Neutral Citation Number: [2014] EWHC 222

Case No: HQ11X03476

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/02/2014

Before :

MR JUSTICE NICOL

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Between :

Jamie Alexander Yates	**Claimant**
- and -	
National Trust	**Defendant**

- -
- -

Christopher Wilson-Smith and Matthew Phillips (instructed by **Stewarts Law LLP**) for the **Claimant**
William Norris QC and Judith Ayling (instructed by **Berrymans Lace Mawer**) for the **Defendant**

Hearing dates: 9th December – 13th December 2013

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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.

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Mr Justice Nicol :

1. Morden Hall Park in Surrey is one of the properties owned by the National Trust ('NT'). Morden Lodge is in the south west corner of the Park. It is occupied by private tenants and the public do not have access to it, but the gardens of the Lodge are managed by the NT. In February 2009 the NT's gardener, Alan Green, carried out a Visual Tree Assessment ('VTA') of the trees in the garden of the Lodge. Not far from both the Lodge itself and from the River Wandle, which flows through the gardens of the Lodge, was a horse chestnut tree that was described as suffering from extensive bleeding canker and honey fungus. The VTA said that it should be felled within the following 6 months. The warden of Morden Hall Park was Chris Heels. For some 2 ½ years, Mr Heels had made use of a tree surgeon, or arborist, called Joe Jackman. On Tuesday 1st December 2009 Mr Heels contracted with Mr Jackman to undertake several days of work in Morden Hall Park. On Wednesday 2nd December Mr Heels showed Mr Jackman the horse chestnut tree, and said it needed to be taken down. They agreed that two days should be allowed for this particular job. Mr Jackman had worked with a team of others when previously employed at Morden Hall Park and he worked with others at the beginning of this week in December. On Thursday 3rd December he telephoned Mr Heels and said that he would not be available the next day, but other members of his team would be there and would start work on the horse chestnut tree.

2. On Friday 4th December three members of Joe Jackman's team arrived. They were the Claimant, who was then 22, Scott Ralston and Oliver Mackrell. The Claimant climbed the tree using a rope and harness and began to cut off the branches of the tree with a chain saw. Joe Jackman had told them they were to fell the tree sectionally. This involved first cutting off the limbs of the tree which were dropped to the ground and then, when that was done, cutting the main trunk in sections. Mr Ralston and Mr Mackrell remained on the ground and fed the branches into a wood chipper. The tree was about 23 metres high. The Claimant had been working for about 1 – 1 ½ hours and was probably about 50 feet up when he fell to the ground. He has no memory of what caused him to fall and neither Mr Ralston nor Mr Mackrell was looking in his direction at the time. When Mr Mackrell got to the Claimant he was tangled in his rope and Mr Mackrell said he cut the rope with secateurs in two or three places to free him. An ambulance arrived shortly afterwards and the paramedics cut the Claimant out of his harness.

3. The consequences for the Claimant have been severe. He suffered a fracture dislocation at T10/T11 with a complete spinal cord injury. This has rendered him permanently paraplegic. He has sued the NT in negligence and the Work at height Regulations 2005 and this is the judgment of the preliminary issue which was tried to determine whether the NT is liable for his loss.

Evidence

4. The Claimant gave evidence in support of his claim and he also called Mr Ralston and Mr Mackrell. Although he served a witness statement from Mr Jackman, the Claimant chose not to call him (nor, for that matter, did the Defendant). Accordingly, I have disregarded the statements made by Mr Jackman save where there is other admissible evidence as to what he said or did. The Claimant also relied on the expert evidence of Mr Tony Lane.

5. The Defendant called Mr Heels, Zoe Colbeck (the Property Manager for Morden Hall Park), Fred Moughton (the NT's Health and Safety Officer for the South of England), Richard Owen (Insurance Manager for the NT), Louisa Craven (Risk and Assurance Director of the NT), Stephen Wheeler (Senior Health and Safety Officer within the NT's Heath and Safety Team), and PS Washington, PCSO James Lewis and PC Simon Wallace (who attended after the Claimant's accident). The following witness statements were also adduced by the Defendant without the need for the makers to be called: paramedics Richard Clements, Nathan Ward, Richard Cutbill and Dean Bateman. The Defendant relied on the expert evidence of Roy Finch. The two experts met and produced a report of the matters on which they agreed and disagreed.

6. As well as the pleadings, there were two bundles of trial documents and a further bundle of photographs. A fifth bundle was of documents collected by the London Borough of Merton ('Merton'). Its Environmental Health Department caused summonses to be issued against Joe Jackman and the NT because of the Claimant's accident. Merton did not proceed with these prosecutions. I have taken into account the statements which Merton took from the Claimant, Mr Ralston and Mr Mackrell (but not the statement taken from Mr Jackman) and also the interview which Merton conducted with Mr Heels. I have also considered emails which give details of the National Proficiency Tests Council ('NPTC') certificates held by Mr Jackman, Mr Ralston and Mr Mackrell. The Merton file also included reports by Mr Bradley (Merton's investigating officer) and Liam McKeown (a consultant arborist instructed by Merton). The Defendant objected to the admissibility of these reports and the Claimant chose not to contest the matter. I have disregarded them.

7. I had written opening notes from both sides. In theirs, the Defendant suggested that a view would be useful. I was sceptical. In August 2010 the horse chestnut tree was taken down by another firm of tree surgeons, Wimbledon Tree Surgeons, and I was doubtful as to what I would be able to glean from an inspection of the site. The Defendant did not press the matter. No view was held.

8. After the evidence was completed on Friday 13th December 2013 there was no time for oral closing submissions. I received detailed written submissions from both the Claimant and Defendant and a further round of submissions in reply from each. I am grateful to the parties for all of these and I have taken into account all that they have submitted.

Relationship between the Defendant and Joe Jackman

9. Morden Hall Park had a large number of trees and the NT had fairly regular need for tree surgeons. Chris Heels had worked at Morden Hall Park since 2001. He was himself qualified to use a chain saw to cut up timber on the ground. He also held NPTC certificates CS31 and CS32 which covered the felling of small and medium trees. He had attended a course on conducting tree inspections for 1 day in 2001 and he did another, 4 day, course on tree safety management in 2008. He did not have certificates which would qualify him to climb trees and operate a chain saw. He brought in outside contractors to do this and sometimes other types of work on the trees and had been doing so since 2001. In 2006/2007 he wished to replace one of their two current contractors. At that time the tenant of Morden Lodge, Ben Gordon, was arranging and paying for the work on the trees in the garden of the Lodge. He was using Joe Jackman who was the partner of Mr Gordon's niece. Mr Gordon verbally recommended Mr Jackman. Zoe Colbeck suggested to Mr Heels that he should watch Mr Jackman at work and see whether he seemed competent.

10. In April 2007, Mr Heels watched Mr Jackman for about 10 minutes or so. Mr Jackman was climbing trees and there were two other people with him. Mr Heels does not claim to be an expert in tree climbing, but, on the basis of his experience of dealing with other arborists, he was satisfied with Mr Jackman's work and decided to get some quotes from him. The quotes were satisfactory and the NT first contracted with Mr Jackman in May 2007. Mr Heels and Ms Colbeck watched Mr Jackman and his men carry out that work and were again satisfied with it.

11. Prior to Mr Jackman starting that first assignment, Mr Heels asked him for evidence of his Public Liability Insurance cover. The certificate of insurance dated 2nd May 2007 names 'Mr J Jackman' as the policy holder. From the beginning, it seems, Mr Jackman had a team of men working with him. It was the Claimant's case that this was insufficient to demonstrate that the Public Liability cover extended to the other members of Mr Jackman's team. I will return to consider that argument later and what, if any, significance it would have if correct. Here, I shall focus on the evidence. In cross examination, Mr Heels said that Mr Jackman had assured him that the men who were working with him did have Public Liability cover, but that was a matter between Mr Jackman and his men, rather than an issue with which the NT needed to be concerned. I do not think it more likely than not that Mr Jackman gave Mr Heels the express assurance that his men were covered by Public Liability Insurance. In his interview with Merton, Mr Heels said, in effect, that the insurance position as between Joe Jackman and his men was a matter for them. Had Mr Jackman given an express assurance, I would have expected it to have been mentioned by Mr Heels in the course of this interview which took place on 1st December 2011.

12. Mr Heels was also asked about the inquiries that he made concerning the NPTC certificates held by Mr Jackman. He said he had seen Mr Jackman's card – a document which summarises the certificates held by its owner. He did not keep a copy. A copy was obtained by Merton. It shows that Mr Jackman had CS 31 – felling small trees; CS39 – operate a chainsaw from a rope and harness; and CS38 - tree climbing and aerial rescue. He did not have CS 32 – felling medium trees or CS41 – carry out dismantling operations, although Mr Heels, mistakenly, thought that the latter had been included. Mr Jackman was not a member of the Arboricultural

Association or any other professional body but all of his quotations (until a standard day rate was agreed between him and the NT in about April 2008) included the sentence 'All works to be carried out by fully qualified and experienced arborists'.

13. After that first occasion in May 2007 over the next 2 ½ years the NT entered into a further 13 contracts with Joe Jackman for work on over 60 trees in Morden Hall Park. Mr Heels said that this previous work included the sectional felling of other trees. In addition, he and his team had removed the complete canopy from an ash tree in 2007 and de-crowned two poplar trees in August 2009. All three had been a similar height to the horse chestnut tree from which the Claimant later fell, as were two London plane trees from which Joe Jackman was commissioned to remove deadwood. A large number of the trees on which Mr Jackman had worked were chestnuts and he had felled two such trees. Mr Heels's pattern was to spend 5 minutes or so around the beginning of the day, watching the Jackman operations and return periodically throughout the day. He was satisfied that they were competent and comparable with the other arborists with whom he had contracted since 2001. There has been no evidence that any of these earlier jobs gave rise to any problems.

14. Mr Heels said that at some point in 2007 he asked to see Joe Jackman's risk assessments and method statements. He was shown them and considered that they were in a similar form to the ones which other tree surgeons had produced. They went through the documents, but Mr Heels did not ask for copies. Ms Colbeck also recalled an occasion when Joe Jackman came to her office with a number of different risk assessments for the various scenarios with which he might be involved. She was satisfied with them but did not keep copies.

Relationship between the Claimant and Joe Jackman

15. When he was 19-20 the Claimant undertook a number of courses and gained some qualifications in certain aspects of tree surgery. These included CS31 – felling and processing small trees and CS39 – climbing and aerial rescue and how to use a chainsaw from a rope and harness. Not long after completing these courses he met Joe Jackman and began to work for him. He had been working for him for about 2 years prior to the incident at Morden Lodge. Joe paid him between £100 - £140 per day cash in hand with the Claimant responsible for his own tax and National Insurance. The Claimant provided his own chain saw and safety equipment. Joe provided the wood chipper, fuel for the chain saw and transport to the site. The other members of Mr Jackman's team with whom the Claimant worked were Oliver Mackrell and Scott Ralston. The Claimant worked for no one else during this two year period. He regarded Joe Jackman as his boss and took all his instructions from him. Joe would notify him when he needed him. During the first year this was about 3 days a week. In the second year it was about 1 -2 days per week. It is not necessary for me to decide the precise legal character of the relationship between the Claimant and Joe Jackman. It is at least arguable that he was Mr Jackman's employee. It is sufficient to describe him as a member of Mr Jackman's team.

16. Joe Jackman was clearly more experienced than the Claimant and tended to do the big jobs, but over time the Claimant gained more experience and confidence. Overall, Joe Jackman was the climber on about 70% of the occasions when the Claimant was part of his team and the Claimant was the climber for the other 30%. The Claimant had done a number of jobs with the Jackman team in Morden Hall Park (as well as other sites). Together they had cut down trees that were as big, or bigger, than the horse chestnut tree. The Claimant himself had climbed higher in a tree than he did at the time of the incident. He had cut out deadwood and limbs from such trees, but he had not cut out limbs as big as the ones he was dropping on this occasion and nor had he had to take down a tree of this size before where he had been the climber.

17. When the Jackman team worked at Morden Hall Park, Chris Heels would point out which trees had to come down (or otherwise needed work) , but neither he nor any of the other NT staff would say how to carry out the operations. The Claimant's instructions on those matters came from Joe Jackman. It was unusual, but not unprecedented, for Mr Jackman to be absent when they were working on his jobs. When he was away, the Claimant said, Scott Ralston was left in charge.

18. The Claimant was asked about his understanding of the insurance position. He did not have his own insurance. He was vague about who was responsible for obtaining public liability cover. So far as he thought about it all, he assumed he would be covered by Joe Jackman's insurance.

The events leading up to the Claimant's fall

19. Mr Heels booked Joe Jackman for 5 days of tree surgery work from 1st – 7th December 2009. On the 1st December he went through a written record of exchange of information. This concerned general matters rather than particular trees, but it confirms these dates. As I have said, on the following afternoon (Wednesday 2nd December), he showed Joe Jackman the horse chestnut and explained that it was diseased and needed to be taken down because it was dying. He showed Mr Jackman the bark which was coming away from the trunk in some sections, the fungi and the bleeding canker. He did not give him a copy of the VTA but Mr Heels said, and I accept, this would have given Mr Jackman no further material information than he could see from inspecting the tree itself. Mr Heels suggested that it should be sectionally felled, but did not insist on this method of taking it down. It was the method which Joe Jackman had used to take down other trees in the Park and Mr Jackman raised no difficulties about it being used on this occasion.

20. There was a divergence of evidence as to what the plans had been for the remainder of the week. Mr Heels said that Joe Jackman proposed to take down another tree (a willow) on the Thursday. He told Mr Heels that he was due to be working elsewhere on the Friday, but three of his men would start the work on the horse chestnut that day and the tree would be felled in sections on Monday 7th December. Mr Heels was away on the Thursday. Later that afternoon he said he was telephoned by Mr Jackman who said that he was at Morden Lodge. They had finished the willow and were planning to

start the horse chestnut on the Friday by taking off the branches. He said that Mr Jackman told him that the Claimant would do the climbing work on the Friday and that the Claimant was qualified to do this particular work. Mr Heels had seen the Claimant working with the Jackman team on previous occasions. Mr Heels said it was his understanding that Joe Jackman himself would come and finish taking down the trunk of the tree on Monday 7th December. That was important for him because Mr Heels knew that the Claimant did not have a CS41 certificate which would be the appropriate qualification for sectionally felling the trunk of the tree. Mr Heels said that he was told by Mr Jackman that the Claimant had CS39 and he thought this was sufficient to take the branches off the horse chestnut tree. Whether he was right about this last point was a matter on which the experts differed.

21. The Claimant had not been working with Joe Jackman on 1st or 2nd December but Mr Mackrell and Mr Ralston had. They said they were shown the tree briefly on the Wednesday evening although by that time it was dark. Joe Jackman said that the tree was to be felled sectionally, beginning the next day. Because he was due to be away (they were told on holiday), he would ask the Claimant to do the climbing. The Claimant likewise said that he was telephoned by Joe Jackman who said that he was due to be away and wanted the Claimant to dismantle the horse chestnut tree. Mr Jackman told the Claimant that he believed he could handle the task.

22. The Claimant, Mr Ralston and Mr Mackrell all said in evidence that the next day (Thursday 3rd December) they suffered a blow out on the way to the Park and so could not work that day.

23. They arrived on the Friday morning. They inspected the tree before the Claimant began his climb. It was apparent that it was diseased and, indeed, they understood that this was why it was to be taken down.

How the Claimant fell from the tree

24. As I have said, the Claimant has no recollection of the events immediately prior to his fall and it was not witnessed by either of the other members of the team who were present. Four possibilities were considered by the experts: (i) that the Claimant had accidentally cut the branch on which he was sitting or standing; (ii) that the Claimant cut his rope accidentally while suspended from it; (iii) that a branch or other anchor point to which the rope was attached gave way; or (iv) that the Claimant had inadvertently detached himself from one anchor point before he was safely attached to another.

25. The experts agreed that the first was inherently unlikely and can be dismissed.

26. The second possibility could happen, in particular when a chainsaw kicks back because it encounters an obstacle that is not immediately severed. The Claimant's ropes and other climbing equipment were, unfortunately, disposed of shortly after the incident.

There are, though, photographs of them which were taken after the Claimant had been removed. These show a number of cut ends of the climbing rope. If the Claimant had accidentally cut his rope while climbing, the rope would have been under pressure. There is not a sufficient distinction between the appearance of the cut ends which this would produce and the cuts from secateurs (which is what Mr Mackrell says he used to free the Claimant from the tangle of rope). The Defendant observes that the police officers who attended the scene said that there had been some discussion (particularly with Mr Mackrell) as to how the accident might have happened and he had suggested that the rope had been cut by the chainsaw kicking back. He did not mention to them his part in cutting the rope after the fall with secateurs. In the statement which Mr Mackrell gave to Merton on 4th November 2010, he said that when he found the Claimant he had still been clipped in with some 4 metres of rope and there was no sign that the rope had been cut through. In this statement Mr Mackrell said that he cut the Claimant out of the rope on the ground. He repeated this in his witness statement for the present proceedings dated 25th January 2012 and when challenged in cross examination. He agreed there had been some discussion with the police about the possibility that the claimant had cut his rope with the chainsaw, but that was only a possibility. More important, though, is the evidence of Mr Finch who said that if the Claimant had cut his own rope, he would not have expected there to have been more than 1 – 1.5 metres between the cut and the attachment to the harness, yet when studying the photographs, it was apparent that there was well in excess of 2 metres. In addition, it would be an unlikely coincidence for both ends of a severed rope to land close to each other on the ground (as the photographs showed them to be). This led Mr Finch (and Mr Lane) to conclude that it was unlikely that the Claimant cut through his own rope. I accept their view. The failure of Mr Mackrell to mention to the police that he had cut the rope 2 or 3 times with secateurs may be explained by the effect of the shock of just learning that his colleague had suffered a serious accident.

27. As between the third (failure of branch of the tree as an anchor point) and the fourth (inadvertence on the part of the Claimant) possibilities, the evidence does not allow me to reach a conclusion as to which was more likely on the balance of probabilities. Mr Finch is a very experienced arborist. He had never known an anchor point to fail. However, Mr Lane, who is also very experienced had known this to be the cause of 2 out of 12 falls from trees with which he had been concerned. The tree that the Claimant was climbing was diseased. Mr Lane (but not Mr Finch) climbed it as part of his preparation for his report. He found that there were both safe and unsafe anchor points. The experts did not suggest that the photographs taken immediately after the accident allowed them to identify a recently broken limb and Mr Lane's climb took place some 7 months later. I conclude that the third alternative is a possible cause of the fall (but no more than that). That leaves the fourth possibility, the Claimant's inadvertence. It is good practice for a tree surgeon to have a secondary anchor point at any time when he is actually using the chain saw. The experts agreed that, if the Claimant had followed this practice, it is very unlikely that two anchor points would have failed. However, when moving around within a tree, there will inevitably be occasions when the climber is attached only to one anchor point. If that is insecure or released before the next anchor point is properly attached then a fall can occur. On the Claimant's behalf it was submitted that he was anxious because this tree and the operation he was engaged on were more difficult and this might have contributed to

him making a mistake. As with the third alternative, I consider this fourth alternative was a possible cause of the Claimant's fall, but no more than that.

Did the NT owe the claimant a relevant duty of care?

The Claimant's case that the NT did owe him a relevant duty of care

28. It is axiomatic that to succeed in a claim for negligence, the Claimant must show that the Defendant owed him a duty to take care. It is also obvious that it must be a relevant duty in the sense that it was a breach of that duty which was causative of the Claimant's loss.

29. The necessary conditions for the existence of a duty of care were summarised by the House of Lords in the well known case of *Caparo Industries plc v Dickman* [1990] 2 AC 605. Thus loss must be reasonably foreseeable if care is not taken. There must also be a relationship of proximity between the Claimant and Defendant. Thirdly, the imposition of liability must be just and reasonable.

30. In this case the Claimant submits those requirements are fulfilled. He was working on the Defendant's land and carrying out a dangerous activity. The NT had hired Joe Jackman but had not taken reasonable care to see that he and his work methods were competent and safe.

31. The Claimant relies particularly on the decision of the Court of Appeal in *Bottomley v Todmorden Cricket Club* [2003] EWCA Civ 1575. In that case, the Defendant Cricket Club had hired a two man stunt team called Chaos Encounter to conduct a pyrotechnic display as part of a fund raising event in November 1997. Chaos Encounter had asked the Claimant to help them. Part of the display involved a pair of mortars which were metal tubes set into the ground and filled with petrol. The Claimant's task was to lower primers in the form of plastic bags filled with gunpowder into the mortars. The intention was that the mortars would then be fired with an electric charge from a car battery operated by another member of the team and connected by a wire to the mortars. As the Claimant was lowering one of the bags into its mortar, the contents of the tube ignited and caused him serious burns. The Judge at first instance found that the whole operation was highly dangerous and Chaos Encounter was 'an amateurish organisation operating in a field which required the highest degree of professionalism if danger was to be avoided' and the Defendant had failed to exercise reasonable care in selecting them. In those circumstances, the Defendant was liable for the negligent system which Chaos Encounter had adopted and which caused the Claimant's injuries.

32. The Court of Appeal confirmed that the Club had owed Mr Bottomley a relevant duty of care. It followed the decision of the House of Lords in *Ferguson v Welsh* [1987] 1 WLR 1553 in which Lord Keith (with whom Lord Brandon and Lord Griffiths agreed) had said (at p. 1560) that there might be special circumstances in which an occupier might be liable for things done or not done on his premises if he did not take

reasonable steps to satisfy himself that the contractor was competent and the work was properly done. Those three Judges had envisaged liability potentially arising under the Occupiers Liability Act 1957. Lord Goff at p.1564 disagreed that the statute would be the basis of liability but did contemplate that in special circumstances the occupier might be liable together with the injured man's employer as joint tortfeasors. Lord Oliver likewise thought that any such liability would be as a joint tortfeasor rather than as an occupier. Brooke LJ, giving the leading judgment in *Bottomley* concluded that the club ought to have taken reasonable care in its selection of a 'contractor' to conduct the dangerous pyrotechnics display on its land and it had failed to do so. It was immaterial that Chaos Encounter were not going to be paid a fee (nor, for that matter, was the fact that Mr Bottomley was paid nothing for his part). In *Ferguson v Welsh* the defendants had escaped liability because they had taken reasonable care to select competent and safe contractors, but the Cricket Club had not.

33. The Court of Appeal also confirmed that the principle in *Honeywill and Stein Ltd v Larkin Brothers Ltd* [1934] 1 KB 191 survived the Occupiers Liability Act 1957 because the statute concerned an occupier's 'occupancy duty' whereas the former related to the occupier's liability for activities conducted on the premises (see *Bottomley* at [31] and *Fairchild v Glenhaven Funeral Services* [2002] 1 WLR 1052 CA – the subsequent decision of the House of Lords in *Fairchild* did not affect this part of the decision). However, in the event, the Court of Appeal did not need to rely on the *Honeywill* line of authority (see *Bottomley* at [50]).

34. The Claimant argues that just as Chaos Encounter were engaged in a dangerous activity on the Cricket Club's grounds, so, too, the demolition of the horse chestnut tree was a dangerous occupation. Just as it was reasonably foreseeable that visitors to the Cricket Club (including the agents of Chaos Encounter) would be harmed if the pyrotechnic display was not conducted properly, so, it is said, it was reasonably foreseeable that members of Joe Jackman's team would be injured if their work was not carried out safely. The Claimant's case is said to be stronger because, whereas the Cricket Club had no knowledge of Mr Bottomley prior to his accident, here the NT knew that Joe Jackman would not be present on Friday 4th December and knew that the Claimant would be the climber in his place. Joe Jackman employed men who were under-qualified and under-trained for the task and also, it is submitted, not covered by public liability insurance. It is argued that his operation could properly be described as cowboy operators for whose negligence the NT should be jointly responsible.

35. The Claimant also argues that the *Honeywill* line of authority is relevant where the occupier has used reasonable care in choosing an independent contractor but an unsafe method of work has nonetheless been adopted. Liability is then dependent on the activity being 'extra-hazardous', but, it is the Claimant's contention that the NT did not use reasonable care in choosing Joe Jackman and therefore it is sufficient, as *Bottomley* showed, that the activity in question was 'dangerous'. The Claimant does not have to go further and establish that it was 'extra-hazardous'.

36. Although the Claimant's primary case was that the relevant duty of care owed to him was to take reasonable care in the choice of the contractor, there were also times when

he suggested that the NT owed him a duty of care even if the choice of Joe Jackman as the contractor had been reasonable. I shall postpone dealing with this part of the case until later.

Whether the NT owed the Claimant a duty of care in the choice of Joe Jackman as contractor: discussion

37. The NT plainly did owe *a* duty of care to the Claimant. He was a lawful visitor to Morden Lodge and, as such, he was owed the common duty of care in s.2(2) of the Occupiers Liability Act 1957. However, that is a duty to take such care as in all the circumstances of the case is reasonable to see that he was reasonably safe in using the premises for the purpose for which he was invited by the NT to be there. But that is not a relevant duty of care. The Claimant was not injured because of the state of the premises but because of his activity as a tree surgeon in the horse chestnut tree. As I have already mentioned, the Court of Appeal held in *Fairchild*, that the 1957 Act does not help answer the question whether an occupier owes a duty of care to a visitor for an injury caused by a third party's activity on the premises. For that purpose one has to look to the common law (see Brooke LJ at [131]). The same must apply where the act is the Claimant's own.

38. The Particulars of Claim relied also on the Work at Height Regulations 2005. Although not formally abandoned, the Claimant has not actively pursued this part of his case. That was inevitable in view of the state of the evidence at trial. The NT was not the claimant's employer. The Regulations would then only have imposed a duty on them if the Claimant was working under their control and to the extent of any such control. It was originally argued that Mr Heels had directed that the horse chestnut tree should be taken down by sectional felling which would inevitably have required a member of Joe Jackman's team to climb the tree (rather than the alternatives of either clear felling or dismantling the tree with the aid of a cherry picker). In his witness statement, Mr Heels agreed that he had suggested this method, but had not insisted on it, and Joe Jackman had said nothing to him to suggest that this method would be unsafe. In the absence of any evidence from Mr Jackman, Mr Heels's evidence was unchallenged. It was not possible in those circumstances for the Claimant to maintain that the NT had had any control of the method of work or that the Work at Height Regulations imposed any duty on the NT.

39. So far as the common law is concerned, the important starting point is that the Claimant was not the NT's employee and that he was either an employee or otherwise a member of the team of its independent contractor, Joe Jackman. He was on the NT's premises and injured in the course of carrying out work which the NT had contracted with Joe Jackman to do.

40. I have emphasised that the 1957 Act did not apply in the circumstances of the case, but I think it nonetheless noteworthy that, if it had, s.2(3)(b) would have been relevant. This provides that an occupier 'may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it.' As Lord

Denning MR said of this provision in *Roles v Nathan* [1963] 1 WLR 1117 at 1123, it followed the common law – see *General Cleaning Contractors v Christmas* [1952] 1 KB 141 (affirmed on other grounds by the House of Lords [1953] AC 180) which had held that a window cleaner had no claim against an occupier of a house when a defective sash fell on his fingers because this was one of the risks that window cleaners had to guard against. In *Roles* itself the claimants were chimney sweeps who were overcome by carbon monoxide fumes. Lord Denning said that, as far as the occupier was concerned, the sweeps could be expected to take care of themselves in connection with dangers from such fumes. 'When a householder calls in a specialist to deal with a defective installation on his premises, he can reasonably expect the specialist to appreciate and guard against the dangers arising from the defect.' In *Tomlinson v Congleton* [2004] 1 AC 46 Lord Hobhouse at [71] gave as other examples of the skilled visitor, who can be expected to appreciate and guard against the risks ordinarily incident to his calling, the steeplejack brought in to repair a church spire and an electrician hired to replace faulty wiring.

41. The risks presented by this horse chestnut tree were the risks ordinarily incident to the calling of a tree surgeon who was climbing a tree with a chainsaw. The tree was diseased and dying but that was apparent to the team when they went to Morden Lodge on Friday 4th December. It was also the reason why the tree was to be taken down. Its condition meant that care needed to be taken in the choice of anchor points, but that was an example of the risks ordinarily incident to the work of a climbing tree surgeon. Accordingly, so far as this was a claim under the 1957 Act, the NT would be able to rely on s.2(3)(b). The subsection is not directly relevant so far as the claim is based on a common law claim, but it would be anomalous if the Claimant was able to succeed in that regard when he could not under the 1957 Act. I accept that this is not determinative of the claim, but it is a matter in the Defendant's favour.

42. Section 2(3)(b) did not feature in the Court of Appeal's discussion in *Bottomley*. One explanation may be that the Court treated the claim as arising out of an 'activity duty' to which the 1957 Act did not apply (see [31]), but, on the other hand, that did not stop the Court drawing on the discussion of s.2(4) of the Act in *Ferguson v Welsh* [1987] 1 WLR 1553 (Section 2(4) provides a defence where the occupier has acted reasonably in entrusting the work whose execution damaged the claimant to an independent contractor who had been reasonably selected) – see *Bottomley* at [44] and alluding to the defence later in the judgment – see *Bottomley* at [49]. Another explanation may be that the enterprise on which Chaos Encounter were engaged was so novel and bizarre that it may have been impossible to identify risks ordinarily associated with it.

43. An employer of course owes a duty of care to his employee amongst other things in relation to the system of work which is adopted and to see that the employee has the appropriate training or experience for the tasks which the employer gives him. But the Claimant was not the employee of the NT. He was the employee or sub-contractor of the NT's independent contractor. It is unusual for the hirer of an independent contractor to owe a duty of care to the contractor's employees of a comparable kind.

44. The Defendant relied on the Court of Appeal's decision in *Fairchild* (above) but in the present context, that decision is of limited use. I am examining whether the NT owed the Claimant a duty of care in selecting Joe Jackman as a contractor. As the Claimant rightly observes, the three occupiers in *Fairchild* were found to have been competent – see [150] 'the CEGB hired highly reputable contractors'; and for the other two appeals see the findings by the trial judges recorded at [141] and [144]. What the Court of Appeal was considering was whether the occupiers nonetheless owed a duty of care to the employees despite the fact that their employers appeared to be competent. It concluded that they did not.

45. In *Bottomley* the hirer (the cricket club) was found to owe a duty of care to its contractor's (Chaos Encounter's) agent (i.e. Mr Bottomley) but the circumstances were highly unusual. In particular the Court referred to the dangerous character of the pyrotechnic display - see [48]. I agree with the Claimant that the Court of Appeal reached its decision independently of the *Honeywill* line of authority as is apparent from [50] although in that paragraph and [31] it acknowledged the continuing binding character of that line of authority despite academic and foreign judicial criticism of it. Nonetheless, the factual basis of the decision was the trial judge's findings of fact from which it was clear that this was an exceptionally dangerous operation and dangerous not only to Mr Bottomley, but to all of the visitors to the Club's event.

46. Tree surgery which involves climbing into a tree is hazardous. It is described as such by the Health and Safety Executive and both experts agreed. But so, too, are other operations carried out at some height off the ground, like many aspects of construction or, for that matter, window cleaning. It is of some significance that the 2005 Regulations do place a duty, even on a non-employer, to take care to see that those working at height are safe, but for non-employers this duty is dependent on exercising control over the worker and, as I have said, the NT did not have control over the Claimant. He looked, and looked exclusively, to his boss, Joe Jackman, for instructions.

47. In his closing submissions in reply, the Claimant referred to *Perrett v Collins* [1999] PNLR 77. In that case the Court of Appeal found that an inspector for the Popular Flying Association owed a duty of care to the Plaintiff who was injured when an aircraft, which the inspector had certified as fit to fly, allegedly developed a fault and crashed. What created the necessary proximity between the Plaintiff and the inspector was the latter's measure of control over the aircraft. Without the certificate the aircraft could not have been flown. Likewise, in *Watson v British Boxing Board of Control* [2001] QB 1134 the defendant was found to owe a duty of care to the Plaintiff boxer who had suffered more significant injury because the medical services available at the ringside were inadequate. The Board set requirements for such services and all involved in boxing contests were obliged to follow them. The Board, too, had the necessary measure of control to be sufficiently proximate to the Plaintiff and so owe a duty of care in negligence. The absence of such a measure of control is significant in deciding that there is no such proximity and no such duty of care – see *Sutradhar v Natural Environment Research Council* [2006] UKHL 33, [2006] PNLR 36 at [37] – [39].

48. There was no equivalent measure of control exercised by the NT over Joe Jackman or his team. Neither *Perrett* nor *Watson* assists the Claimant in the present case. On the contrary, the absence of such a measure of control does help the Defendant, as *Sutradhar* shows. Furthermore, while, as I have said, tree felling is hazardous, I find that it is simply not in the same league as the pyrotechnic display in *Bottomley.* Its hazardous nature is not such as to impose on the NT a duty of care in the choice of its contractors to those contractors' employees.

49. In his evidence Mr Heels accepted that it was important from the NT's point of view to take care in the selection of contractors. In one respect that accords with the NT's legal obligations. If an ordinary visitor (that is a visitor other than one of the contractor's employees) was injured as a result of carelessness by the contractor or his employees, the NT's liability under the Occupiers Liability Act 1957 would be affected by whether it had taken reasonable care in the selection of the contractor – see the 1957 Act s.2(4)(b). Mr Heels's answer went beyond that. He agreed with the proposition that it was important for the NT to see that they only had competent contractors to protect the contractors themselves and, indeed, in May 2007 the NT issued a briefing to its staff, Health and Safety Instruction 11, which contained mandatory requirements and explanatory guidance amongst other things in relation to tree inspection programmes and remedial action. However, I agree with the Defendant that neither Mr Heels's response nor the NT documents themselves create a duty of care. Whether such a duty exists is a matter of law for the Court (see for instance *Tomlinson v Congleton BC* [2004] 1 AC 46 at [78]). Of course, one way that a person can come under a duty of care is if they assume responsibility for the Claimant's safety. However it neither is, nor could be, alleged that the NT documents or answers from its witnesses went so far in this case as to confer a duty of care to the Claimant in relation to the choice of an appropriate contractor by the assumption of responsibility route.

50. There was considerable debate in the course of the evidence as to whether Joe Jackman's men were covered by Public Liability Insurance. In the Claimant's closing submissions, however, it was made clear that it was not his case that the (alleged) failure to ensure that Joe Jackman's men possessed any or any adequate insurance should result in a finding of breach of duty against the NT. It was not, therefore, contended that this was a distinct route by which the Court could find that the NT did owe a duty of care to the Claimant in connection with the selection of Joe Jackman as their contractor.

51. I conclude, therefore, that the NT did not owe the Claimant a duty of care in its choice of Joe Jackman as its independent contractor.

52. In his closing submissions in reply the Claimant said that such a conclusion would be illogical and contrary to common sense. I disagree. One, though only one, condition for a duty of care is that it should be fair and reasonable to impose such a duty on the Defendant. In this case, I do not think it would. If Joe Jackman was the Claimant's employer, *he* would owe the Claimant a duty of care that was relevant in the circumstances. Whether or not the Claimant was his employee, it would seem likely

that Joe Jackman exercised control over his working so as to place on Joe Jackman the duties under the Work at Height Regulations. I do not regard it as illogical or nonsensical that the NT did not, in addition, owe him a duty of care in its choice of his 'boss' as a contractor. It is right that a failure to exercise reasonable care in the choice of an independent contractor might lead the NT being liable to an ordinary visitor since it could not then rely on s.2(4)(b) of the Occupiers Liability Act 1957 but it would place a very much more onerous obligation on occupiers to extend that duty to the contractor's employees or sub-contractors. That is because, as the present case illustrates, there is very much more scope for an employee to be injured than for an ordinary visitor. Therefore the range of matters which the occupier would have to take into account in order to discharge that wider duty would be considerably greater and the imposition of such a duty would not, in my view, be fair or reasonable.

If the NT did owe the Claimant a duty of care in its choice of contractor, was it negligent in that regard?

53. On the conclusion that I have reached in the previous paragraphs, this issue does not arise but I will consider it in case the conclusion was wrong. Again, it is convenient to take first the way in which the Claimant alleges the NT was negligent in its choice of Joe Jackman.

The Claimant's case in relation to negligence in the choice of Joe Jackman as contractor

54. The Claimant points first to Joe Jackman's lack of appropriate certificates. He did not have CS 33 - felling of large trees or CS 40 – carry out pruning operations or CS41 - carry out dismantling operations, yet, he submits, CS 33 and or CS 41 would have been needed for the demolition of the horse chestnut tree.

55. Next it is said that Joe Jackman's invoices referred to his business as 'Jackman and Sons' yet the Public Liability Insurance certificates which he gave to the NT showed that the insured was 'Mr J Jackman'. The Claimant argues that this meant those working for Mr Jackman, such as him, Scott Ralston and Oliver Mackrell were not covered by the policy. It was contrary to the NT's policy to have contractors who were not covered by PLI.

56. The NT Health and Safety Instruction 11 which was issued on 27th May 2007 included among its mandatory requirements the following, 'Provision must be made in property budgets and staff work schedules for tree inspection programmes and necessary remedial action (see 2.5)' and Paragraph 2.5 of the Explanatory Guidance then said,

> "Implementing a prioritised work programme: Remedial tree work will often involve tree climbing. This work is normally contracted out for reasons of cost and safety. If the work is to be undertaken by staff, they should be trained and competent, holding relevant NPTC certificates. Work should be carried out in accordance with industry and HSE guidance and NT model

> risk assessments. Contractors should be Arboricultural Association approved (see list of Aboricultrual Association approved contractors), or judged to be competent and safe as a result of previous work for the Trust and having appropriate certificates of competence and insurance. Useful guidance is provided by the leaflet 'Choosing an Arborist' available from the Arboricultural Association or from Forestry Advisers. Work must be carefully specified and will be subject to:…NT Conservation Directorate document *General Requirements and Conditions for Countryside and Garden Work;* NT Conservation Department Directorate document *Special Requirements and Conditions for Arboricultural Work.*…British Standard BS3998 (1989) *Recommendations for tree work* (revised edition expected in 2007). It is important that provision is made in property budgets for inspection and remedial work. Once priorities have been determined for remedial work, lack of available funding would not be accepted by external enforcing authorities as a valid reason for non-completion."

57. The leaflet *Choosing an Arborist* proposed that a prospective contractor should be asked if they were insured and provide evidence of Public Liability Insurance and Employers Liability Insurance; confirm that they work to BS 3998; provide copies of their qualifications (NPTC certificates for chainsaw use both ground and aerially were compulsory); provide a written quotation; and ask for the phone number of a referee. Prospective contractors should also be asked whether they are members of a professional organisation. This was not essential, but if they were not, the advice was to take more care in asking the previous questions.

58. The Claimant submits that, contrary to this instruction, Joe Jackman was chosen originally in breach of these provisions. Thus he was not a member of the Arboricutural Association and, when first appointed in May 2007 he had not done previous work for the Trust. He had been recommended by Mr Gordon, the tenant of Morden Lodge, but Mr Gordon did not have the skills to judge whether he was a safe and competent tree surgeon. Mr Jackman lacked the necessary certificates (see above). He did not have PLI for his men and did not have any Employers Liability Insurance. Mr Heels watched him at work commissioned by Mr Gordon, but only for about 10 minutes. It was a cursory examination and, in any case, Mr Heels did not have the experience or training to assess whether Mr Jackman was a competent and safe contractor.

59. By the time Joe Jackman entered into the contract with Mr Heels to work for the Trust in December 2009, he had carried out a number of other contacts for the Trust. However, even if they were done competently, Mr Heels again was not able to assess whether they were done safely. Mr Jackman still lacked the appropriate certificates for the felling of large trees (which the horse chestnut was). He also still lacked PLI.

Was the NT negligent in its choice of Joe Jackman?

60. Whether the NT was negligent in the choice of Joe Jackman in May 2007 seems to me to be completely beside the point. On the assumption which I am presently making (that the NT owed a duty of care to the Claimant in relation to its choice of contractor) the issue of whether there was negligence or not is only material in relation to the contract which Mr Heels on behalf of the NT entered into with Joe Jackman on 1st December 2009.

61. That was a contract which included the sectional felling of the horse chestnut tree. Mr Lane and Mr Finch differed on whether the certificates which Mr Jackman did have, in particular CS39, would have covered him for this work. It was Mr Finch's view that CS 41 would have been required if the intention had been to lower either the branches or parts of the stem of the tree with ropes and rigging (that is quite separate ropes from that which the climber would use in order to access the tree). Mr Lane thought that this was incorrect and CS41 would be needed whether or not ropes were used to lower parts of the tree to the ground. It is fair to say that Mr Finch's view, expressed shortly before the trial and during his evidence represented a change in his position . In the Joint Report Mr Finch and Mr Lane had agreed that Joe Jackman did not have the requisite competency certification for the work being undertaken. I have not found it necessary to resolve this debate.

62. It is important to remember that the certificates in question are not licences, possession of which is a necessary condition to undertaking the work in question. They are, as the experts agreed, certificates of competency. But that competency can be demonstrated in other ways. For what it is worth, Joe Jackman's quotations all included the sentence 'All works to be carried out by fully qualified and experienced arborists.' The NT's standard terms and conditions, printed on the reverse of each purchase order said at para 11.2 that 'the supplier warrants that the services will be performed by appropriately trained and qualified personnel with due care and diligence'. These statements in the contractual documents are relevant but by themselves these contractual documents might not be sufficient.

63. However, as I have previously mentioned, by 1st December 2009, Joe Jackman had undertaken a very large number of assignments for Mr Heels. They had included the felling of substantial trees and the significant cutting back of other very tall trees. It was Mr Heels's impression that the card which Joe Jackman had shown him and which summarised his certificates had included CS 41. That was wrong. The mistake was immaterial on the first contract (which involved cutting up timber that had already fallen). It is unfortunate that Mr Heels did not keep a copy of the card or ask to see it again when Joe Jackman was given more challenging jobs. Nonetheless, it was Mr Heels's view that all of the jobs which Joe Jackman had been given had been done competently. I accept that Mr Heels himself has limited certificates (they include felling medium size trees but not aerial work for which CS39, CS40 or CS41 would be relevant). However, Mr Lane accepted that Mr Heels was in a position to judge the quality of work done by Joe Jackman (Mr Lane had a different view as to Mr Heels's experience to judge the safety of the work. I will come back to that below). Mr Heels's view that the work was being done satisfactorily is shared by Mr Finch. On a further site visit which Mr Finch made in April 2013 he was shown two large riverside poplars which Joe Jackman and his team had reduced in height by one third.

They had been dismantled by allowing the smaller branches to free fall and the larger ones lowered on a rope. He was also shown two large London planes from which dead branches had been removed and also a large horse chestnut which had been reduced in height to about 5 metres above ground. In Mr Finch's view these trees showed that Joe Jackman and his team had achieved a satisfactory standard of work and that they appeared to have attained a high standard of skill when working on very large, tall trees. Mr Lane declined to accompany Mr Finch on this visit. He thought that it would not be possible to assess the quality of the work done by Mr Jackman given that most of it involved cutting down or cutting up all or part of the trees and the parts disposed of would, obviously, be no longer there. Nor could an inspection now reveal whether the work had been done safely. I accept that Mr Finch's inspection had these limitations, but his opinion that the work seemed to have been done competently is, nonetheless, of some value.

64. As to level of safety of Mr Jackman's work, Mr Heels said that Mr Jackman showed a number of risk assessments and method statements. In his first witness statement he said that it was some time in 2007 when he asked to see these. Mr Jackman showed him an A4 size folder of documents which was quite large. This contained risk assessments and method statements as well as his qualifications. He said the documents were similar to those provided by other tree surgeons he had employed. They went through the documents together. Mr Heels similarly told Merton in his interview that he had seen risk assessments from Mr Jackman in the past (and assumed that he had prepared something similar for the horse chestnut tree). In cross examination, Mr Heels said that he had seen the first few risk assessments which Mr Jackman had prepared (in re-examination he said on 2 -3 occasions), but he did not keep copies of them. He said in re-examination that the assessments explained the task in question, how it was going to be done safely, information regarding the nearest hospital and contact details. Some of the information would be common to all of the tasks (e.g. about the nearest hospital), other parts would be specific to the particular task (e.g. how it was going to be carried out). He also confirmed that Mr Jackman had produced method statements to him. The Claimant suggested that Mr Heels was not telling the truth when he said he saw a few of the first risk assessments prepared by Mr Jackman. I reject that suggestion. The evidence of Mr Heels on this aspect has been broadly consistent since his first statement to Merton. He accepted in cross examination that he had not seen any of Mr Jackman's risk assessments since 2007. Had he been gilding his evidence, it would have been simple not to make that concession. Mr Lane said that while it was good practice for risk assessments to be in writing, especially for a small business like Joe Jackman's, it would be acceptable to do a risk assessment by eye without making a formal record.

65. In addition to the risk assessments and method statements, Mr Heels had the opportunity to observe Jackman and his men at work frequently over the 2 ½ years that he was engaged in contracts at Morden Hall Park. While Mr Heels was not standing over Mr Jackman and his team the entire time that they were there, he regularly visited the trees that they were working on and, he said, he saw nothing to indicate that they were working unsafely.

66. The NT's instruction HS11 says that the alternative to a contractor being a member of the Arboricultural Association is that they are judged as competent and safe as a result of previous work for the Trust *and* having appropriate certificates of competence. The only certificates of competence which are mentioned as compulsory in the *Choosing Your Arborist* leaflet are the NPTC certificates for use of the chainsaw on the ground and aerially. Joe Jackman did have these. It right to add that Mr Heels and the NT's health and safety witnesses considered that, to comply with the Trust's policy, the contractor should also have had certificates covering the specific work which was being contracted for (I will assume, in the Claimant's favour that this was so although paragraph 2.5 of HS11 is in the section marked 'Explanatory Guidance' as opposed to the earlier section marked 'Mandatory Requirements'. In addition the later document, *Tree Management: Q and A,* says, 'If contractors are not AA approved, staff must be able to justify their selection through past experience, possession of relevant NPTC units *or* meaningful references [my emphasis and suggesting that past experience may suffice even in the absence of relevant NPTC units]). I have referred to Mr Finch's view that Joe Jackman's CS39 did cover the sectional felling of the horse chestnut tree. However, even if he is wrong about that I do not consider it to be decisive. I remind myself that I am asking whether Mr Heels breached an assumed duty of care to the Claimant in choosing Joe Jackman as the contractor for this work. The internal procedures and standards set by the NT may inform whether that duty was broken, but, just as they do not create a duty of care where none existed, so they cannot determine whether any duty in law was observed. Similarly, Mr Heels's evidence that, if he had known Mr Jackman did not have CS 33 (felling large trees), CS 40 (pruning) or CS 41 (sectional felling), he would not have engaged him to carry out these tasks on NT property, is also not determinative. In my judgment the very large number of contracts which Joe Jackman had previously performed for the NT satisfactorily, did allow Mr Heels to regard him as a competent and safe contractor. He had worked on a number of trees at least as tall as the horse chestnut and he had sectionally felled several trees. I accept that Mr Heels had nothing like the skills or experience of an assessor for the NPTC certificates, such as Mr Lane, but even if there is a duty on an occupier towards the employees of the contractor to choose only a competent contractor (which is the assumption I am making for these purposes) it would, in my judgment be far too onerous to expect the occupier to bring to bear that level of skill in deciding whether the contractor is competent and safe. Mr Heels could, of course, have limited his selection to contractors who were members of the Arboricultural Association but, as both experts accepted, there are many perfectly competent tree surgeons who are not members of that body or any other professional association. I also reject the suggestion, made at one stage, that the NT was over influenced by the prices which Joe Jackman was charging. They were competitive, but there is no evidence that they were excessively cheap or should have been a warning sign that Joe Jackman was cutting corners. Thus, for instance, the horse chestnut tree was later demolished by Wimbledon Tree Surgeons for a price which was comparable to that which Joe Jackman would have charged if he and his team had completed the task.

67. I do not consider that the evidence which was presented regarding Joe Jackman's Public Liability Insurance means that I should come to a different conclusion.

68. Firstly, I accept the proposition put forward by Mr Norris QC for the Defendant. The policy of insurance is not in evidence. The certificate of insurance names 'J. Jackman' as the insured, but I simply do not know whether that includes or excludes his employees or members of his team working under his direction even if not his employees. Mr Heels assumed that it did. In the course of his evidence he said that Joe Jackman had specifically assured him that his PLI covered the men in his team as well. Although there was no evidence from Mr Jackman to contradict this, I accept the point made by the Claimant that Mr Heels made no mention of this conversation in his earlier statements. In his interview with Merton the following exchanges took place:

> "'Q. At the time of the accident it was our belief that Joe Jackman only held personal public liability that did not cover the other three men in the team and he did not hold employers liability insurance. Would the National Trust have demanded this information for the others working under him? Was there any system to ask for supplementary information for the other working under him?
>
> A. I viewed the situation that we were contracting Joe Jackman and the person used I considered they were not subcontractors and was a matter between them.
>
> ….
>
> Q. As they [Jackman's men] were working on their own were any checks made as to the insurance they held?
>
> A. I knew that Joe Jackman had public liability, as for other insurance for the people that worked for him, it was a matter between he and them."

Had Joe Jackman given Mr Heels the express assurance that his men were also covered by his PLI, I would have expected Mr Heels to mention it during or after this exchange. In his second witness statement he says that he *assumed* Joe Jackman's PLI cover extended to those working for him. Again, he did not refer to a conversation in which Mr Jackman expressly said this was so. I do not consider that Mr Heels was being deliberately misleading, but so far as he said there was such an express assurance, I did not find his evidence reliable. Nonetheless, if it was only an assumption on Mr Heels's part that the PLI cover extended to Joe Jackman's men, the point remains that there is no evidence to show that assumption was incorrect.

69. Secondly, if Mr Heels's assumption was incorrect, it does not show that Joe Jackman was an incompetent contractor. The absence of such insurance may be an indication that the contractor in question is not competent - see for instance *Gwilliam v West Hertfordshire Hospital NHS Trust* [2002] EWCA Civ 1041 at [15] per Lord Woolf CJ and *Naylor v Payling* [2004] EWCA Civ 560 especially Neuberger LJ at [34]. The absence of public liability insurance was one of the reasons that the trial judge in *Bottomley* found that the Cricket Club had not taken sufficient care in the choice of Chaos Encounter as a contractor – see the Court of Appeal's judgment at [25] – [28]

and that Court dismissed an argument that the Judge was disentitled to conclude that there had been a lack of care in this connection - see [32] – [40]. But in the present case Joe Jackman plainly did have Public Liability Insurance, at least for himself. This was not, therefore, a case where the contractor had been unable to satisfy an insurer as to the risks he ran or lacked funds to pay the premium (compare the reasons given by the trial judge in *Bottomley* at [26] for holding the absence of insurance to be relevant to the competence of the contractor in that case). The extent of the cover could have been resolved if Mr Heels had asked to see a copy of the policy itself, but even in *Gwilliam* Lord Woolf and Neuberger LJ thought that would be excessive - see [16] and [25].

70. In some of the cases there is a suggestion that there might be a free standing duty to see that an independent contractor had insurance cover – see for instance Waller LJ in *Gwilliam* at [22], but this is a controversial approach - see for instance the views of Neuberger LJ and Sedley LJ in *Naylor v Pelling* and *Glaister v Appleby-in-Westmoreland* [2009] EWCA Civ 1325 [2010] PIQR p6 at [54] and [67]. It is unnecessary for me to resolve this topic since, as I have mentioned, the Claimant does not rely on any such free standing duty.

71. Joe Jackman's omission to obtain Employer Liability Insurance (or, more precisely, the omission of Mr Heels to see whether he did have such insurance) cannot be of any significance in these circumstances. I agree with the submission of Mr Norris that there is no basis on which it can be said that the NT owed a duty of care to the Claimant, who was not their employee, to ensure that if an accident happened as a consequence of his employer's fault he would be able to enforce a claim against that employer.

72. Since the incident involving the Claimant, the NT has changed its procedures at Morden Hall Park. They only use contractors who employ their own staff and these are asked to provide copies of their PLI when they are renewed and Employers Liability Insurance. The Claimant's closing submissions said the changes were telling. However, Mr Heels's evidence was that, in response to the accident, they now felt they had to be ultra-cautious. I do not regard these changes, post the accident as any more significant than the changes which the Congleton Borough Council made after Mr Tomlinson's accident when diving into their lake. As Lord Hoffman said in *Tomlinson v Congleton BC* at [43] there is a difference between what a defendant does subsequently (even if under the belief that this was necessary to avoid future liability) and whether there was actually a legal duty to make the change.

73. For all of these reasons I conclude that, even if the NT owed the Claimant a duty of care in deciding to contract with Joe Jackman in December 2009, it was not in breach of that duty. Put another way, Mr Heels was entitled to regard Joe Jackman as a reasonably competent and safe contractor, if and so far as he owed the Claimant a duty of care in that regard.

Any other relevant duty of care owed to the Claimant by the NT?

74. In his oral opening on behalf of the Claimant, Mr Wilson-Smith QC said that the Claimant's case came down to the question, whether it was reasonable for the Defendant's to instruct Joe Jackman as an independent contractor. I have answered that question adversely to the Claimant: the NT owed no such duty of care to the Claimant, but, even if they had, it was reasonable for them to instruct Joe Jackman.

75. Although Mr Wilson-Smith put his case in those simple terms there are aspects of the Particulars of Claim, evidence and submissions which suggest that he submits the Defendant should be found liable even so.

76. Thus it was argued that the Claimant lacked the qualifications or experience to carry out the work he was doing on the horse chestnut tree and he was not properly supervised. It is said that the nature of this unfamiliar task made him understandably anxious and it was this which led him (one way or another) to fall. The Defendant infers that these factors are said to impose a duty of care on the Defendant towards the Claimant.

77. There is a formidable legal difficulty with this way of putting the case. I have found that the NT was entitled to regard Joe Jackman as a competent contractor. In those circumstances it would be exceptional to find that the NT as occupier owed a duty of care to its contractors' employees to see that the work which they had commissioned was carried out safely. The reason is that the hirer can expect an independent contractor (certainly one who appears to be reasonably competent) to choose appropriate and safe means for its employees to carry out their tasks. Thus, as Lord Keith said in *Ferguson v Welsh* at p. 1560-1561,

> "It would not ordinarily be reasonable to expect an occupier of premises having engaged a contractor whom he has reasonable grounds for regarding as competent, to supervise the contractor's activities in order to ensure that he was discharging his duty to his employees to observe a safe system of work. In special circumstances, on the other hand, where the occupier knows or has reason to suspect that the contractor is using an unsafe system of work, it might well be reasonable for the occupier to see that the system was made safe. The crux of the present case, therefore, is whether the council knew or had reason to suspect that Mr Spence, in contravention of the terms of his contract was bringing in cowboy operators who would proceed to demolish the building in thoroughly unsafe way."

78. The same point was made by the Court of Appeal in *Fairchild* at [150] – [151] when Brooke LJ said,

> "The CEGB hired highly reputable contractors, and we can see no reason why in the circumstances of that case the law should impose any liability on them, in their capacity as (virtually) absentee occupiers, when it was Babcock's duty to look after

> the health and safety of their employees. To impose such a liability would in effect require an occupier to owe an employee an employer's duty of care to somebody else's employees; indeed it could be argued that it would impose on an occupier an even more rigorous duty of care than it would require him to ensure that the employer was carrying out his own duty of care. We can see no principled reason for imposing such a duty…[151] So far as the other two appeals are concerned, there is no finding that any of the occupiers before the court knew of the risks which Mr Twohey and Mr Fairchild were running… Ignorance of risks cannot excuse an employer, because it is an employer's duty to find out about well known risks which may imperil his workforce, but we were not shown any authority which suggested that such a duty rested on a mere occupier who had engaged competent contractors."

79. In this case, having engaged with Joe Jackman to carry out the work in December 2009, the NT was similarly entitled to leave it to him to decide who was to carry out the work and how. Lord Keith's reference to 'cowboy contractors' was to *subcontractors* who were manifestly incompetent. He was, as the quotation makes clear, proceeding on the premise that the *contractor* was competent.

80. In the present case, if the Claimant is treated as a sub-contractor, it would in my judgment be quite wrong to put him in the 'cowboy' category. The emphasis in this context, as Lord Keith and Brooke LJ made clear, is on what the occupier knew about the sub-contractor. Mr Heels had seen the Claimant previously working on trees as part of Joe Jackman's team. There is no evidence that this had given him any cause for concern. He knew that Joe Jackman would not be present on the Friday when the work actually started, but there had been occasions in the past when Joe Jackman had been absent while other members of his team carried on working. In addition, Mr Heels knew that there would be two other members of the team present, as Mr Heels knew would be necessary when tree climbing was involved in an operation. He said that he knew that the Claimant did not have CS41, but, on the other hand, Joe Jackman had told him that the Claimant was qualified to do what he would be required to do in Mr Jackman's absence and I accept that part of Mr Heels's evidence. I recognise that Mr Heels told Merton that he was not aware of any qualifications held by Jamie Yates, yet in evidence he said that he realised that the Claimant did not have a CS41, but did have CS39. He explained that he was entirely reliant on the information which Mr Jackman had provided as to Jamie Yates' qualifications. He had not checked them independently. While Mr Heels might have given a fuller answer to Merton, I accept what he said in evidence.

81. There was a difference of evidence as to whether the original plan was for the horse chestnut tree to be taken down on Thursday 3rd and Friday 4th December. This was the recollection of the Claimant, Oliver Mackrell and Scott Ralston. They said that the van in which they were travelling had a puncture on their way to work on Thursday 3rd, they could not complete the journey on that day and it was for that reason the work on the horse chestnut did not in fact start until the Friday. Mr Heels's evidence

was that the team was to do other work on a willow tree on the Thursday and that it always was the intention that the horse chestnut should be started on the Friday, but not completed until Monday 7th December.

82. I accept the evidence of the Claimant, Mr Mackrell and Mr Ralston that the puncture occurred on the Thursday, but I also conclude that this finding does not assist the Claimant.

83. What matters in the present context is Mr Heels's state of knowledge. I accept his evidence that he was told by Joe Jackman on the afternoon of Wednesday 2nd December and/or in a telephone call which he had with Mr Jackman in the early afternoon of Thursday 3rd December that the work on the horse chestnut tree would take place on Friday 4th December and Monday 7th December. From the time that Mr Heels and Mr Jackman entered into the contract for this batch of work on Tuesday 1st December, it was expected that the work would extend into Monday 7th December, as the Record of Information Exchange signed on 1st December makes clear. Mr Jackman told Mr Heels he would be away from Morden Hall Park on the Friday, but he was expected to be back on the Monday. Mr Heels was due to be away himself on both the Thursday and the Friday. He said that Mr Jackman told him that on the Thursday the men would work on other trees. They would start on the horse chestnut on the Friday and it would be completed on the Monday (by which time Mr Jackman would be back).

84. I understand (and accept) that the Claimant, Mr Ralston and Mr Mackerel were given different information by Mr Jackman. They thought the work on the horse chestnut would begin on the Thursday and be completed on the Friday. However, this does not lead me to disbelieve Mr Heels's evidence. There is other evidence that Mr Jackman was capable of giving different information to different people. Thus, he told Mr Heels that he was not going to be present at the site on the Friday because he had to do clearance work for an electricity company in Hampshire. He told Oliver Mackrell and Scott Ralston that he was going on holiday in Africa. Furthermore, in the telephone call which Mr Jackman had with Mr Heels on the Thursday Mr Jackman said that he and his men were then at Morden Lodge and he was then showing them the horse chestnut. Since the men did not arrive at the Lodge that day because of the puncture, this cannot have been correct. I also consider that the essence of Mr Heels's understanding was set out in his first witness statement. It is true that this did not, in terms, say that Mr Jackman had told Mr Heels he would take over the final stages of taking down the horse chestnut on the Monday, but if Mr Jackman was going to be back on that day, it would have been natural for him to resume the lead role. I am not persuaded that this evidence of Mr Heels should be disbelieved.

85. The first stage of the demolition of the horse chestnut was taking down the branches. There was a dispute between the experts as to whether this was in fact within the Claimant's CS39 certificate. In Mr Lane's view it was not because the size of the branches exceeded what someone with that certificate would have been assessed as being able to cut. In addition, some of the branches (including at least one which the Claimant had apparently cut prior to his fall) were ascending branches and the cutting

of branches which extended above the climber presented risks and hazards which the CS39 certificate did not test. Mr Finch, on the other hand, observed that the assessment criteria for a CS39 certificate did not specify a maximum size of branch but referred to ones which were 'around 100mm' and made no distinction between horizontal and ascending branches.

86. In my judgment, it is not necessary to resolve these rather fine distinctions. It is sufficient for me to consider whether there was information available to Mr Heels to put him on notice that the Claimant was not someone who should be undertaking the climbing task of the first of two days work on this horse chestnut when the NT's contractor had assured him that the Claimant was qualified for the job. In my judgment there was not. There were no 'special circumstances' in the sense referred to in *Ferguson v Welsh.*

87. None of the other matters relied upon, at various stages, by the Claimant would suffice (either alone or together with any of the other aspects I have already considered) to put the NT under a duty of care to the Claimant. Mr Heels accepted that the VTA form which Alan Green, the gardener, had completed in February 2009 was not given to Joe Jackman or any other member of his team. I agree with the Defendant's submissions that this would have told them no more of relevance than they would have been able to appreciate (and did appreciate) from their own observations of the tree: it was diseased and dying and, for that reason, needed to be treated with some care. Mr Green had identified that the tree should be felled within 6 months. It was in fact some 10 months later that the work was arranged. The delay was due in part to a bat survey which had to be conducted. The experts agreed that the tree would not have significantly deteriorated in the additional 4 months. I find that delay was of no importance.

88. In the circumstances it is not necessary for me to consider other issues canvassed at the trial such as causation and contributory negligence.

Conclusion

89. The Claimant suffered a fall which caused him grave injuries. They have radically altered his life and, in addition to the pain and suffering which he must have endured, they will have caused him very substantial financial loss. Anyone who learns of the case must have enormous sympathy for him. The NT (or its insurers) undoubtedly has a deeper pocket than he does. If the question before me was which of the two was best placed to shoulder these losses there could be only one answer. But that is not the question which I have had to address. The Claimant is entitled to compensation from the NT if, and only if, the NT owed him a relevant duty of care. I have concluded that it did not. The inevitable consequence is that this action must be dismissed.