Neutral Citation Number: [2024] EWHC 2325 (Admin)

Case No: AC-2023-LON-003465

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/09/2024

Before :

MR C M G OCKELTON

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Between :

The King on the application of ANDREW BRENNER	**Claimant**
- and -	
HARINGEY LONDON BOROUGH COUNCIL	**Defendant**
(1) AVIVA INSURANCE LIMITED	**Interested Parties**
(2) ALLIANZ INSURANCE PLC	

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Charles Streeten and **Ella Gunn** (instructed by **Richard Buxton Solicitors**) for the **Claimant**
James Findlay KC and **Stephen Evans** (instructed by **Haringey LBC**) for the **Defendant**
No appearance or representation for the **Interested Parties**

Hearing date: 17 July 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 10 September 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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C M G Ockelton :

Introduction

1. In the pavement outside numbers 61 and 63 Oakfield Road, Stroud Green, London N4 4LD is a tree, a mature London Plane, Platanus x hispanica. It has caused, or at the very least has contributed to, subsidence in both houses. The tree belongs to the defendant, the London Borough of Haringey, which is also the Highway Authority. The defendant has decided to fell the tree. That decision was made on 24 October 2023. The claimant lives in number 63 and challenges the defendant's decision of 24 October, as well as the defendant's failure to reconsider it on further information becoming available shortly thereafter.

2. The present claim was made on an urgent basis on 21 November 2023. An interim order is in place preventing the felling of the tree (but, after amendment, allowing routine maintenance by way of pollarding) pending the determination of this claim. By consent, it was ordered that the application for permission for Judicial Review would be ordered into Court on a 'rolled-up' basis, the substantive claim to be determined forthwith if permission be granted.

3. There is a very substantial history to this litigation, including a similar claim challenging a similar decision on similar grounds earlier in 2023. I shall have to refer to that claim, but I must first set out another aspect of the history and context, which is the relationship between the owners of both houses and their insurers.

4. Aviva Insurance Limited, the first interested party, is the insurer of number 63. Allianz Insurance plc, the second interested party, is the insurer of number 61. Each of the owners of the houses had made claims against their insurers for the damage arising out of the subsidence. Each of them had been dissatisfied with the way in which the insurer dealt with the claim, and in due course each made formal complaints to their insurer and subsequently to the Financial Ombudsman Service ("FOS").

5. The correspondence between the owners of the two houses, their insurers, the FOS, and to a more limited extent the defendant, occupies a great deal of the papers supporting the present claim. I do not have to go in detail into the relationships between them, which sound in private law and are in one case at least the subject of other litigation. But the basic questions, and the timescale, may be significant.

6. There had been subsidence at number 63 caused by the tree in 1996, and there was some underpinning then. The present story starts in 2010, when the claimant noticed further subsidence and in due course contacted his insurer, Aviva. He subsequently took the view that the insurer was not processing his claim with proper diligence or expedition, and raised a formal complaint; still dissatisfied, he complained to the FOS. Following a recommendation by the FOS, the claimant and his wife agreed with Aviva to try and find a way of resolving the subsidence without the tree being removed, and therefore to appoint an independent structural engineer to devise such a solution. That was done, and a scheme for underpinning number 63 was agreed by its owners and their insurer.

7. The owners of number 61 were not parties to any of that, but it is said by the claimant that by 2019 they and their insurer Allianz had also agreed that number 61 should be underpinned. It is not, however, argued by the claimant that the owners of number 61 had agreed with anybody that the work on their house was to be planned or undertaken with a view to avoiding the removal of the tree.

8. According to the claimant, the next part of the story results from a change of personnel, or a change of attitude, or both, at the loss adjuster: as it happened, the same firm of loss adjusters was retained by both insurers, but different individuals were responsible for the two cases. Whatever the reason, in February 2022, lawyers apparently acting for (or being part of) the loss adjusters but operating solely in relation to number 61 wrote to the defendant Council alleging that the tree was a nuisance and demanding its removal, failing which they would proceed with underpinning number 61 and pursue further action against the Council to recover their losses. The claimant points out that in that context there was no mention of the agreement concerning number 63 to try and solve the problem of subsidence without removing the tree. Through Mr Streeten he describes the action by those interested in number 61 as 'seeking to undermine' the agreement made by those interested in number 63.

9. I must now divide the history into two separate strands. The first is the claim by the owners of number 61 against Haringey and its consequences. The Council apparently decided to fell the tree in March 2022, and it was occupied by protestors in June 2022. Haringey took proceedings for possession; and in parallel secured the tree. On 12 March 2023 Haringey notified the claimant that it had taken a decision to fell the tree following an insurance claim and evidence of subsistence submitted in support of it which demonstrated the tree was contributing to subsistence at number 61.

10. The claimant issued proceedings against the defendant on 14 March, challenging the decision to fell the tree, and alleging that the defendant had failed in its duty of candour in disclosing what account it had taken of the dealings of the house-owners with the FOS. The defendant responded to that by saying that those dealings were irrelevant to its decision. Permission was refused by Sir Ross Cranston after a hearing on 29 March. He took the view that the claim was out of time.

11. The claimant appealed that decision to the Court of Appeal. Edis LJ gave permission on the papers. He granted permission for the claimant to argue that there had been a decision on a date, after March 2022, which was recent enough for the present action to have been commenced in time; and that it was irrational to decide that the FOS's 'decisions (past and future)' about the remedial works required to remedy existing damage to the claimant's property were irrelevant. In his 'reasons', Edis LJ wrote this:

> 'The reason for these proceedings is a private law dispute over tree root damage to property, and the decision in March 2022 to fell the tree was taken to protect the Council from further liability to number 61 arising from damage continuing to accrue after that date. In these circumstances it is arguable that the Council should have taken the different situation in relation to number 63 into account when it became aware of it. That situation has not yet finalised and a further FOS decision is awaited. It is arguable that this is relevant to when,

and on what basis, the Council should take a final decision about this tree.'

12. The claim was subsequently settled on the basis that the Council withdrew the decision or decisions to fell the tree, and that the claimant and both insurance firms could make written representations by 28 April 2023 as to matters they considered the Council should take into account in making a new decision on whether or not to fell the tree. Representations were indeed made by the claimant, and by Allianz. The claimant argued (amongst other things) that the further decision should not be made until the FOS had determined the issues before it in relation to both properties.

13. Meanwhile, the owners of number 61 issued proceedings against the Council on 7 August 2023 for 'injunctive relief and/or damages as a result of past and/or continuing nuisance' caused by the tree to their house, seeking in particular an order that the Council 'abate the nuisance by felling or removing the plane tree'. The claim form, supported by a Statement of Truth by the owners of number 61, sets out the damages claimed under two heads. 'If the defendants remove the plane tree', the amount sought is special damages to compensate for harm and to provide for reinstatement and repair, and a further sum for professional expenses, all estimated at 2021 prices together at £663.846.40. 'If the defendants do not remove the plane tree', the amount sought is that already set out, plus further special damages to protect from future harm by way of underpinning, special damages for consequential losses caused by needing to seek alternative accommodation, and general damages to compensate for discomfort, inconvenience and disturbance. The total of special damages sought if the tree is not removed is £847,330.20, with general damages to add to that. It cannot be doubted that Allianz is and always was the real claimant, but, as I have said, the basis for this claim is the individual owners' own pleaded loss, and their Statement of Truth.

14. However, on 16 November 2023 the owners of number 61 wrote to the Council, observing that in the reasons for the decision under challenge in these proceedings, the Council had noted that they 'do not intend to underpin the property if the tree is removed', which was apparently confirmed by the terms of the claim against the Council. The Owners of number 61 said that that was false. They would 'demand that our house be underpinned regardless of what happens to the tree. If you accept liability for the tree's role in our subsidence, removing the tree or not removing the tree will make little difference to the extent of the liability'. Further information (or perhaps explanation) is provided by a notice of assignment of a legal cause of action served on Haringey on 24 May 2024. The owners of number 61 have settled their claim against Allianz and have assigned to Allianz their right of action against the Council. The claim thus proceeds as Allianz against Haringey. That claim is still in progress.

15. The second strand, running in parallel and no doubt informing (in particular) the actions of the owners of number 61, is further complaints to the FOS made by the owners of each of the properties, evidently in the summer of 2022.

16. The complaint by the claimant was that in the context of a decision that the tree should be removed, the insurers had revised their agreement to underpin his house, number 63, and were seeking a less expensive remedy. The engineers' recommendation was still that underpinning 'with or without the removal of the tree'

was the way forward, and the claimant's position was that the insurers should proceed with arrangements for underpinning, despite the removal of the tree. In a report, undated but requiring response by 5 September 2023, the FOS investigator recommended that Aviva should proceed promptly to enter into a contract of repair 'to include underpinning without tree removal' in accordance with the previous scheme. The complaint from number 61 appears to have been a little different. As I read the investigator's report their principal complaint was that the decision by Allianz to pursue the removal of the tree was what was causing further delay to the implementation of a scheme that had already been agreed. Thus the focus was on whether Allianz had really left it too late to say that what should be done was to fell the tree. Underpinning was, in the investigator's view, certainly a solution to the problem, and the owners of number 61 should not have to wait any longer for it to be put into effect.

17. Whether or not there was any substantial difference in the complaints or the motivation for them, both the FOS investigators' reports were to the same effect, and on the insurers' separate rejection of the investigators' recommendations, both provisional decisions by the Ombudsman were to the same effect: that the insurer should proceed with underpinning 'rather than pursuing removal of the tree'. The decision in the case of number 61 was on 9 November 2023; that in relation to the claimant's house one week later on 16 November. The Ombudsman's decisions became final during the fourth week of January 2024.

18. As I have said, the decision under challenge was made on 24 October 2023, and was not subsequently revised. The Officer's report sets out the motivation for its previous, withdrawn, decision, and re-evaluates the options available, taking into account the technical advice received, the litigation initiated by the owners of number 61 and the remedy sought in that claim, and the submissions made following the Consent Order concluding the previous judicial review challenge. In considering whether it would be right to defer a decision pending the outcome of further decisions from the FOS, the Officer records that the decisions had been awaited for some time and did not seem to be available, but in any event 'the matter before the FOS is a private law complaint to which the Council is not a party and is not bound [by] and cannot enforce their decision'. The report immediately goes on to say that 'the decision being taken by the Council relates to the insurance claim brought by the insurers of number 61'. Elsewhere it is clear that that claim is noted as possibly heralding a similar claim in respect of number 63, the Council's position in respect of which may be easier if the tree has been removed.

19. Despite the complexity of the history and context, the present claim is quite limited. The grounds as set out in the claim form are as follows:

> 1. In respect of the 24.10.23 decision, the Council acted unlawfully (a) by failing to take into account information that the FOS was in the immediate course of making a decision that would oblige underpinning of the properties concerned; (b) by failing to make further enquiries about same; and (c) to the contrary by expressly indicating in the decision report that nothing had been heard from the FOS as to making its decision. 2. In respect of later information with specific FOS investigator reports and provisional final decisions, with the latter due to become final on or about 14.12.23,

> in failing to reconsider its operational plan to fell on or about 23-24.11.23 so that its impugned decision could be reconsidered in the light of final FOS decisions which are expected to require underpinning of the properties concerned.

20. The claimant applies to amend the grounds, to add the following after the present text of ground 2:

> Further, in failing to reconsider its decision to fell the Tree in light of a letter dated 16 November 2023, by which the Defendant was advised by the owners of No 61 that its decision was based on a false premise – namely that contrary to its decision, they will pursue underpinning of No 61 regardless of whether the Tree is felled and that not removing the tree will not make a difference to the extent of the Defendant's liability.

The defendant raises no objection to the application to amend, and I grant it.

21. There is no dispute about the proper approach of the court to a challenge such as this, and I take the following summary from Mr Streeten's written skeleton argument. The reasons for the Council's decision are taken to be those set out in the decision record and officer's report (see regulation 7 of the Openness of Local Government Bodies Regulations 2014 and R (Shasha) v Westminster CC [2017] PTSR 306 at [32]). The standard of reasoning expected in such a report is that set out in South Buckinghamshire DC v Porter (No 2) [2004] 1 WLR 1953 at [36] (see CPRE Kent v Dover DC [2017] UKSC 79 at [37]). Applying that approach, the court will not read an officer's report with undue rigour. The question for the court will always be whether on a fair reading of the report as a whole, the report was materially misleading on a matter bearing upon the decision and went uncorrected before the decision was made. This includes where the officer has inadvertently made some significant error of fact or has failed to deal with a matter on which the report should have contained explicit advice (see Mansell v Tonbridge and Malling [2018] PTSR 88 at [42], applied to delegated decision-making in e.g. R (Buxton) v Cambridge CC [2021] EWHC 2028 (Admin) at para [41]).

22. In support of ground 1, as well as alluding to the terms of the grant of permission by Edis LJ in the previous claim, Mr Streeten points out that the position at the date of the decision was that there had been some progress in determining the claims, as the Council knew, by implication if not otherwise, and if it did not know, it could and should have enquired. The progress was that the investigator's reports had been issued and that there was a strict timetable for their consideration and if appropriate reference to the Ombudsman. Each of them might well conclude that the insurers should underpin the property in question. If the properties were underpinned the need to remove the tree would vanish. So far as concerns ground 2 (as amended), the claimant's position is that the later material, in the form of provisional FOS decisions in favour of requiring the insurers to underpin, and the letter indicating that the owners of number 61 would seek to pursue underpinning even if the tree was removed, were further obviously relevant factors that should have caused the Council to reconsider whether there was any reason for the tree to be felled.

23. It is right at this point to take a step back and consider broadly the position of the various parties and their relationships.

24. The Council is in principle liable for damage caused by the tree in the past or in the future. The liability remains even if the damage to the properties is remedied at the instance of the insurers. That does not mean, however, that the Council is liable to reimburse whatever the insurers have paid in settlement of a claim under the contract of insurance: the Council may argue that the tree was not the sole cause of the damage; and the Council may argue that more than was necessary has been spent in remediation of damage.

25. The Council has a vast number of different duties and obligations, and limited (although no doubt considerable) resources. It has an obligation to spend, or make provision for spending, its resources fairly and with proper consideration. If it sees two ways forward, one of which will be more expensive now and may carry future liability, whereas the other is cheaper now and appears to carry reduced or no forward liability, it is entitled to choose the latter, provided that the decision to do so meets public law standards (and, of course, any statutory or other constraints).

26. The insurers are liable to their insureds under the contracts of insurance. They are liable only for damage in the past, at times when they carried the relevant insurance. As a matter of the law of contract they can take whatever steps they think fit to challenge a claim or to satisfy it. It may be presumed that they will attempt to satisfy a claim at an amount which does not include an unnecessary payment, but the judgment of what may be desirable (for example) to avoid further trouble is a matter purely for them. The terms of the settlement with either insured has no direct relevance to the Council's private law liability for the damage.

27. The owners of the insured property claim on their insurance for insured losses that have occurred. They have no obligation to accept a solution that will provide protection against future similar losses, and may well choose not to do so if the relevant operation will be very disruptive (although such a choice is likely to affect future insurance). If so, and there is further damage, they, or their successors in title, may take further proceedings against the Council.

28. The FOS provides a channel for mediation between the parties to a contract of insurance. Its staff can take a broad look at a complaint and recommend a resolution. If the recommendation is not accepted (by either side or both sides), the matter may be referred to the Ombudsman, who may make a final decision, sometimes preceded by a provisional final decision. The final decision is binding on the insurer if, but only if, it is accepted by the complainant. If the complainant does not accept the decision it is of no effect.

29. It may well be arguable in certain circumstances that the decision of the FOS could be relevant to a determination of a public law liability, but in my judgment those circumstances are likely to be rather limited. In the present case, one possible (perhaps probable) outcome of the two complaints to the FOS was that the insurers would be told to proceed to underpin the houses. The owners of the houses might accept a decision to that effect or might (for any reason) choose not to accept it. The problem is that (even if it is accepted that underpinning removes the possibility of further damage from the tree) the Council's exposure to future claims arising out of

the tree depends not on whether the insurers ought to have underpinned the property in pursuit of their duty to their insureds, but whether underpinning has actually taken place.

30. At the time the decision was made, a fact clearly known to the defendant was that (whatever might be the result of the FOS complaint) the owners of number 61 were only claiming the costs of underpinning and the consequent disturbance if the tree was not removed. The clear implication was that even if it turned out that their insurers ought to pay the cost of underpinning, they would not have that work done if, by removing the tree, the Council nullified the risk of further damage from it. But whether or not that was the reason for the claim's being in the terms it was, the Council was entitled and bound to note, as it did, that (a) removing the tree would very substantially reduce its maximum liability under the claim, and (b) the owners of number 61 were not committed to underpinning.

31. Those two factors are not properly reflected in the claimant's critique of the decision, as set out in the grounds and amplified by Mr Streeten's submissions. The reliance on the potential for FOS decisions to impose a private law duty on the insurers in their relations with the owners of the houses is, in my judgment, misplaced in the circumstances of this case. The material the Council had available to it serves only to emphasise what it said in its decision: that the FOS decisions were simply a matter of the relationships between insurer and insured and not a matter for the Council, and that what the Council did have to deal with was the actual claim against it. Those two clearly material factors: the saving of money in the claim, and the fact that even a positive accepted decision might well not result in actual underpinning at number 61, were the basis of the decision and there can be no proper criticism of their being treated in the way they were.

32. The position in relation to number 63 was different, as I accept. Here there was no reason to suppose that underpinning if required by the FOS would not be undertaken, and there was no suggestion that the Council's liability in tort would be reduced or partially waived if the tree were removed. But I do not accept that those factors needed to be treated as material to a decision made in the context of the claim in relation to number 61. Even if each of them is taken in favour of the claimant's case, they would serve merely as an indication of no increase in existing liability in relation to number 63. The factors pointing towards the removal of the tree would be unaffected. To put that another way, the Council was not required to consider that the removal of the tree would be justified only if similar considerations applied to both properties. One was enough; although it was not an error of law to consider also the possibility of claims in relation to the other.

33. The claim that the defendant ought to have waited for an imminent FOS decision that would have resolved the question of underpinning is therefore misplaced in a number of ways. The defendant considered whether to wait. The defendant correctly noted that there was nothing available showing that any final (Ombudsman's) decision was imminent. The defendant correctly observed that any decision was a matter of private law not binding on or enforceable by the defendant. And, as a matter of fact, pointed out by Mr Findlay KC, the decisions (actually investigators' recommendations) upon which he relies for this part of his claim had in fact been rejected by the insurers by the time the decision was taken.

34. In relation to ground 1(b) it is impossible to see anything available to the defendant that should have caused it to make any further enquiries, given the view it lawfully took on whether it ought to delay making a decision. Looking at ground 1(c), the claimant relies on information given to the defendant that a decision had been communicated to the property owners; but again, there was nothing substantial for the defendant to consider, the information was in fact incorrect, and the decisions which may have been meant are those which the insurers rejected. There is nothing in this set of circumstances that was lawfully required to feature in the defendant's decision.

35. Ground 1, the challenge to the original decision, fails because the claimant has not shown that the defendant was obliged to defer the decision to await the FOS determinations, or otherwise obliged to take their possible terms into account. Given the way in which the question whether the tree should be felled presented itself (through the claim in relation to number 61) at the time of the decision, the defendant was amply entitled for the reasons it gave to proceed in the absence of further material from the FOS. It did not misstate the facts made available to it, and it had no obligation to enquire further.

36. Ground 2 relies on a public law obligation to reconsider a decision in the light of new facts to which the decision-maker's attention is drawn. There is little doubt about the power to reconsider a decision. A duty to do so can arise only when either there has been a change of circumstances so obviously material that no reasonable decision-maker could fail to reconsider the decision (R (Hardcastle) v Buckinghamshire Council [2022] EWHC 2905 at [100]), or (perhaps) where there is a statutory or other scheme that is subject to discretionary non-enforcement or reversal of an adverse decision made against an individual (eg Stannard v CPS [2019] 1 WLR 3229; R (Dickinson) v HMRC [2019] 4 WLR 22). There can be no general requirement or expectation that a decision-maker will not seek to act on a decision it has made, but will instead leave the matter open in case a new decision should be made. Summarising the position in Hardcastle at [101], Sir Ross Cranston said: 'If no rational decision-maker would regard a consideration as "so obviously material" that it must be taken into account, that is the end of the matter'. This is a high hurdle for the claimant.

37. The amended grounds raise two facts which it is said fall into that category. The claimant says that the defendant did not take either into account in declining to alter its decision, and that the subsequent witness statement of Mark Stevens is an impermissible attempt to provide subsequent justification. The two facts are, first, the progress of the FOS process to the point where there were provisional decisions that would become final within a short timescale, and, secondly, the letter dated 16 November 2023 from the owners of number 61 stating that contrary to the view the defendant had derived from their claim, they would demand that their house be underpinned, and that there was therefore no reason on their account to remove the tree.

38. In my judgment, neither of those facts meets the test of being "so obviously material" that it needed to be taken into account. The first simply meant that a further provisional, unenforceable decision might be on its way soon. As a matter of fact, their decision has been rejected by the owners of number 61, and is accordingly of no effect. To that extent this ground is almost academic. What has happened demonstrates that at the time to which the claimant points, it was not material. The

second indicates a position taken by the owners of number 61 that is flatly contradictory to their pleadings in proceedings to which the defendant is a party. The defendant was entitled to ignore it and to rely on the formal documentation supporting the claim that was at the heart of the decision it made.

39. The defendant had no obligation to reconsider the decision on learning of either or both these new facts. Ground 2 therefore fails.

40. There was a further factor motivating the decision, which was challenged by the claimant, but to which I have not needed to allude in making my decision. That is the defendant's view that there would be a risk of further damage if the tree remained in place, even if both properties were underpinned. In my judgment the defendant's decision and its maintenance were clearly lawful for the reasons explained above; but I ought to say something about this point.

41. I begin with the obvious: the felling of the tree could not be intended as a punishment for harm it had already done. The tree could be removed only if there was some future advantage to be gained. Thus, if it were the case that both properties were to be underpinned, that the underpinning would guarantee that the tree could not damage them further, and that no other powerful considerations motivated the felling of the tree, there would be no reason for its removal. That proposition (which I accept) forms, I think, the basis of the claimant's position. On the facts it does not apply, because the defendant was entitled to consider both that there was no evidence that both properties would be underpinned, and that in any event its financial liability in respect of number 61 would be substantially reduced if the tree were felled to avoid the risk of further damage.

42. In the course of the decision, the defendant alluded to the risk that there will be further damage even if both properties are underpinned. The claimant challenged it on that, and it is fair to say received no very persuasive answer. On the other hand, although the claimant's expert said that he was unaware of any case in which proper and complete underpinning had been followed by further subsidence, nobody suggests that there could be a guarantee that the tree would do no further damage. This is not, therefore, a matter on which the report can have 'led the [decision-maker] astray'; and there was no error of fact (cf Mansell v Tonbridge and Malling). In those circumstances it was, in my judgment, open to the defendant to take into account, as it did, even the minimal risk that damage for which it was responsible might continue even after underpinning, to set that against the relatively low asset value of the tree (not disputed by the claimant) and to conclude that it was disproportionate to run that risk. In doing so, the defendant did consider the possibility that both properties would in fact be underpinned, but decided, for good reason, that the tree ought nevertheless to be removed. That single point is a further good response to every element of the claim as pleaded, and an alternative route to the decisions I reach.

43. Turning then to the formal matters before me, I have already indicated my decision to allow the claimant's application to amend the grounds. I grant permission for the claim to proceed on the basis that, in essence, the observations of Edis LJ in the previous claim are still applicable: in reality the decision not to delay was a decision that the projected or expected FOS decisions were immaterial. I dismiss the substantive claim for judicial review for the reasons given above.