Neutral Citation Number: [2014] EWHC 1891 (TCC)

Case No: HT-12-386

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 June 2014

Before :

THE HONOURABLE MR. JUSTICE COULSON

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Between:

Stagecoach South Western Trains Ltd	**Claimant**
- and -	
(1) Ms Kathleen Hind	**First Defendant**
- and -	
(2) Mr Andrew Steel	**Second Defendant**

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- -

Mr John Meredith Hardy (instructed by **Watmores**) for the **Claimant**
Mr Richard Stead (instructed by **Lyons Davidson**) for the **First Defendant**
Mr Jason Evans-Tovey (instructed by **BLM**) for the **Second Defendant**

Hearing dates: 12, 13, 14 and 15 May 2014

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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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THE HONOURABLE MR. JUSTICE COULSON

The Hon. Mr Justice Coulson:

1. INTRODUCTION

1. Rose Cottage ("the property") is an early Victorian house adjacent to the railway in Staines. At about 12:30am on 18 December 2009, one of the claimant's trains, travelling eastwards from Staines to Feltham, collided with a stem of an Ash tree ("the Tree") which had fallen onto the railway line from the garden of the property. At the time of the collision, the property was owned by the first defendant, Ms Kathleen Hind, a primary school headmistress.

2. In these proceedings, the claimant seeks to recover the cost of repairing the damage to the train, and other consequential costs, against Ms Hind. There is also a separate claim against the second defendant, Mr Andrew Steel, a tree surgeon who carried out certain work to the trees and shrubs in Ms Hind's garden in 2006 and 2007. Damages have been agreed at £325,000. The liability of both defendants remains in issue.

2. CHRONOLOGY

3. Ms Hind bought the property on 15 August 2001. It is an attractive house with a large garden. The southern strip of the garden abuts the railway line; indeed, it appears that this strip was originally owned by the relevant railway company, before being conveyed to a previous owner of the property in the 1960's. The eastern end of this strip of land narrows into a triangular area which, at the relevant time, was uncultivated and covered with ivy, brambles and nettles. The Tree was located close to the point of the triangle. It was hard up against the wooden fence on the southern side of the garden, and part of it overhung the railway.

4. The Tree was an Ash. It was about 150 years old. It was originally made up of three separate stems. The northern stem had fallen many years before Ms Hind bought the property. The two remaining stems, the eastern and the western, grew out of a common trunk. They were largely vertical, although it became apparent during the trial that there was a large branch growing off the eastern stem approximately along the boundary line.

5. Shortly after Ms Hind purchased the property, she employed a tree surgeon, a Mr Holmes, to cut back trees and shrubs to let some light into the garden. This work cost around £2,000. However, Ms Hind was not happy with Mr Holmes' work and did not use him again. She felt that he had caused unnecessary damage to the trees. He may have done some work to the Tree but, if so, it was not clear precisely what he did.

6. In January 2006, Ms Hind engaged Mr Steel, the second defendant, to carry out some further work in the garden. She was given Mr Steel's details by his mother, who worked at Ms Hind's school. A workscope was agreed which included the cleaning out of the crown of the Tree and the removal of deadwood. The total value of the work Mr Steel agreed to do was £725, plus £180 for the removal of vegetation.

7. The detailed evidence about the work that was carried out in January 2006, and how it came about, came from Ms Hind and Mr Steel. Ms Hind said that she did not ask Mr Steel to inspect the Tree, so she could not reasonably expect him to have done so. She went on:

> "He did the work I asked him to do. I was always very satisfied with the work that he did…I walked round the garden with Mr Steel discussing the works that I thought needed doing. And he then did the work we agreed."

She said that they had talked about the trees, in relation to their width, shaping and so on. As to the Tree itself, she said that she had asked Mr Steel to clear out the crown and remove the deadwood – principally twigs – in order to allow more light in.

8. Ms Hind said that she was seeking Mr Steel's advice only to the extent that he would advise on, for example, how much of the branches should be cut out. She said that he needed to be sure precisely what it was that she wanted. She emphasised that, mostly, Mr Steel did not suggest what needed to be done. She said that, essentially, Mr Steel's advice was as to *how* the work she wanted would be carried out, not *what* was to be done in the first place. She did not seek his advice generally about the trees.

9. Mr Steel confirmed all of this in his own evidence. He said:

> "We discussed what she wanted to carry out. I gave some opinions on how to do it."

It was put to Mr Steel that he gave advice. He denied that, saying that he made recommendations. He gave his opinions on the specific matters raised with him, such as what the effect would be if a particular item of work was done. He said that his opinions were limited to (for example) recommending, where Ms Hind said she wanted a tree or shrub reduced by 50%, that it should only be reduced by 25%. He said that he might have pointed out to her any obvious signs of weakness or defects and indicated that they 'needed to talk about that'. Mr Steel would give Ms Hind different options but then leave the final decision to her. He was also very clear that he would not go onto the eastern stem of the Tree at all, because it overhung the railway and he did not want to work over the live rails. It was agreed that he would work on the western stem only.

10. In June 2007, Ms Hind employed Mr Steel to carry out further work in the garden. He described this as "minor work". It does not appear that he carried out any work to the Tree. Similarly, in September 2007 Mr Steel carried out further work in the garden which he described as "general maintenance and tidying trees". Again, this work had nothing to do with the Tree. In addition, at some point during this period, Network Rail sent some contractors to trim back two fir trees and the pyracantha bush growing on the boundary. It seems that this was done from the railway side of the fence.

11. The night of 17/18 December 2009 was cold with a strong wind and snow. There is an agreed weather report which concluded that some of the winds that night reached gale force; the temperatures were below freezing; and there were snow showers. It is agreed that the prevailing weather conditions – in particular, the wind and the snow – explained why the eastern stem of the Tree fell when it did, although they were not the principal cause of the fall.

12. At some time shortly before 12:30am on 18 December, the eastern stem of the Tree fell onto the railway tracks. The lower part of the eastern stem fell across the track

closest to the garden, which was a line serving the up-line sidings. The top part of the eastern stem fell across the adjacent up-line (heading towards Feltham and Waterloo), with some of the top branches extending to the down-line beyond.

13. At about 12:30am an empty train was being driven along the up-line from Staines to Feltham by Mr Orton. It was the last journey of the day and Mr Orton was taking the empty train to the depot at Strawberry Hill, where he was due to arrive at 00:35. The train was travelling at about 40mph. Because of the darkness and the slight curve of the tracks, Mr Orton did not see the Tree until immediately before the collision. He applied full braking and then emergency braking. Two train units struck the fallen stem of the Tree and were damaged by it. The train broke the stem of the Tree in half. Fortunately no one was injured.

14. Emergency personnel were brought to the scene, along with representatives of Nash, Network Rail's 24-hour response contractors. The eastern stem of the Tree was then cut up using a chainsaw. Mr Cull, a representative of Nash who did not give evidence but whose statement was read under the Civil Evidence Act, reiterated that, in his view, the stem was rotten. The following morning, Network Rail's contractors (exercising their statutory powers) entered Ms Hind's garden whilst she was at work, and cut down the western stem of the Tree. The western stem was found to be generally sound, although some minor signs of internal decay were apparent once it had been felled.

15. On 23 April 2010, the claimant sent a letter of claim to Ms Hind. Less than six weeks later, on 2 June 2010, and before Ms Hind's solicitors had written to the claimant's solicitors advising of their instruction, Mr Sheppard, an expert arboriculturalist instructed on behalf of the claimant, attended the property and interviewed Ms Hind. He purported to make a note of her answers and then added the questions that he claimed to have asked into the note afterwards. Concerns have been expressed on behalf of Ms Hind about this process and the evidence demonstrated the unprofessional way in which the interview was carried out and recorded. I deal with that in greater detail in **Section 4** below.

16. In about September 2010, Ms Hind asked Mr Steel to undertake further work at the property. It was only then that Mr Steel learned that the eastern stem of the Tree had fallen onto the railway track. He was asked to remove a large piece of the western stem which was then lying in the overgrown part of the garden, and to fell the two remaining Ash trees on the other side of the property. Although these trees were sound, Ms Hind was understandably concerned about history repeating itself. It appears that this work was completed by 1 October 2010.

3. THE STATE OF THE TREE IN DECEMBER 2009

3.1 Visible Condition

17. In a photograph taken in about September/October 2009 (that is to say, about three months prior to the collision), the Tree can be seen to be in apparently good condition. Mr Sheppard , the claimant's expert, says of the photograph:

> "…it does show that the crown has good colour and density, with no obvious evidence of dieback or decline from this

> direction, and compared with other trees within the vicinity. From the photograph there is no evidence to suggest that the tree crown showed any significant signs of physiological ill-health or decline."

This was consistent with Ms Hind's evidence. She referred to the fact that there were no dead or falling branches and that each spring the Tree produced a large amount of healthy leaves. In her oral evidence she said that her visual inspections of the Tree showed that it was healthy because of the leaf cover and the state of the crown. She described it as "a healthy, strong, majestic tree".

18. This positive assessment of the visible condition of the Tree was also consistent with

(a) Mr Sheppard's inspection of the rings of the Tree after the collision: he said that his inspection demonstrated "steady growth over the last decade indicating sustained vitality"; and

(b) Paragraph 7 of the experts' Joint Statement (noted in detail at paragraphs 49-51 below) which confirmed that, prior to the collision, the Tree would have appeared healthy with no 'visual indication of the deteriorating structural condition of the trunk'.

I therefore find that the Tree looked healthy and strong at all times prior to the collapse.

3.2 The Eastern and Western Stems

19. The eastern and western stems were between 53cm and about 70-80cm in diameter, and about 16 to 18 metres tall. The stems themselves were both largely vertical.

20. During the trial, some aerial photographs, including one photograph exhibited by Mr Pryce, Mr Steel's expert, were considered in some detail by the experts. The photographs were taken in winter, possibly shortly before the fall of the eastern stem. They were helpful because they demonstrated that only a small part of the eastern stem actually overhung the railway tracks. Instead the stem seemed to be growing mainly along the boundary between the garden and the side of the railway.

21. The blown-up version of another aerial photograph, again taken in strong winter sunshine, showed the shadow cast by the Tree. This showed a large branch growing off the eastern stem with a branch framework that appeared to reach as high as the two vertical stems. The significance of this branch does not appear to have been something that the experts had previously considered. It clearly added to the load on the eastern stem, and created an asymmetrical shape.

3.3 The Fork or Union

22. The fork or union between the eastern and the western stems was situated about 1.2 metres above the ground, below the level of the adjoining fence. The evidence was that most forks in trees do not give rise to stability difficulties because, at the junction, the tree grows naturally and the increasing growth provides increasing stability for the fork. But a small minority of forks, called "included bark unions", do not grow in that

way. In these instances, the bark of the two stems push against one another and the year-on-year growth does not provide increasing stability; on the contrary, it causes continuing force between the stems and, as occurred here, causes a crack to develop in the union itself. It is not suggested that anyone saw a crack prior to the collapse, but there is a debate as to whether or not it should have been seen. The crack was one of the two reasons for the failure in December 2009.

3.4 The Wound

23. A similar dispute arises in respect of what was called 'the wound' at the base of the Tree. The wound was about 1 metre high and 600mm across. It was in the area from which the northern stem of the Tree had grown before it fell many years before. It appears that, once that northern stem had fallen, the sapwood behind was exposed and, slowly but surely, it decayed. The decay spread internally and was the source of the decay to the eastern stem and was, in turn, the other main reason for the failure in December 2009. Again there was a dispute as to whether or not the wound, and/or the decayed wood within it, should have been seen prior to the fall of the eastern stem.

3.5 Ivy and Vegetation

24. The principal dispute of fact between the parties concerned the extent to which the base of the tree (and therefore the wound and the fork) was covered in ivy and/or was obscured by vegetation and/or was difficult to access because of the overgrown nature of that part of the garden. The claimant relied principally on the photographs taken on 18 December 2009, after the collapse and removal of the eastern stem, to argue that there was no ivy at the base of the tree and that both the wound and the fork were 'there to be seen'. The defendants relied on the statements of Ms Hind and Mr Steel, and the subsequent photographs, to argue that neither fork nor wound could have been seen from a distance; that the fork was always covered in ivy; and that, even on a close inspection, it was by no means certain that the wound could have been seen. The highest it could be put is that, up close, "the wound might just have been visible". For the reasons set out below, I accept the defendants' case on this issue.

25. I consider that the best evidence as to the covering provided by the ivy and the ground vegetation in this area comes from those who saw it, namely Ms Hind, Mr Steel and Mr Vaughnley, the Network Rail manager who was there on the morning of 18 December. Ms Hind said that the Tree "was covered in dense ivy which had grown from under over and through the fence from the railway line". She described that part of the garden generally as "virtually impassable due to brambles, stinging nettles and rampant ivy, most of which had grown over the garden from the railway line on the other side of the dividing fence." In her oral evidence, when it was put to her that the area of the wound was visible, she said, "No, I'd say it wasn't".

26. Mr Steel described the area "as a sort of 'no-man's land'. The bottom of the garden was unkempt and untended. There was a lot of overgrown vegetation including ivy, brambles, stinging nettles etc". Mr Vaughnley described the same area as a dumping-ground, covered with brambles and nettles and a "considerable amount of ivy".

27. According to Mr Barrell, the expert called on behalf of Ms Hind, a very good comparable was the state of the adjacent tree, a large sycamore that is still standing, just beyond the point of the triangle, on the other side of the boundary of the property.

The photographs show the sycamore covered in ivy, from top to bottom. It is also difficult to access because of overgrown vegetation. Even close-up, only small parts of the trunk can be glimpsed through the dense ivy.

28. The photographs are also consistent with the written and oral evidence noted above. The aerial photographs taken prior to the collapse show dense ivy both on the fence and on both stems of the Tree. Photograph 'A' shows dense ivy at the base of the Tree, which is the area of both the wound and the fork.

29. Then there were the photographs taken on 18 December 2009, the morning after the eastern stem had fallen, but before the western stem was cut down. The western stem is shown to be covered in ivy from top to bottom. So too is the fence between the railway and the garden. There is what Ms Hind called "rampant ivy" growing all over the fence in large clumps. The only place along the boundary where the ivy is missing is the gap where the fence has been brought down by the fallen stem. The only possible inference is that similar extensive ivy growth existed at that point too.

30. There were a number of close-up photographs of the wound area, also taken on 18 December. Mr Meredith Hardy for the claimant was right to note that, in those photographs, there is little ivy to be seen. But there was a complete explanation for that absence: the area had been cleared as a result of the fallen eastern stem and the work done thereafter. Both Mr Barrell and Mr Pryce said that, although ivy could grow across the decayed wood of the wound in just the same way as it would anywhere else, such ivy would not be able to adhere so firmly to the decayed wood, and it was therefore unsurprising that the ivy in that location would have been ripped away by the fall and the subsequent felling works. I accept that explanation for why, in the photographs, the wound area itself is free of ivy.

31. There was a good deal of cross-examination of the experts about whether, in these close-up photographs, there was evidence of significant ivy growth around the wound. This arose from the claimant's stance, adopted during this trial, that there was little or no evidence of such ivy. In my view, this stance was contrary to the experts' Joint Statement which said:

> "10. From the photographs taken at the time of the failure and from the remains present in the garden, the trunk from about one metre above the ground and the middle crown of the tree had an extensive covering of ivy at the time of the failure.
>
> 11. This ivy covering is likely to have obscured any trunk defects from the view of a climber in the tree.
>
> 12. **The more limited ivy covering on the lower trunk and any dense ground vegetation directly adjacent to the trunk would have obscured obvious defects when viewed from a distance when standing at ground level**." (Emphasis supplied).

32. In any event, the oral evidence of Mr Barrell and Mr Pryce stressed that there was evidence of both ivy stems and ivy growth on either side of the wound, in the area above the wound and, most importantly of all, at the base of the trunk. Various stems

and tendrils of ivy can be seen clearly in the photographs and, in my judgment, they supported the ivy that was across the wound prior to it being torn away.

33. Furthermore, my finding that there was ivy across the wound at the time of the collapse is entirely consistent with the written evidence of Mr Sheppard. For example, in his second report, he said that:

> "The trunk supported large stems of common ivy, these had to be cut at two metres, but were in a healthy condition. These were growing from the base of the trunk…"

It was only in his oral evidence that Mr Sheppard attempted to argue that there was no or little ivy in the area, a stance that, as I have said, was contrary to paragraph 12 of the expert's Joint Statement. Moreover, in his cross-examination, he made a number of important concessions concerning the likelihood of ivy growing across and around the wound prior to the collapse.

34. Finally, there are the photographs taken by Mr Barrell when he inspected the area nine months later, in September 2010. These show that, despite the work that had been done in the area of the Tree following the collapse, ivy, along with other vegetation, was re-colonising both the ground and the remains of the Tree which remained in place. Ivy was growing across the wound. It was also growing over the top of the parts of the western stem which lay across the garden in the position in which they had been felled. Those stems were also of interest because they demonstrated the lattice work of ivy that would have been in place all over the Tree at the time of the collapse and which, without removal, would have prevented any sort of detailed inspection of the trunk of the Tree. Ivy had also re-grown over the replacement fence panel, which can only have been in place for nine months at most.

35. My findings of fact are these. At the time of the collapse, the Tree was in an area in which there was a large amount of ivy which had grown all over everything, including the Tree itself. There was no reason in nature why that ivy would not have grown across the base of the Tree, in the area of the wound, just as it had grown everywhere else. Although ivy prefers light to shade, the evidence was that ivy can grow in the shade, and there were plenty of shaded areas both on the Tree and on the ground around it where ivy was growing extensively. By reference to the evidence that I have summarised above, I find that the area of the wound was covered with ivy prior to the collapse. I also find that there was extensive ground vegetation around the base which would also have obscured the wound. In addition, I find that, as a result of the ivy and the vegetation, the wound (and therefore the decayed wood), would not have been seen, unless a close inspection of the trunk or base of the Tree had been requested or required.

36. It was unclear to me whether, by the end of the evidence, the claimant was still maintaining that the fork was, in some way, not covered in ivy. All of the evidence indicated that the fork, 1.2 metres above the ground, was completely covered in ivy prior to the collision. Thus, the crack which the experts agree would have been there would not have been visible, save on a close inspection of the Tree, which would itself have necessitated clearing the ivy from the lower part of the trunk and around the fork, in order to reveal the crack.

4. THE EXPERT EVIDENCE

4.1 General

37. Not all of the expert evidence was satisfactory. In a case of this sort, what assists the court most is agreement about the state of the Tree before the incident and, in connection with the case against Mr Steel, a discussion of the various professional obligations which he may or may not have had. Instead, although there was a useful Joint Statement, the experts, particularly Mr Sheppard, spent far too much time dealing with matters of law and contentious matters of fact. There was also an uncomfortable amount of switching between that which the experts said an arboriculturalist should or could have done, and that which they suggested may be an obligation on the part of the landowner, without these boundaries ever being properly delineated and adhered to, and with no real regard for the fact that the latter issue was a matter for the court, not the experts[1].

4.2 Mr Sheppard

4.2.1 Interview with Ms Hind

38. When he visited the site in June 2010, Mr Sheppard (who had been instructed by the claimant and was already liaising with the claimant's solicitor) briefly inspected the site and then had what was called an informal conversation with Ms Hind. As they were speaking, and rather betraying that alleged informality, Mr Sheppard made some rough notes on a small scrap of paper. He then went back to his car and expanded on his notes, principally by inserting questions into the notes that he had already made. There has been a long-running dispute about the accuracy of the notes. Moreover, although he had told Ms Hind that he would send her a copy of the notes for her to agree, he failed to do so. There was no explanation for this failure.

39. When he was cross-examined by Mr Stead, on behalf of Ms Hind, it quickly became apparent that there were significant inaccuracies in the notes that Mr Sheppard had made. For example, Mr Sheppard noted that Ms Hind had said that she "never" went to the area of the garden where the Tree was. Ms Hind vehemently denied saying that, and stressed instead that she had told Mr Sheppard that she did go there (as part of her general observations of the trees), albeit that (because of the overgrown nature of the area) her visits were relatively rare. In cross-examination, he accepted that, although he could no longer remember the conversation, "rarely" was the word she had used. There was no explanation as to why, in his notes, he had deleted the word "rarely" and inserted the word "never".

40. There were numerous other errors and misleading changes of emphasis in Mr Sheppard's notes. Again by way of example, Ms Hind gave evidence that, during that conversation, she told Mr Sheppard about the work which Mr Steel had done. Although Mr Sheppard could not remember the conversation, he continued to deny that she had made any mention of Mr Steel's work. That seems inherently implausible, since she would have had no reason not to mention that work, particularly as she was talking about the trees in her own garden. That implausibility

[1] This seems to be a recurring problem in these cases: see for example the comments of Recorder Adrian Palmer QC at paragraph 34 of his judgment in ***Selwyn-Smith v Gompels***, referred to below.

was then underlined by the fact that, in his first report, dated 2010, Mr Sheppard made express reference to the work done to the trees in the garden. There was no source for that information other than Ms Hind. This again demonstrated the inaccuracies of Mr Sheppard's note-taking technique, and his equally unreliable recollection of the conversation.

41. Still further, I noted that, in his reports, Mr Sheppard sets out a large number of things which he said Ms Hind had said to him during that interview. They are expressed as things which Ms Hind 'stated'. But these were not matters which were referable even to the (inaccurate) notes that he had made. When Mr Stead cross-examined him about this, he accepted that these were his words, rather than Ms Hind's, and were his 'interpretation' of what she said or would have said. That meant that the reports were doubly misleading, both because they failed accurately to report what Ms Hind had actually said, and because they identified her as saying things which were, in truth, just Mr Sheppard's interpretation of what he thought she would have said.

42. In the context of this case, these failures matter. Ms Hind, an intelligent woman and a keen gardener with a working knowledge of trees (see paragraphs 75-80 below), was portrayed in Mr Sheppard's reports as someone who did not care about this Tree, or any of the trees in her garden at all, and had cheerfully let it all go to rack and ruin. There was even an echo of this stance in Mr Meredith Hardy's closing submissions. I consider that this picture of Ms Hind was wholly misleading and inaccurate.

43. I deprecate this aspect of the claimant's case in the strongest terms. Save in exceptional circumstances, experts should not embark on this kind of fact-finding exercise, particularly when they perform it so unprofessionally. Matters of fact are for witnesses of fact, not for experts. Because a formal claim had already been made against Ms Hind by this time, she should at the very least have been interviewed by a solicitor and been given the opportunity of checking the resulting notes of that interview. Neither of these things happened. Inevitably, therefore, these failures meant that I regarded the remainder of Mr Sheppard's evidence with considerable scepticism.

4.2.2 Mr Sheppard's 'Trimming'

44. Unhappily, my reservations about Mr Sheppard's evidence did not end there. As will become apparent below, there is a significant issue in this case about whether Ms Hind should have regularly arranged for more detailed expert inspections of the trees at the property as a matter of course, or whether such inspections were only necessitated if there was some indication that there may have been a problem with the Tree. In his first report, at paragraph 7.5, Mr Sheppard accepted that the need for more detailed inspections was only triggered "if the tree displays unusual characteristics". However, by the time that paragraph was repeated in his second report (and after the matter had been discussed with the claimant's solicitors), it had been trimmed and the reference to the requirement for some form of trigger had been deleted entirely.

45. Mr Sheppard said that this trimming was for reasons of space. I regret that I am wholly unable to accept that explanation: indeed, I regard it as so absurd as to constitute further evidence that Mr Sheppard was not acting as an independent expert in accordance with CPR Part 35. It is plain that paragraph 7.5 of Mr Sheppard's first

report was his honest belief, and, as we shall see, it is one that was in accordance with the authorities. But it was clearly detrimental to the claimant's case (because of the difficulty in pointing to anything which indicated that this apparently healthy tree was, in fact, potentially unsafe). I find that this was the reason why this important passage was omitted from the second report. It again confirmed my view that Mr Sheppard's expert evidence was unreliable.

4.2.3 The Main Thrust of Mr Sheppard's Evidence

46. When stripped to its essentials, the main thrust of Mr Sheppard's evidence was that an arboriculturalist ought to have inspected the Tree to find both the included bark union and then the decay at the wound. He said that a proper inspection required the inspector to look at what he or she was inspecting, not that which might cover it (like ivy). He accepted that there was ivy in the area of the fork, but he said that a professional person ought to have removed the ivy so as to examine the fork up close. He said that this would have led to an inspection of the trunk below the fork, and the discovery of the wound and the decayed wood within it. However, for what it is worth (because, it is not really a matter for the experts), he said that he would not have expected the ordinary landowner to undertake this line of enquiry, because he would not have expected them to know about an included bark union, let alone be suspicious that this was such a fork.

4.3 Mr Barrell and Mr Pryce

47. Mr Barrell and Mr Pryce gave clear evidence about the extent of the coverage in the area of the ivy and other vegetation. They both said that neither the union nor the wound would have been apparent at any distance. Both said that the fork could not have been inspected without the removal of substantial amounts of ivy. As to the wound, their position is perhaps best summed up by paragraph 5.7 of Mr Pryce's report which indicated that, if a professional had got to the base of the Tree to carry out a close inspection, "*the decay might just have been visible*" through the ivy growing on the trunk. He said that the ivy would have needed to have been cut and cleared from around almost the entire circumference of the tree up to a point above the fork (i.e. to about 1.5 metres), in order to make a full inspection.

48. I consider that both Mr Barrell and Mr Pryce complied with CPR Part 35. In their evidence they made appropriate concessions and endeavoured to assist the court. It follows from all I have said above that, where there were differences of opinion between Mr Sheppard on one hand, and Mr Barrell and Mr Pryce on the other, I preferred the evidence of the latter.

4.4 The Joint Statement

49. I have already referred to some parts of this useful document. In addition, Paragraph 2 of the Joint Statement made plain that, for a professional, a reasonable inspection frequency for the Tree was every 2 to 3 years. The experts also agreed that a quick visual check was "likely to be a reasonable starting point in that situation", but they disagreed on the criteria that would trigger the requirement for clearance of vegetation to allow access for a closer inspection. As I have noted, Mr Sheppard said that some rudimentary clearance was required, whilst Mr Barrell said that, for a professional, whether the check should extend to removing obstructions such as heavy ivy or

coverings would be dependant on the effort required to do that and the resources available. Mr Pryce thought that such criteria would include signs visible from beyond the vegetation surrounding the Tree that there might be defects in the lower trunk or roots that would warrant close inspection.

50. Paragraph 4 of the Joint Statement also records Mr Barrell's views about the different obligations on a householder, as compared to an arboriculturalist. He said:

> "At the other end of the scale, if it is accepted that homeowners can check their own trees, then the standard of that inspection could only reasonably extend to identifying obvious problems, and the extent of reasonable visual observations would vary depending on the individual circumstances of the tree."

Mr Pryce is recorded as concluding that:

> "…such criteria would include signs visible from beyond the vegetation surrounding the tree that there might be defects in the lower trunk or roots that would warrant close inspection. Examples would be sparse or dying foliage or the presence of more deadwood than might be expected in a healthy tree."

51. The remainder of the Joint Statement was concerned with the case against Mr Steel, so I deal with those matters in **Section 5.2** below.

4.5 Published Guidance

52. In their various reports, the experts also referred to a large number of documents setting out guidance for those concerned with the management of trees. It is unnecessary to set out all of these documents, but two in particular were of particular relevance.

53. The first was published by the National Tree Safety Group ("NTSG") and was concerned with tree inspections. It identified three types of inspection: informal observations, formal inspections and detailed inspections. The detailed guidance as to informal observations was in these terms:

> "INFORMAL OBSERVATIONS
>
> Informal observations of trees contribute to wider management and tree safety. They are essentially those day-to-day observations of trees made by owners and employees of a site who have good local knowledge of the trees and location and see them during the course of their daily lives and work. While not going out of their way to make an assessment of the condition of the tree, they are nonetheless aware of it and any changes that may occur over time. In some circumstances, informal observation may be considered reasonable and appropriate when owners and staff are able to assess the trees' health and any structural weaknesses that may pose an imminent threat to public safety.

> **May be undertaken by**:
>
> People with good local knowledge and familiarity with local trees who are not tree specialists, but rather those closely associated with a property, such as the owner, gardener, other employee or agent, who understands the way the property is used (areas most and least frequented) and the extent of the danger, should a tree be found that is clearly falling apart or uprooting. Reports of problems by staff or members of the public are a fundamental part of informal observations and should be acted upon.
>
> **Frequency of inspection**:
>
> Informal observations contribute significantly to public safety, being important for deciding when action is needed and when more formal assessment is appropriate. They are generally on-going and undertaken as a given part of daily life on a site with trees and public access."

Mr Sheppard agreed that this was a "perfectly legitimate form of inspection".

54. The NTSG guidance went on to address formal inspections and detailed inspections, and was principally concerned with the work of arboriculturalists. Both kinds of inspections are identified as being inspections carried out "with the sole purpose of performing an inspection that is not incidental to other activities."

55. The other document was the SIM 01/2007/05 published by the Health and Safety Executive ("HSE"). This document is principally aimed at local authorities and those dealing with trees on a regular basis. It sets out to balance, on the one hand, the benefit and value of trees, with the "limited" risk that they pose. At paragraph 7 of the document, the HSE say:

> "Given the large number of trees in public spaces across the country, control measures that involve inspecting and recording every tree would appear to be grossly disproportionate to the risk. Individual tree inspection should only be necessary in specific circumstances, for example where a particular tree is in a place frequently visited by the public, has been identified as having structural faults that are likely to make it unstable, but a decision has been made to retain it with these faults."

At paragraph 10(ii) the guidance goes on:

> "For trees in a frequently visited zone, a system for periodic, proactive checks is appropriate. This should involve a quick visual check for obvious signs that a tree is likely to be unstable and be carried out by a person with a working knowledge of trees and their defects, but who need not be an arboricultural specialist."

5. THE LAW RELATING TO A LANDOWNER'S LIABILITY FOR HIS/HER TREES

56. Ms Hind, as the owner of the Tree, owed a duty to the claimant to act in the manner "to be expected from a reasonable and prudent landowner": see ***Caminer v Northern Investment Trust Ltd*** [1951] AC 88. The following cases decided before and after ***Caminer***, give some guidance as to the scope and extent of that duty.

57. In ***Noble v Harrison*** [1926] 2 KB 332 (CA), a tree shed a limb onto a passer-by, causing personal injury. The Court of Appeal reversed the original finding in favour of the claimant because the defect could not have been discovered by inspection. Rowlatt J said:

> "I see no ground for holding that the owner is to become an insurer of nature, or that default is to be imputed to him until it appears, or would appear upon proper inspection, that nature can no longer be relied upon…"

In similar vein, in ***Brown v Harrison*** [1947] 177 LT 281, Somervell LJ reiterated the relevant test (formulated by the judge at first instance) in these terms:

> "…If there is a danger which is apparent, not only to the expert but to the ordinary layman which the ordinary layman can see with his own eyes, if he chooses to use them, and he fails to do so, with the result that injury is inflicted, as in this case, upon somebody passing along the highroad, the owner is in those circumstances responsible, because in the management of his property he had not acted as a normal reasonable landowner would act."

58. In ***Lambourn v London Brick Co Ltd*** [1950] EG 28 July 1950, Finnemore J stated that an unreasonable burden must not be placed on the reasonable owner: "the standard to be taken should be that of an ordinary landowner and not an expert. It was neither the duty nor the practice of the ordinary prudent landowner to make a meticulous examination of its individual trees." In that case the judge said that there was nothing to indicate that the trees were dangerous. They appeared to be sound, of good quality and of comparatively young growth. The tree fell because the roots had been severed but the judge found that "this was not an obvious feature and it was not known when or by whom the severing was done."

59. In ***Caminer***, Lord Normand said at pages 99-100:

> "…The Court of Appeal applied what is, I think, the proper test - the conduct to be expected from a reasonable and prudent land-owner - and held on the evidence that the appellants had satisfied this test because there was nothing dangerous in the appearance of the tree, no sign of disease, advanced age, disproportion of crown to stem, or rising roots…

> The test of the conduct to be expected from a reasonable and prudent landlord sounds more simple than it really is. For it postulates some degree of knowledge on the part of landlords which must necessarily fall short of the knowledge possessed by scientific arboriculturists but which must surely be greater than the knowledge possessed by the ordinary urban observer of trees or even of the countryman not practically concerned with their care."

60. In the same case, Lord Reid said:

> "I think that the respondents' duty was not limited to dealing with any danger of which they might happen to be aware; and if a person has any further duty than that with regard to trees his first step must be to look at those trees which are near the highway or to get someone else to do so on his behalf to see whether any of them is dangerous…I think that it was their duty to have this tree inspected within a reasonable time, and it was not suggested that they did not have before the accident ample time to do this and to consider the results of an inspection and take any necessary action."

He addressed the degree of knowledge and experience necessary for adequate inspection. He said:

> "So in my judgment the appellants can only succeed in this appeal if they can show that there was something about this particular tree which should have suggested that lopping or other action was necessary. What inspection will suggest will depend on the knowledge and experience of the inspector, and there has been some controversy about the degree of knowledge and experience necessary for adequate inspection. Plainly it would be no use to send a person who knew nothing about trees. The alternatives put forward were that he should be an expert or that he should have at least such knowledge and experience of trees as a landowner with trees on his land would generally have. As the question depends on what a reasonable man would do I think that it may be put in this way. Would a reasonable and careful owner, without expert knowledge but accustomed to dealing with his trees and having a countryman's general knowledge about them, think it necessary to call in an expert to advise him or would he think it sufficient to act at least in the first instance on his own knowledge and judgment?"

61. It is important to view these passages against the facts of that case. The owners were a limited company, and could only act through agents (such as managing agents and arboriculturalists). The Court of Appeal had allowed their appeal against the original finding of liability, and the House of Lords upheld that decision. They concluded that, as the tree was apparently sound and healthy, and the evidence did not establish that an inspection by an expert would have revealed that it was dangerous, the occupiers were not liable in either negligence or nuisance. Although they concluded

that an inspection by an expert was required in that case, it appears from the speech of Lord Normand that this was principally because the tree in question was an elm. He said that such trees were:

> "…notorious or generally recognised by persons concerned with the cure of them and which have a bearing on the danger which they may cause when they are growing on or near ground which the public has lawful access. They are less resistant to wind than the other common British trees; the limbs and branches are more likely to fall; they are more prone to disease; their lateral roots are shallow and their tap root decays with age, so that the trees themselves are also more likely to fall…if a landlord is aware of his ignorance about Elms he should obtain the advice of someone better instructed, not a scientific expert in the ordinary case, but another landlord with greater experience, or a practical forester, for example."

62. In ***Quinn v Scott*** [1965] 1 WLR 1004, Glyn-Jones J found for the claimant because the decay of the tree (which was owned by the National Trust), was there to be seen and the tree should have been felled. The judge said:

> "The duty of the Trust is to take such care as a reasonable landowner — and that means a prudent landowner — would take to prevent unnecessary danger to users of the highway adjoining the Trust's land. There is not to be imputed in the ordinary landowner the knowledge possessed by the skilled expert in forestry…But, in my opinion, there may be circumstances in which it is incumbent on a landowner to call in somebody skilled in forestry to advise him, and I have no doubt but that a landowner on whose land this belt of trees stood, adjoining a busy highway, was under a duty to provide himself with skilled advice about the safety of the trees…"

63. The most recent Court of Appeal decision relating to falling trees is, in many ways, the most helpful. In ***Micklewright v Surrey County Council*** [2011] EWCA Civ 922, the Court of Appeal dismissed the appeal against the first instance judge's conclusion that the death of an individual killed by a branch falling from a tree overhanging the highway was not attributable to the negligence of the local authority. The judge found that extensive internal decay was a major factor in the branch's fall. He found that nobody had seen any external signs of decay and he found that, even if the local authority had had in place a proper system of inspection, the extent of the decay, and the danger it posed, would not have been revealed.

64. In his judgment, with which both Patten and Mummery LJJ agreed, Hedley J focused on the two stages of the judge's enquiry: namely whether a routine inspection would have led on to a detailed inspection by a qualified arboriculturalist and, if so, whether that expert's inspection would have led to the removal of the branch. Hedley J said that the judge's findings made it probable that, had the outcome of a preliminary inspection warranted an inspection by an expert, then the later, detailed inspection would have revealed the extent of the decay and would have led to the removal of the branch. Thus, he said, the critical issue was whether or not the judge had been right to

find that no expert inspection had been warranted, because a preliminary inspection would not have given rise to any cause for concern. The Court of Appeal concluded that, on the facts, the judge had been right to reach that conclusion.

65. Although not cases concerned specifically with trees, ***Goldman v Hargrave*** [1967] 1 AC 645 and ***Leakey v National Trust*** [1980] 1 QB 485 reiterated the principle that, in cases involving natural nuisances, the obligation was "to do that which is reasonable in all the circumstances, and no more than what, if anything, is reasonable, to prevent or minimise the known risk of damage or injury to one's neighbour or to his property" (see the judgment of Megaw LJ in ***Leakey*** at page 524). Both cases also stressed that one aspect of the court's consideration of the duty and the potential breach was the resources available to the landowner.

66. A raft of other first instance decisions concerned with trees have been cited to me. They are mainly concerned with claims against local authorities or landed estates, and turned on their own facts. For these reasons I do not set them out here. But it is worth noting two of these cases because they involved what might be called 'ordinary' landowners:

    (a) In ***Corker v Wilson*** (10th November 2006; Mayor's and City of London Court; HHJ Simpson QC), the defendant was an ordinary landowner who owned a tree by a road. A heavy branch fell onto a passing car. There was a crack at the junction of the stem of the branch, and the claimant's case was that this should have been identified and the branch should have been lopped. The defendant said that the crack could not have been seen on a roadside inspection or even on a more detailed inspection and that the tree was in visibly good health. The judge rejected the claim, saying that the defendant carried out informal observations of the tree on an ongoing basis and that all the evidence was that the tree was in good health. There was nothing about the tree which should have alerted the defendant or led him to obtain a more detailed inspection by an arboriculturalist.

    (b) ***Selwyn-Smith v Gompels*** (22 December 2009; Swindon County Court; Recorder Adrian Palmer QC) also concerned an ordinary landholder, whose tree fell onto a neighbouring garage. Again the claim was rejected, the learned recorder finding that the law did not require the landowner to engage an expert "unless and until reasonable inspection by the standards of that knowledge discloses or should disclose that the tree might be unsafe".

67. It is to be noted that in both ***Corker v Wilson*** and ***Selwyn-Smith v Gompels***, the court adopted a similar approach, concluding that a system of informal observations by the landowner was adequate, and that an inspection by an expert arboriculturalist was only necessary if there was something revealed by the informal inspection which suggested that a more detailed inspection was required. I consider that that is consistent with the approach of the Court of Appeal in ***Micklewright***. It is also the approach commended in clear terms in ***Charlesworth and Percy on Negligence***, 12th

Edition, paragraphs 10-20[2], which states that "there is no obligation to call in an expert to examine trees, unless there is reason to believe that they may be unsafe".

68. 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 (***Caminer***);

(b) Such a duty must not amount to an unreasonable burden (***Lambourn***) or force the landowner to act as the insurer of nature (***Noble***). 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 (***Brown***);

(c) A reasonable and prudent landowner should carry out preliminary/informal inspections or observations on a regular basis (***Micklewright*** and the first instance cases noted in paragraph 66 above);

(d) In certain circumstances, the landowner should arrange for fuller inspections by arboriculturalists (***Caminer***, ***Quinn***). This will usually be because preliminary/informal inspections or observations have revealed a potential problem (***Micklewright***, ***Charlesworth and Percy***), 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 (***Caminer***). 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 (***Leakey***) to the way in which the duty is discharged.

6. THE LIABILITY OF Ms HIND

6.1 The Issues

69. It seems to me that the issues concerning the potential liability of Ms Hind are as follows:

(i) Issue 1: Is an ordinary landowner obliged as a matter of course to instruct an expert arboriculturalist to carry out regular inspections of the trees on his or her land?

(ii) Issue 2: If not, is the landowner obliged to carry out preliminary/informal inspections?

(iii) Issue 3: Did Ms Hind have sufficient knowledge and experience to carry out proper preliminary/informal inspections?

[2] This is not the approach adopted in ***Mynor's Law of Trees, Forests and Hedges*** 2nd edition, at paragraph 8.5.2, which does not address ***Micklewright*** and asserts that the reasoning in ***Selwyn-Smith*** is 'incorrect' . To the extent there is a conflict in the textbooks. I unhesitatingly prefer the summary in ***Charlesworth and Percy on Negligence*** because, as I have shown, it is in line with the authorities.

(iv) Issue 4: Did she carry out proper preliminary/informal inspections?

6.2 Issue 1

70. During his closing submissions, Mr Meredith Hardy relied on ***Caminer*** to argue that, because of the position of the Tree next to the railway line, Ms Hind owed a duty to the claimant to have the Tree regularly inspected by an arboriculturalist. His argument was that, if that had happened, the arboriculturalist would have been obliged to carry out a detailed inspection of the base of the Tree and would have discovered the decay. He said that this was a stand-alone duty which arose regardless of any trigger or warning sign, a view which, as I have noted at paragraphs 44-45 above, was contrary to the original position adopted by Mr Sheppard. Mr Meredith Hardy agreed in his closing submissions that, with the possible exception of ***Caminer***, there was no authority in which it had been found that an ordinary landowner owed a freestanding obligation to employ an expert to carry out an inspection, without a trigger or any sign of a problem.

71. The omission is telling. I can see no basis in the authorities for the proposition that a reasonable and prudent landowner is obliged, as a matter of course and without any trigger or warning sign, to pay for an arboriculturalist to carry out periodic inspections of the trees on his or her land. In my view, that is coming far to close to making the landowner an insurer of nature. It is contrary to the principles of law that I have summarised above. It is contrary to the approach of the Court of Appeal in ***Micklewright*** (and the first instance cases referred to in paragraph 66 above, and the note in ***Charlesworth and Percy***), which all proceed on the basis that a closer inspection by an expert was only required where something was revealed by the informal or preliminary inspection which gave rise to a cause for concern.

72. In my view, ***Caminer*** does not decide to the contrary. It is not a case about an individual landowner, but a limited company who could only act through agents. The resources available to the claimant property company would have been considerably greater than those available to an ordinary landowner like Ms Hind. It is in any event a case where, as I have noted at paragraphs 60-61 above, the notorious problems with elms were found to give rise to a particular obligation on the facts of that case. It cannot be said to be authority for the proposition that all individual landowners must periodically engage an arboriculturalist to inspect their trees. At the very most, any freestanding duty would be a matter of fact and degree.

6.3 Issue 2

73. An ordinary landowner, required to act reasonably and prudently, is obliged to carry out regular preliminary/informal inspections of the trees on his or her land, particularly where those trees may border a highway, a railway or the property of another. All of the authorities noted above either say expressly that a landowner should perform this task, or simply assume that such an obligation exists. The guidance from the NTSG and the HSE also indicates that such an obligation is owed. As already noted, the unchallenged evidence was that this was a perfectly legitimate form of inspection.

74. Of course, there may be circumstances in which a landowner cannot fulfil this obligation. The landowner may be absent for long periods of time, or may not be

physically able to undertake such a task. Although I consider it less likely, it could also be the position that the landowner is so completely ignorant of trees that he or she would be unable to carry out a meaningful inspection, even if such an inspection was just preliminary or informal. In those unusual circumstances, the landowner would be obliged to instruct an arboriculturalist. The next question, therefore, is whether, in the particular circumstances of this case, Ms Hind was herself able to carry out a meaningful preliminary/informal inspection of her trees.

6.4 Issue 3

75. In my view, the evidence made plain that Ms Hind was more than capable of carrying out a meaningful preliminary/informal inspection of her trees. She was an educated woman and a primary school headmistress. She was a regular and enthusiastic gardener. She maintained a large garden at the property and spent as much time in the garden as she could, particularly at weekends and school holidays.

76. In addition, she plainly knew a reasonable amount about trees. She confirmed this in her cross-examination saying that, although she did not know the names of the diseases to which they might be prone, she knew when a tree was in peril. Furthermore, as a teacher she said she had taught the children about trees and, in order to do that satisfactorily, had had to research various aspects of trees.

77. She gave particularly telling evidence about what she would have looked for in order to identify potential problems. She said that she knew how to recognise growths on the bark of trees; breaks in their boughs; whether there was fungal growth or too much deadwood. She also knew the signs of health: the absence of deadwood and a healthy crown with full leaf.

78. In addition, I accept Mr Stead's submissions that, more widely, Ms Hind was a careful and responsible landowner. She spent more than £4,000 on tree surgeons between 2001 and 2009. Moreover, after the incident, she arranged for the other two ash trees on her land to be felled, even though they were healthy, because by then she was understandably concerned about the risk of them falling on to the railway.

79. In his closing submissions, Mr Meredith Hardy argued that Ms Hind's inspections were inadequate because she looked at the physiological condition of the Tree, not its structure. I do not accept that as a relevant distinction: Ms Hind was looking at the Tree generally, not dividing it up into component parts appropriate only for an arboriculturalist's checklist. Moreover it is not a fair distinction either; Ms Hind was looking at the trunk as part of the Tree as a whole, so she was looking at its structure. She could see nothing wrong. Furthermore, Mr Sheppard agreed that she would not have been expected to know about included bark unions anyway.

80. For all these reasons I find that Ms Hind was capable of carrying out a meaningful preliminary/informal inspection of her trees. She met the test postulated by Lord Reid in ***Caminer*** (paragraph 60 above). The remaining question is whether she carried out such inspections and, if so, whether she carried them out properly.

6.5 Issue 4

81. The evidence established that Ms Hind carried out regular informal inspections/observations. She said that she kept an eye on all of the trees and shrubs in her garden, including the Tree itself. As a keen gardener, she had a particular eye for deadwood, leaf coverage and the like. She repeatedly reiterated (both in her witness statement and orally) that she inspected the Tree and noticed its healthy foliage and the lack of deadwood.

82. The remaining issue is whether, when Ms Hind carried out those inspections, she did them properly. Should it have become apparent to her that there was a potential problem with the Tree which required the more detailed inspection of an arboriculturalist? In my view, on the evidence before me, Ms Hind carried out the informal/preliminary inspections properly. There was nothing which should have triggered in her mind, as a reasonable and prudent landowner, any concern or suspicion that there was a potential problem with the Tree which needed to be investigated further. There are three reasons for that view.

83. First, as I have already noted, Ms Hind regularly looked at the Tree. She confirmed its various visible signs of health. Those signs of health were also apparent from the photographs taken before December 2009 and from the inspection of the western stem after it had been cut down. The experts have expressly agreed that prior to the collapse, the Tree would have appeared healthy. For the reasons set out at paragraphs 17-18 above, I find that there was no visible sign that the Tree was anything other than healthy.

84. Secondly, although the "included bark union" might have alerted an arboriculturalist to the presence of a potential problem, Mr Sheppard accepted that there was no way in which such a feature would have alerted an ordinary landowner to any difficulty. Moreover, the included bark union in this case was covered in ivy, so there was a further reason why no alarm bells could have rung as a consequence.

85. Thirdly, there is the decayed wood in the wound at the base of the Tree. Although this was not the principal line of enquiry identified by Mr Sheppard in his reports or his oral evidence, Mr Meredith Hardy in his closing submissions made much of the fact that, because it was just about possible that the base of the Tree could have been inspected through the ivy, Ms Hind failed to carry out a proper inspection, even if it was informal or preliminary. I reject that submission.

86. I have set out at paragraphs 24-36 above my findings as to both the ivy coverage and the other vegetation in that area. I reject the suggestion that as a reasonable and prudent landowner, Ms Hind was obliged to carry out inspections of the trunks of each of her apparently-healthy trees, no matter how difficult they were to access, and no matter how much they might be covered in ivy. A reasonable and prudent landowner in Ms Hind's position was not obliged to struggle her way through the nettles and brambles to the foot of what appeared to be a healthy tree, in order to pull off some of the ivy leaves and then strip off the lattice work of ivy stems from the base of the Tree in order to look for decayed areas behind the ivy.

6.6 Conclusion

87. Accordingly, I find that Ms Hind's duty extended no further than the carrying out of periodic informal or preliminary observations/inspections of the Tree. I find that she

was capable of performing that duty and that she complied with that duty. There was nothing that should have alerted her, or put her on notice, that the Tree was anything other than healthy, or required a closer inspection by an arboriculturalist. The claim in tort against her therefore fails. In those circumstances, it is unnecessary for me to consider Ms Hind's claim for contributory negligence.

7. THE CASE AGAINST MR STEEL

7.1 The Narrow Basis of the Claim

88. By the time of the final submissions, Mr Meredith Hardy accepted that his case against Mr Steel could only be maintained on the narrow basis that, when undertaking the work in 2006, Mr Steel, as a tree surgeon, owed a duty of care both to Ms Hind and to the claimant, which went beyond the express terms of his agreement with Ms Hind and extended to advising on general safety issues in connection with the Tree, and/or a duty to warn them about the potential defects in the Tree. That case depends on my finding that there was sufficient proximity between Mr Steel and the claimant for such a duty of care to arise; that Mr Steel was performing services pursuant to a retainer which should be taken to include a wide duty to point out specific problems with the Tree, even if that task had not been requested by Ms Hind; and/or that Mr Steel owed a duty to the claimant to warn of such problems, and that Mr Steel was in breach of any such duty.

89. On analysis, and for the reasons set out below, I am confident that none of these findings are appropriate. I record here that it is unnecessary for me to explore the vast bulk of the pleaded case against Mr Steel, either because it was abandoned by Mr Meredith Hardy, or because it assumed, wrongly, that Mr Steel was a professional arboriculturalist.

7.2 Mr Steel's Qualifications and Experience

90. Mr Steel was a tree surgeon. He was a contractor who carried out specific tree works when requested by landowners to do so. By the conclusion of the trial, it was expressly accepted that Mr Steel was not an arboriculturalist. Although he had studied some elements of arboriculture as part of his training, the evidence was that this would have been insufficient to achieve even technical grade membership in the Arboricultural Association ("AA").

7.3 Mr Steel's Obligations

91. As a tree surgeon, Mr Steel was employed by Ms Hind on three separate occasions to carry out specific works in her garden. The relevant work was that which was carried out in 2006. The basis on which the workscope was identified is explained at paragraphs 6-9 above. In essence, it was Ms Hind who identified what work she wanted to have carried out. Mr Steel may have expressed opinions as to *how* that work might be carried out, and whether anything arose out of the nature and scope of the works that she had indicated, but the expression of his opinions or recommendations did not go beyond that.

92. Crucially, at no time was Mr Steel ever asked to carry out either an informal or a formal inspection of the Tree. At no time did Mr Steel carry out such an inspection.

His work was limited to the contract that he had agreed orally with Ms Hind, which was evidenced by his written quotation. As a contractor, he owed an obligation to carry out those works properly and to ensure that, in doing so, he did not create a danger, either to Ms Hind or to the claimant. But for the reasons noted below, I find that he owed no general obligation (either to Ms Hind or the claimant) to advise generally or warn about the state of the Tree and/or that, if he did, he was in breach of such a duty.

93. The first reason for that is that his contractual obligations did not require him to inspect or advise generally about the Tree. His duties were circumscribed by his contractual obligations: see ***Henderson v Merrett*** [1994] CLC 55 at 62-63 and in the House of Lords at [1995] 2 AC 145 at 186. That is a complete answer to the claim against him.

7.4 Sufficient Proximity

94. For a duty of care to arise, sufficient proximity between claimant and defendant is required: see, for example, ***Caparo Industries PLC v Dickman*** [1990] 2 AC 605. Although Mr Steel owed a duty of care in relation to the manner in which those works were carried out in 2006, there is no suggestion that he carried out those works in any way deficiently so as to be in breach of that duty. Thus, in order to get home against Mr Steel, the claimant needs to establish that there was sufficient proximity between Mr Steel and themselves to give rise to a wider duty, arising in respect of any possible defects in the Tree and therefore the possible future safety of the people and property in the vicinity of the Tree, including the claimant's employees, passengers and trains.

95. In my view, Mr Evans-Tovey was right to contend that there was no sufficient degree of proximity to give rise to that wider duty of care. The situation is similar to that in ***Harrison v Technical Sign Company Ltd*** [2013] EWCA Civ 1569, in which the landlord's agent was asked by the lessee to inspect an awning over a shop to see why it was catching, in order to determine whether the landlord might pay for repairs. The inspection had nothing to do with ensuring the safety of passers-by. The Court of Appeal so found: the agents' role was simply to see whether the shop front had sustained damage for which their clients might be liable. There was therefore an insufficient degree of proximity between the agents and the passer-by who was injured by the awning.

96. In my judgment, the same analysis would apply here. Mr Steel was asked to climb the western stem of the tree for the specific purpose of clearing deadwood, a task which he proceeded to carry out. That work had nothing to do with the safety of those using the railway. To put it another way, in the words of Hobhouse LJ (as he then was) in ***Perrett v Collins*** [1999] PNLR 77, Mr Steel was not involved in an activity which gave him a measure of control over, and responsibility for, the safety of the claimant's trains. For that reason, I conclude that the necessary proximity between Mr Steel and the claimant has not been established.

7.5 Extension of Retainer

97. Mr Meredith Hardy argued, by reference to ***Carradine Properties v DJ Freeman*** [1999] Lloyd's Rep PN 403 (CA), and ***Pickergill v Riley*** [2004] UKPC 14, that Mr Steel should have taken a broad view of his retainer and that he should have realised

that it encompassed a wider duty to inspect the Tree for the purposes of ensuring the future safety of people and property in the vicinity of the Tree.

98. Notwithstanding the skill with which this argument was developed by Mr Meredith Hardy, I consider it to be hopeless in the context of this case. The cases on which he relied (which all involved solicitors) were very different to this situation. They were cases where the courts concluded that the defendant could not rely on the letter of his or her retainer, in order to protect inexperienced clients from incompetent solicitors who took a narrow view of the work which they had to undertake. That is a very long way away from the facts in this case. Mr Steel did not have a retainer because he was not a professional man: he was a contractor, instructed to carry out specific works, which he did. Moreover, Ms Hind was not an inexperienced client; as she said, "I know quite a bit about trees". If she had wanted a wider inspection, she would have asked for it. She made plain that she did not ask for a wider inspection so she could not complain when such an inspection was not carried out. In my view, the solicitor cases are simply not analogous.

7.6 Duty to Warn

99. A series of cases, some in the construction field, were cited to me to establish the proposition that, in certain circumstances, a professional man and/or a contractor can owe a duty to their employer to warn them of inherent defects in the works, even if those defects or that work were not their direct responsibility: see for example ***Plant Construction Plc v Clive Adams Associates*** [2000] BLR 137 CA; ***Aurum Investments Ltd v Avonforce Ltd*** [2001] Lloyds PN 285 (Dyson J (as he then was)); and ***Marplace (Number 512) Ltd v Chaffe Street*** [2006] EWHC 1919 (Ch).

100. However, it does not seem to me that such a duty arises on the facts of this case. First, the 'duty to warn' cases all arise in the context of a contractual relationship: there are no reported cases in which this kind of duty to warn is said to arise in tort, owed to a third party. There is no reason, either on the facts or as a matter of policy, to extend the duty in this case, particularly as Mr Steel was a contractor, not a professional. That conclusion may be another way of expressing the conclusion I have reached above about the absence of sufficient proximity.

101. But even assuming that such a duty was capable of being owed to a third party, all of the cases stress that a duty to warn is only triggered by a clear defect or something that is 'obviously dangerous' (the expression used in ***Plant*** and ***Aurum***). When applied to the facts of this case, it means that if (which I do not accept) Mr Steel was capable of owing a duty to warn to the claimant, that duty would only have been triggered by his discovery of something that was obviously dangerous. But there was no such thing. As set out in paragraphs 17-18 above, the Tree was apparently healthy. It was also covered in ivy. There was nothing which would have identified to Mr Steel that the Tree was 'obviously dangerous'. He would not have seen the fork because it was covered in ivy. And the mere fact of the fork would not have put even a trained arboriculturalist on notice that there was a problem, at least not without further investigation. He would only have noticed the decay behind the ivy if he had looked carefully for it and there was nothing in his contract workscope that required him to do any such thing.

102. The duty to warn cases are all designed to ensure that a defendant cannot escape liability by referring to and relying upon the narrow constraints of his contractual obligations, in circumstances where he knew (or perhaps ought to have known, although that is itself controversial) that there was a significant danger or problem which no one else had spotted. But it is wrong in principle, as Mr Meredith Hardy seeks to do, to say that there was an obligation to carry out a detailed inspection of the Tree, pursuant to which Mr Steel would have found out its condition, so he could then comply with a duty to warn of obvious defects. That is the wrong way round. A duty to warn starts with the existence of obvious problems which are either known (or perhaps which should have been known) to the professional man or contractor. It does not impose an obligation to carry out wide-ranging inspections and investigations so as to discover whether there is an obvious defect, which might then trigger a duty to warn.

103. To put the point another way, per Dyson J in ***Aurum***, in my view it is not reasonable to impose the duty to warn on Mr Steel in this case.

104. At one point the claimant appeared to be running a separate and stand-alone argument that, if Mr Steel had carried out the climb up the western stem in the way recommended by the guidance provided by the AA[3], he ought to have discovered the open wound at the base, as part of his preparations to climb the Tree safely. Again, in my view, this is arguing backwards from a counsel of perfection. The guide (which may not even have been in force in 2006) is just that; it is far from being a mandatory checklist, as Mr Sheppard accepted. Mr Steel climbed only the western stem of the tree and there is nothing to suggest that he did not do so in an entirely safe and proper fashion. Mr Barrell and Mr Pryce both said that, ultimately, climbing trees was a matter of feel and of experience. It was clear to me that Mr Steel had both. He said that he put the ladder some feet away from the base of the Tree and leaned it on the western stem. Accordingly, he did not notice (and had no reason to investigate) the ivy-covered wound at the base. There is therefore nothing in this final point.

105. For completeness, I should add that, even if I was wrong, and Mr Steel did owe the alleged duty to warn, he was not in breach of that duty because there was nothing obvious to alert him to the need to warn anyone of anything. The Tree was apparently healthy (see paragraphs 17-18 above) and the wound and the fork would only have been visible on a close inspection (paragraphs 24-36 above) which Mr Steel was not required or obliged to carry out. Even on Mr Sheppard's analysis, an arboriculturalist would have no reason to conclude that the fork was a (rare) 'included bark union' unless he had first stripped off all the ivy from the fork. Thus the problem was – on any view - far from obvious.

7.7 Conclusions

106. For all these reasons, therefore, I reject the claimant's (limited) claim against Mr Steel. It depended on a number of findings against him which I am simply not prepared to make.

8. CONCLUSIONS

[3] 'A Guide to Good Climbing Practice'

107. For the reasons set out above, I dismiss the claimant's claims against both defendants. In those circumstances, I would ask the parties to agree the appropriate form of order arising out of this Judgment.