

28<sup>th</sup> July 2024

## **TPO Appeal**

My Ref: 081Trees/TPO Appeal

PINS Ref: APP/TPO/H1033/9748

LPA Ref: HPT/23/018

## **Tree at Bowden Hall Bowden Derbyshire SK23 0QP**

# **Commentary on LPA Case**

## **Risk**

The National Tree safety Group (NTSG) document '*Common sense risk management of Trees*' (Forestry Commission 2011) urges all involved in the process of managing trees to maintain a sense of perspective. The more one looks at a subject, the more 'important' it becomes.

(Link: [www.forestry.gov.uk/publications](http://www.forestry.gov.uk/publications))

There is no formal agreed methodology for risk assessment for trees. There are at least three different approaches, but it is fair to say that underpinning the process is the concept of a 'balance of benefits and disbenefits'.

The Appellant and the LPA do not agree what might constitute benefits and disbenefits, let alone a methodology.

In the absence of an agreed methodology and assessment parameters, the process is flawed in that there is a natural bias – the assessor brings his or her prejudices/position as a baseline and professional neutrality is the casualty - i.e. 'The eye of the beholder'. With each party taking a different view and starting from different standpoints, the process is borderline useless – at best unhelpful. There are some facts, however, which can assist.

In this case:

- The tree is a self-set Sycamore; it was not part of a planting scheme or management plan relating to wider estate. It is established.

No1 Fletcher Gate Nottingham NG1 1DF

07968 326331

[mark@camplan.co.uk](mailto:mark@camplan.co.uk)  
[www.camplan.co.uk](http://www.camplan.co.uk)

- The TPO includes upwards of 100 individual trees; the subject tree is one of a great many and is unremarkable, in context.
- The subject tree is in proximity to the highway/public right of way (PRoW) and neighbouring property boundaries. There may be some obligation on the Highway Authority to ensure that safety of the users of the highway is considered and assured (within reason).
- The Structural Advice provided to the Appellant noted that the subject tree has a deflection of around 10 degrees, leaning towards towards the Stable Block. Coupled with the structural state of the bank, whilst in itself not likely to be conclusive, it is the presumption that, were it to fail, the tree would be more than less likely to fall towards the building.
- The historic fabric of the Listed Building is irreplaceable; even if there is evidence of what was there before so it can confidently be restored, the patina of age, the craftsmanship, the archaeological interest and the plain sense of connection with the past through the age of the materials will be lost.
- Trees, not being inert, can be replaced; the opportunity to make beneficial change in terms location and specification can be taken without detriment.
- The curtilage of a LB is part of the listed entity; as such, the prevention/avoidance of damage to curtilage structures needs to be considered the same way as the host building.
- Structural/geotechnic advice has been taken; there is evidence of instability of the bank and former retaining wall. The wall was a curtilage structure. The tree roots were constrained by the structure and became compressed against the back of the wall – this is clearly evident on site – over time it appears that the growth of the roots caused the wall to be unstable.

It is agreed that regular maintenance and repair are the key to the preservation of historic buildings. (Ref: PPG 15 as was).

There is, however, no obligation on the owners of old buildings to put them into a condition where they are capable of resisting not only all ordinary but also all extraordinary forces that may be let loose to operate against them. Once a threat has been identified, however, it would be irresponsible not to seek to neutralise it. The HE document '*A Stitch In Time*' (Historic England) suggests the best strategy is to deal with the cause, not the effect of harm. This is related to buildings but the advice is applicable to trees, monuments and other items. In this case, the potential harm could be ameliorated by removing the problem – i.e. the tree.

In terms of the balance, the Appellant made it known to the then Tree Officer at the outset that he would be more than happy replace the subject tree with up to 12 trees of her choosing, planted elsewhere in the relatively extensive grounds.

### **Duty of Care**

Occupiers of property are under a duty (the common duty of care) to take such care as is reasonable in all the circumstances to see that visitors will be reasonably safe for the purposes for which they are invited or permitted to be there. Occupiers of the property are required to protect anyone on their property (even trespassers).

Civil law requires the owner of the land on which a tree stands together with any party which has control over the tree's management has a duty of care at common law to all people who might be injured by the falling of all or part of a tree, the duty of care is to take responsible care to avoid acts or omissions that cause a reasonable foreseeable risk of injury to persons or property. The law requires only that people should take reasonable care to avoid acts or omissions which cause a reasonably foreseeable risk of injury to persons or property. The generally agreed standard to be achieved is that of a reasonable and prudent landowner. (See Appendix A).

In this case the risk has been professionally assessed on a number of occasions and recommendations made.

The Appellant has identified potential danger to the adjacent listed building, the stability of the bank and the proximity to the public footpath/highway. The appropriate action would be to negate the source of the potential harm. In the balance, the Appellant has made a credible suggestion on the appropriate level of replacement planting.

The Appellant's Insurers have said that they will provide cover but if the tree was to fail and fall, causing damage or injury, they would be obliged to treat it as caused by a known risk that had not been negated. In the event of a payout, the Insurers would be likely to seek recompense from any agency that had prevented risk from being reduced.

Mark Strawbridge

CAMplan  
pp Appellant

## Appendix A

Duty of care/legal position:

Under both the civil law and criminal law, an owner of land on which a tree stands has responsibilities for the health and safety of those on or near the land and has potential liabilities arising from the falling of a tree or branch. The civil law gives rise to duties and potential liabilities to pay damages in the event of a breach of those duties. The criminal law gives rise to the risk of prosecution in the event of an infringement of the criminal law.

The owner of the land on which a tree stands, together with any party who has control over the tree's management, owes a duty of care at common law to all people who might be injured by the tree. The duty of care is to take reasonable care to avoid acts or omissions that cause a reasonably foreseeable risk of injury to persons or property.

The duty holder is the person who has control of the tree's management whether as owner, lessee, licensee or occupier of the land on which the tree stands. The relevant highway authority is responsible for trees on land forming part of the highway.

The person to whom the duty is owed is any person who can be reasonably foreseen as coming within the tree's vicinity and being injured by a fall of the tree or a branch from the tree. Those using highways, footways, public footpaths, bridleways, railways and canals are likely to come within striking distance of trees on adjacent land. In public spaces, and semi-public spaces such as churchyards and school grounds, those working in or visiting them can be expected to come within the vicinity of trees. On private land, visitors and employees can also be expected to come within the reach of trees. Trespassers may also, in certain circumstances, be expected to come within the vicinity of trees on private land.

The duty owed can be stated in general terms as being a duty to take reasonable care for the safety of those who may come within the vicinity of a tree. The courts have endeavoured to provide a definition of what amounts to reasonable care in the context of tree safety and have stated that the standard of care is that of "the reasonable and prudent landowner".

The tree owner is not, however, expected to guarantee that the tree is safe. They have to take only reasonable care such as could be expected of the reasonable and prudent landowner. The duty owed under the tort of nuisance is owed by a tree owner to the occupier of neighbouring land. The duty, however, is no different to the general duty owed under the tort of negligence. It is the duty holder's fundamental responsibility, in taking

reasonable care as a reasonable and prudent landowner, to consider the risks posed by their trees. the level of knowledge and the standard of inspection that must be applied to the inspection of trees are of critical importance. it is at this point that the balance between the risk posed by trees in general terms, the amenity or other values of trees and the cost of different types of inspection and remedial measures becomes relevant.

ThE sTandard Of insPECTiOn the courts have not defined the standard of inspection more precisely than the standard of "the reasonable and prudent landowner". in individual cases, the courts have sought to apply this general standard to the facts of each case. However, there is no clear and unambiguous indication from the courts in regard to the extent of the knowledge about trees a landowner is expected to bring to tree inspection in terms of type and regularity of inspection. generally, the courts appear to indicate that the standard of inspection is proportional to the size of and resources available (in terms of expertise) to the landowner. it is of note that the Hse states in the Hse sector information minute Management of the risk from falling trees (Hse 2007), that: "for trees in a frequently visited zone, a system for periodic, proactive checks is appropriate". NT S G10 common sense risk management of trees ThE Criminal Law the Health and safety at Work etc act 1974 places a duty on employers to ensure, so far as is reasonably practicable, that in the course of conducting their undertaking, employees and members of the public are not put at risk (sections 2(1) and 3(1) respectively, see also 3(2) in respect of self-employed persons). the acts of felling or lopping a tree clearly fall within the scope of this duty. it is also likely that the growing and management of trees on land falls within the scope of the duty if such operations fall within the employer's undertaking. the duty is subject to the words "so far as is reasonably practicable". this proviso requires an employer to address the practical and proportionate precautions which can be taken to reduce a risk. the courts have generally been unwilling to take into account environmental or aesthetic values when considering whether a step is reasonably practicable, confining the consideration to whether a precautionary step can "practically" be undertaken. nevertheless, in HSE v North Yorkshire County Council (20.5.10) Wilkie J., when directing the jury as to the meaning of "reasonably practicable", identified as a material consideration "the benefits of conducting the activity". He said (ntsg emphasis): "Now, in this context what does 'reasonably practicable' mean? Well, as you have been told correctly, it is a narrower concept than what is physically possible. it requires a computation to be made by the employer in which the amount of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk, whether in terms of money, time or trouble, or the benefits of

conducting the activity, are placed in the other. if there is a gross disproportion between them where the risk to health and safety is insignificant in relation to the sacrifice and/or loss of benefit involved in averting that risk then the defendant discharges the onus upon him and is entitled to be acquitted, but if the defendant does not persuade you of that on the balance of probabilities then you would convict.” the management of Health and safety at Work regulations 1999 require employers, and self-employed persons, by regulation 3 to “make a suitable and sufficient assessment of the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking”. this requires an employer, and a self-employed person, to undertake a risk assessment of the tree stock on the land which forms part of the undertaking. Breach of the duty under the act, or the regulations derived from the act, can give rise to a criminal prosecution against the employer. Reasonable, balanced tree risk management landowners who already sensibly manage their trees can be reasonably confident that there is no need for any radical change driven by a fear of the law, though they may find this guidance useful when reviewing management practice. no tree can be guaranteed to be safe. as long as we retain trees, we cannot achieve zero risk. a disproportionate response to the actual risks posed by trees leads to unnecessary intervention, particularly alongside roads and public places. Disproportionately responding to risk itself runs the risk of diminishing the landscape and depriving the whole community of the enjoyment of trees and their wider benefits.

The law requires only that people should take reasonable care to avoid acts or omissions which cause a reasonably foreseeable risk of injury to persons or property. the generally agreed standard to be achieved is that of a reasonable and prudent landowner.