendant's case (in relation to all three matters which Mr Forbes-Laird indicated were the likely cause of the presentation of the Tree, i.e. pruning, poisoning due to the use of de-icing salt and drought) and he gave answers based on what he was asked. If that may have involved his providing answers which amounted to speculation, it was because he was asked questions which were speculative in nature. Mr Forbes-Laird, on the other hand, refused to answer, or to answer satisfactorily, any question which could undermine the Defendant's case. As regards the failure of Mr Benzies to include the expert's declarations in his original report, I accepted the submission of the Claimants that this was not deliberate and gave permission to the Claimants to rely on that report and he gave his evidence after having been sworn to the contents of those declarations.

107 Just as the Defendant's position on breach of duty lacks substance, its position on the issue of causation also lacks substance. It amounts to saying little more than this: "although there is no documentary evidence at all that the Tree was pruned, it was. If it was not pruned, it was subject to de-icing or drought. That is because Mr Forbes-Laird (who provided better expert evidence than Mr Benzies) says so." That position proceeds on a basis which is fundamentally flawed: it is clear from the evidence that the Tree was not pruned, and the de-icing and drought are matters of pure conjecture. Mr Forbes-Laird might have thought of a host of other matters, amounting to speculation, which could have affected the Tree. The plain fact is that I found much of his evidence to be unreliable, not only because it proceeded on assumptions which it was not appropriate for him to make but also because his evidence was largely partisan and biased. He appeared to be intent throughout on supporting the Defendant's extremely weak case on causation.

108 I come to the resounding conclusion that the most probable cause of the presentation of the Tree in the Bing images was due to *K. Deusta*. I would not have expected Ms Tune to know that from a properly-conducted visual inspection of the Tree. However, the presentation of the Tree should have put her on enquiry that there was something wrong with it and that the matter needed further investigation. She did not take any steps to enable such an investigation to be conducted.

109 I, therefore, find causation to be established.

CONCLUSION

110 I come to the clear conclusion that liability must be determined in favour of the Claimants.

111 I was informed by Mr Murray that if I determined the issue of liability against the Defendant, it would appeal. I consider it appropriate, therefore, to fix a date when I can hear any application that the Defendant may wish to make for permission to appeal. That hearing can also be used to deal with costs and any directions necessary to deal with the issue of quantum. I do not think that it needs to be listed for more than 1 hour.

ACKNOWLEDGMENTS

112 I express my deep and sincere gratitude to both counsel, particularly for their patience on the occasions when I was struggling to understand some of the more complex matters which arose in the claim.