Neutral Citation Number: [2013] EWHC 2687 (TCC)

Case No: HT-11-99

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 September 2013

**Before** :

**THE HON MR JUSTICE RAMSEY**

**Between :**

| | |
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| **Saqib Khan**<br>**Shazia Khan** | **Claimants** |
| **- and -** | |
| **Harrow Council**<br>**Helen Sheila Kane** | **Defendants** |

**Daniel Crowley** (instructed by **Kennedys**) for the **Claimants**
**James Bowling** (instructed by **Keoghs LLP**) for the **Second Defendant**

# Approved Judgment

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

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MR JUSTICE RAMSEY

**Mr Justice Ramsey:**

## Introduction

1. This is a claim for damage to a house alleged to have been caused by tree roots from a neighbouring property. Mr and Mrs Khan own the house at 68 Dennis Lane, Stanmore, Middlesex ("the Property") where damage has occurred and Mrs Kane owns the neighbouring property and trees at 62 Dennis Lane, to the right of the Property when viewed from the road. Originally the claim included a claim against Harrow Council who own land to the left of the Property but those proceedings were settled.

## Background

2. The houses at 62 and 68 Dennis Lane were built in the 1950s or 1960s on land which was originally Old Stanmore Country Park. In about 1982 the then owner of 68 Dennis Lane built an extension on the right hand side of the Property, near the boundary with 62 Dennis Lane. Mrs Kane and her late husband purchased 62 Dennis Lane in April 1982.

3. A survey of 68 Dennis Lane was carried out for Mr and Mrs Khan by WG Edwards & Partners, Chartered surveyors, in November 2000**.** It noted that mature trees and shrubs, including oak and weeping willow were present on the Property and advised that the buyer should insure, in particular, against subsidence, settlement, landslip and heave. In July 2001 Mr and Mrs Khan purchased the Property. Some five years later in September 2006 Mr and Mrs Khan noticed damage in the form of cracks to the Property. They contacted their insurers, Sterling Insurance, who appointed Carmichaels, loss adjusters, on 13 September 2006. Mr Hadley of Carmichaels dealt with the day to day conduct of the claim, inspected the Property and produced a preliminary report on 22 September 2006. He advised that there should be further investigation and monitoring before repair work was carried out.

4. In the event, Carmichaels appointed PBA Structural Consulting Ltd ("PBA") in about April 2007 and they commenced monitoring and carried out a site investigation with four trial pits, including trial pits TH3 and TH4 being at the right hand side of the Property. They instructed Marishal Thompson & Co (Environmental) Ltd, arboricultural consultants, who in a report dated 9 July 2007 identified a Lawson Cypress hedge (which I refer to as H1) in Mrs Kane's property as being one of the species of tree that had "the potential to be a significant factor in the current damage." For H1 they recommended "*Remove section of hedge to achieve a minimum clearance of 5m to insured property. Maintain retained section at current dimensions*". In relation to an oak tree owned by Mr and Mrs Khan at the front of the Property (T2) and an oak tree at the front of Mrs Kane's property (which I refer to as T1 but which was identified in the report as T4) they recommended "*Do not allow to exceed current dimensions*" as "*Action to avoid future risk*". They found roots of shrubs in TH3 but they were described as "too thin". They did not retrieve any roots from TH4.

5. PBA monitored the Property at seven locations (1 to 7) from 30 April 2007 and added four further locations (8 to 11) from June 2009 and the locations relevant here are:

   (1) Location 1 was on the front elevation to the right of the porch at the rainwater pipe at high level;

   (2) Location 2 was on the front elevation to the right of the porch at the rainwater pipe at low level;

   (3) Location 8 was external at the bottom corner of the landing window;

   (4) Location 9 was external on the front elevation at the top right corner of the landing window;

   (5) Location 10 was in the Lounge at the top corner of the Study door;

   (6) Location 11 was in the Lounge at the bottom right hand corner of the front window.

6. PBA also carried out further investigation by two boreholes in June 2008. One borehole (BHF or THF) was at the front of the house at the right hand corner. They sent roots from these boreholes to Richardson's Botanical Identifications. From THF at 1 metre depth they identified one root as being a conifer root particularly like Cypresses, with three further roots appearing to be similar and three roots being too thin for identification. At 2 metre depth in THF they found an Ash root and one root that looked similar.

7. Mr Hadley says that he first wrote to Mrs Kane on 11 September 2007 and again on 27 May 2008 but received no reply and the letters were not returned to him. Those letters referred to the damage to the Property and the need for cooperation in tree management work. The letters of 11 September 2007 and 27 May 2008 were addressed to "The Owner/Occupier" at 66 Dennis Lane, an address which does not exist, rather than 62 Dennis Lane where Mrs Kane lives. Mrs Kane says that she did not receive those letters but she did receive a letter from Kennedys, Mr and Mrs Khan's solicitors, dated 2 June 2009 but which was confusingly addressed to Mr and Mrs Khan rather than Mrs Kane. Shortly after receiving the letter from Kennedys Mrs Kane contacted her insurers, Liverpool Victoria, who wrote to Kennedys on 19 June 2009 saying that Mrs Kane had not received the previous letters.

8. On 12 June 2009 PBA reported on increased and new damage to the Property and a site investigation consisting relevantly of one trial hole, TH7, at the front towards the left of the Property and two boreholes, BH8A and BH8B, both located at the front of the Property towards the right hand side. In BH8A a 10mm diameter oak root was found at 0.5 metre depth and in BH8B roots from adjacent shrub vegetation were identified.

9. On 22 June 2009 Kennedys stated that the Cypress trees which formed the hedge (H1) on Mrs Kane's property were the most likely cause of the damage to the right hand side of the Property and asked for the nuisance to be abated by felling those trees. On 30 June 2009 they sent Liverpool Victoria a copy of a report dated 30 June 2009 from Dr Martin Dobson, Mr and Mrs Khan's arboricultural expert, and referred to paragraph 9.5 where Dr Dobson stated that "*The Cypresses are most likely to be the material cause of damage to the right hand side of the property.*" At paragraph 9.8 he said that to remove the material cause of damage it would be necessary to fell "*all Cypress trees within 5m of the right hand side of the building.*"

10. At about the beginning of July 2009 the Cypress trees adjacent to the right hand wall of the Property were removed. On 16 October 2009 Dr Dobson wrote an addendum to his report of 30 June 2009. In that report he said that, following the removal of the trees, the results obtained from TH7 and BH8A and BH8B and further level survey results, new damage had occurred particularly to the right hand side of the Property. At paragraph 4.4 of the addendum report he said: "*It is clear that one or both of the Oak trees T1 and T2 are a material cause of damage to 68 Dennis Lane. Since the trees are very close to each other and have similar sized crowns and are of similar age it seems likely that they are jointly responsible for the damage.*" He recommended that T1 and T2 be felled.

11. On 17 December 2009 Mr Hadley of Carmichaels wrote to Mrs Kane to say that local authority approval had been granted to felling Oak trees T1 (on Mrs Kane's property) and T2 (on the Property) and seeking approval for the felling of T1. Oak trees T1 and T2 were subsequently felled.

12. Carmichaels obtained tenders for remedial work to the Property and on 1 June 2010 recommended to insurers that a cash settlement be reached with Mr and Mrs Khan to cover remedial work to repair all the damage to the Property on the basis that Mr and Mrs Khan would then be responsible for carrying out the work themselves.

13. Proceedings were issued against the London Borough of Harrow on 18 March 2011 and the Claim Form and Particulars of Claim were amended on 14 November 2011 to include the claim against Mrs Kane for damage to the right hand side of the Property caused by the Cypress hedge (H1) and the Oak tree (T1). The claim was pleaded in nuisance and negligence against the defendants and at paragraph 8 of the Amended Particulars of Claim Mr and Mrs Khan pleaded that "*The risk of damage to the premises by subsidence caused as aforesaid and/or the continuance thereof was or ought to have been reasonably foreseeable to the Defendants.*"

14. In her defence Mrs Kane admitted in paragraph 5(3) that the "*subsidence to the rear right-hand side of 68 Dennis Lane was: (a) Caused in whole or in part by the hedge; and/or (b) Contributed to by the oak Tree T1 (on Mrs Kane's property) and Oak Tree*

*T2 (on the Claimants' property).*" It was denied in paragraph 10(1) that the subsidence to the right-hand side of 68 Dennis Lane was reasonably foreseeable by Mrs Kane.

15. Mrs Kane sought further information of the allegation at paragraph 8 of the Amended Particulars of Claim and Mr and Mrs Khan responded by saying:

> "*It is reasonably foreseeable, and was so foreseeable in the period leading up to the Summer of 2006, to a person who owned and/or controlled and/or maintained and/or was responsible for a number of trees that there was a risk that the trees and/or their roots could cause damage to property.*"

16. It was also pleaded that: "*This is common knowledge through extensive reporting in the media and hence something the Second Defendant knew or ought to have known.*" Reference was also made to a "*small selection of newspaper articles*" from, for instance, the Harrow Times, the Daily Mail and the Evening Standard, which were attached. Reliance was also placed on actual knowledge, including the fact that Mrs Kane had buildings insurance.

**The Issues**

17. By the end of the hearing the issues between the parties had narrowed and can be summarised as follows:

(1) Was the damage to Mr and Mrs Khan's property from the Second Defendant's Oak Tree T1 and the Lawson Cypresses HI reasonably foreseeable?

(2) Did the Lawson Cypresses H1 materially contribute to the damage to Area B of Mr and Mrs Khan's property?

(3) Did the Second Defendant act reasonably to prevent the damage?

(4) Were Mr and Mrs Khan contributorily negligent as pleaded in sub-paragraph 15(2) of the Defence of the Second Defendant?

(5) If so, what percentage of the damage is attributable to Mr and Mrs Khan's contributory negligence?

(6) Did Mr and Mrs Khan fail to mitigate their loss as pleaded in sub-paragraph 15(1) of the Defence of the Second Defendant?

(7) If so, what is the amount of damage caused by their failure to mitigate?

(8) What is the quantum of Mr and Mrs Khan's claim?

(9) Are the fees for the abortive underpinning scheme (£3,196) recoverable?

**The evidence**

18. I heard evidence from three witnesses of fact and from four experts. I heard evidence from Mr Saqib Khan himself and from Mr Hadley of Carmichaels, on behalf of Mr

and Mrs Khan. I then heard evidence from Mrs Kane herself. Mr Hadley was obviously embarrassed that the letters he sent to Mrs Kane and which led to no response had not been followed up and there were surprising differences in recollection between Mr Khan and Mrs Kane as to contact between them. However I consider that all the witnesses sought to provide me with their honest evidence on the relevant factual matters.

19. I heard arboricultural expert evidence from Dr Dobson on behalf of Mr and Mrs Khan and from Ms Margaret MacQueen on behalf of Mrs Kane. In relation to engineering expert evidence I heard from Mr Stephen Kirwin on behalf of Mr and Mrs Khan and Mr Leslie Calder on behalf of Mrs Kane. The scope of dispute between the experts was, in the end, narrow. Ms MacQueen came late to the case and it was evident that the lack of her previous involvement meant that her opinions had been formed more hastily. This led to her, quite properly, having to change her views. The experts all provided me with their honest opinions and the expert joint statements demonstrated the large measure of agreement between them.

**Cause of the damage**

20. For the purpose of assessing the influence of trees to the damage caused, the Property has been divided into two areas indicating the area influenced by trees on the left-hand side of the property which formed the subject matter of the claim against the London Borough of Harrow and those of the right-hand side of the property influenced by trees on that side. The area on the right-hand side has been sub-divided into three areas, Areas A, B and C.

21. The engineering experts have reached substantial agreement on the cause of the damage to those three areas on the right-hand side of the Property. They are agreed that the cause of the damage to Area A, the rear extension housing the office at ground floor, was caused solely by the cypress hedge, H1. In relation to Area B, the right hand-side of the house forming part of the sitting room at ground floor, the experts are not agreed. Mr Kirwin's view is that the area was influenced by root activity from trees T1, T2 and H1. Mr Calder's view is that Area B was damaged principally by the root activity of T1 and T2. In relation to Area C, the experts are in agreement that this area was damaged by trees T1 and T2 and that they each contributed equally to the damage.

22. The arboricultural experts have reached various conclusions on matters relevant to the cause of damage. In relation to H1, the experts are agreed that due to its proximity to Mr and Mrs Khan's property, these trees are likely to have roots under the foundations. Dr Dobson considered that H1 materially contributed to subsidence in 2006 until the trees were removed in July 2009. Ms MacQueen was originally of the opinion that H1 had little or no involvement in causing the damage but subsequently modified this view after further discussion with Mr Calder. She deferred to his opinion that the damage to Area A was caused by H1 but maintained that H1 had little or no involvement in the damage to Area B.

23. In relation to the influence of T1 and T2, the experts agree that the opening of cracks 1 and 2 in 2006 was probably caused largely (as Dr Dobson views it) and predominantly (as Ms MacQueen views it) by T1 and T2. Dr Dobson considered that they materially contributed to the subsidence damage in 2006 and subsequently until they were removed. Ms MacQueen's view differed from that of the engineers and was that they made no material contribution to the crack damage at locations 1 and 2 between April 2007 and September 2009. The experts are agreed that the new damage which began in late Summer 2009, as demonstrated in cracks 8 to 11, was caused by T1 and T2.

24. Dr Dobson's view was that it was difficult to say whether T2 would have caused subsidence in the absence of H1 and T1 but thought that the likelihood was that T2 could have caused damage on its own but would have been significantly less than half the damage caused by the combined influence of T1, T2 and H1 prior to 2009 and about half of that caused by T1 and T2 from 2009 onwards. Ms MacQueen was of the view that T2 was more likely to have had a greater influence on the property than T1 and that the frontage oaks were more likely to have been the effective cause of damage to Area B.

25. In relation to Area A, it is common ground between all experts, latterly including Ms MacQueen, that the effective cause of damage to this area was the trees in H1.

26. In relation to Area B, I prefer the evidence of Dr Dobson and Mr Kirwin that H1, as well as T1 and T2, had an influence on the damage in this area. By inspection of the photographs and plans it can be seen that H1 ran along and close to the right-hand side of the Property. As it is accepted that H1 had an influence on the rear right-hand side of the Property in Area A, I consider it likely that it would also have had an influence on the front right-hand side too. This is supported by Mr Kirwin's evidence.

27. In his report of 30 June 2009 Dr Dobson had analysed data from soil samples taken in 2007 and 2008. He concluded that cracks 1 and 2 showed no consistent pattern of movement and did not provide any compelling evidence to implicate trees in those cracks. Nonetheless he observed that cypress roots had been found below the foundations and that the soil at the front right hand corner was at the borderline of significant desiccation. He also stated that the pattern of movement of the parquet floor in the sitting room suggested that the front right hand side had subsided and rotated towards to the cypresses. On this basis he considered it likely that H1 were a material cause to the damage at the right hand side of the Property In his report of 16 October 2009 Dr Dobson reported on further movement and on the results of boreholes carried out at the right-hand side of the property. He concluded that T1 and T2 were responsible for the damage to the front right hand side of the property. As stated above, Ms MacQueen originally expressed the opinion that H1 had not caused

damage to the right-hand of the Property but she then modified that view to limit the dispute to the influence of HI on area B.

28. I consider that there is persuasive evidence from borehole BHF which indicated both cypress roots and desiccation in this borehole located just at the right-hand front corner of the property. The arboriculturalists also agreed that H1 was likely to have roots underneath the foundations of the property. All of this provides powerful support for the influence of H1 on Area B.

29. The damage which was caused by 2006 led to the monitoring of Cracks 1 and 2 in the front elevation. The data shows only small seasonal variations in these cracks from 2007 until 2009 when the trees forming H1 were removed. However, the lack of further opening of those cracks is not conclusive. Once there is a crack then its further movement will depend on how the damage structure reacts. The fact of cracking in cracks 1 and 2 provides some, although weak, support for the influence of H1 in movement to that area. On this aspect whilst it is agreed by all experts that the further movement to these cracks was caused by T1 and T2 that does not mean, as Mr Calder and Ms MacQueen view the matter, that H1 was not also an influence on that area until it was removed.

30. Whilst the new crack monitoring points, M8 to M11, installed in 2009 and monitored until after T1 and T2 were removed in February 2010 showed continuing movement after the removal of H1, the monitor M10 “Lounge-Top Corner Study Door” installed on 12 June 2009 which showed some movement by 29 June 2009 showed no significant further movement after the removal of H1 on 31 July 2009. Again I consider that this provides some limited support for H1 having a degree of influence, certainly over an extensive length to the right-hand side of the Property.

31. Reliance on the pattern of cracking of the parquet floor in the sitting room was, as his evidence showed, dependent on the interpretation of photographs and the precise view shown in them. I do not consider that this aspect provides any proper support for the influence of H1 on the damage to Area B.

32. Overall, taking into account all the evidence, it seems to me that the influence of H1 on the right-hand side of the property is well established both in Area A and in Area B.

33. In relation to the comparative influence of T1 and T2 on the damage to Area B in the end it was difficult to discern any real difference between the experts. The engineering experts considered that they had an equal effect. The arboricultural evidence was that, in essence, whilst there might have been some differences between

the two trees they had similar and overlapping zones of influence. They were of similar sizes and had similar crown sizes. In the end there is no persuasive arboricultural evidence to depart from the conclusion that T1 and T2 had equal effect on the damage to the property.

**Foreseeability**

34. An important issue in this case is the question whether the damage was reasonably foreseeable. This requires consideration of the test for establishing reasonable foreseeability in tort generally and particularly how this has been applied in cases involving tree roots. The starting point for any analysis of nuisance, including tree root cases, is the well-known decision in The Wagon Mound No 2 [1967] 1 AC 617. There Lord Reid, delivering the judgment of the Privy Council, considered the need for foreseeability as part of the tort of nuisance. In that case a spark had ignited flammable material floating on oil in Sydney Harbour and the judge held that a fire was not reasonably foreseeable but that foreseeability was not necessary in the tort of nuisance. Lord Reid held at 640D that foreseeability was an essential element in determining liability in nuisance: "*It is not sufficient that the injury suffered by the respondents' vessels was the direct result of the nuisance if that injury was in some relevant sense unforeseeable.*"

35. In reversing the judge's finding that fire was not reasonably foreseeable, Lord Reid analysed what was necessary for a finding of reasonable foreseeability. He referred to the decision of the House of Lords in Bolton v Stone [1951] AC 850 where it was held that a reasonable person would have been justified in disregarding an infinitesimal risk of a cricket ball being hit onto a highway and injuring someone. He said that whilst the risk was foreseeable, the risk was so small that a reasonable man would have been justified in disregarding it and taking no steps to eliminate it.

36. He said at 642G that Bolton v Stone did not alter the general principle that a person was liable:

> "*if he does not take steps to eliminate a risk which he knows or ought to know is a real risk and not a mere possibility which would never influence the mind of a reasonable man. What that decision did was to recognise and give effect to the qualification that it is justifiable not to take steps to eliminate a real risk if it is small and if the circumstances are such that a reasonable man, careful of the safety of his neighbour, would think it right to neglect it.*"

37. At 643F to G he said that a real risk which is remote cannot be described as not reasonably foreseeable and that:

> "*If a real risk is one which would occur to the mind of a reasonable man in the position of the defendant's servant and which he would not brush aside as far-fetched, and if the criterion is to be what that reasonable man would have done in the circumstances, then surely he would not neglect a risk if action to eliminate it presented no difficulty, involved no disadvantage, and required no expense.*"

38. A number of authorities have been cited, most of which apply the Wagon Mound No2. The central question in this case is whether the damage caused by T1 and H1 was reasonably foreseeable and, in particular, whether Mrs Kane knew or ought to have known about the risk of damage to Mr and Mrs Khan's property caused by T1 and H1. That requires the claimant to establish the necessary actual or imputed knowledge and also to identify what the risk was.

39. Mr Daniel Crowley, on behalf of Mr and Mrs Khan, seeks to rely both on actual knowledge and on knowledge which he says Mrs Kane ought to have had as a reasonably prudent landowner. For the reasons set out below I do not accept that Mrs Kane had actual knowledge. In relation to presumed knowledge, Mr James Bowling, on behalf of Mrs Kane, submits that Mr Crowley's reliance on knowledge which he says a reasonably prudent landowner ought to have had is tantamount to a submission that "everyone" ought to know that there is a risk of damage, thereby effectively making nuisance by tree root damage a tort of strict liability.

40. The question is in this case is whether the risk of damage by H1 and T1 ought to have been known to a reasonable person in the position of Mrs Kane. As Lord Reid said in The Wagon Mound No 2, the risk must "*occur to the mind of a reasonable man in the position of*" the relevant person. This is also reflected by what has been said in a number of other decisions. In this case the relevant person is a reasonably prudent landowner.

41. For example in Delaware Mansions Limited v Westminster City Council [2002] 1 AC 321 Lord Cooke of Thorndon, with whom the other members of the House of Lords agreed, referred to "*a reasonable person in the shoes of the defendant*" at [31]:

> "*In both the second Wagon Mound case and Goldman v Hargrave the judgments, which repay full rereading, are directed to what a reasonable person in the shoes of the defendant would have done. The label nuisance or negligence is treated as of no real significance. In this field, I think, the concern of the common law lies in working out the fair and just content and incidents of a neighbour's duty rather than affixing a label and inferring the extent of the duty from it.*"

42. At one stage it seemed that Mr Bowling was contending that because Mrs Kane did not have actual knowledge then the standard should be reduced to take account of that. However, to do this would be to seek to lower the standard applicable because of a lack of knowledge and, as stated in Clerk & Lindsell at para 8-142, a person's subjective knowledge cannot lower the standard. As also stated at para 8-142, subjective knowledge can impose a higher standard. This was the conclusion of the House of Lords in Baker v Quantum Clothing Group [2011] 1 WLR 1003 where appreciation by certain employers that noise levels in a code were no longer acceptable imposed a duty based on those lower noise levels. In my judgment, the purpose of the standard being set by the knowledge imputed to a class of person is to impose a standard on persons in that class. It therefore creates a floor but not a ceiling on the level of knowledge so that subjective knowledge can raise the standard. However, lack of actual knowledge cannot lower the standard or exclude liability which would be imposed based on the standard generally imposed.

43. In the present case I do not consider that, on the evidence, Mrs Kane had any relevant subjective knowledge which meant that she had actual knowledge about the risk of damage to Mr and Mrs Khan's property caused by T1 and H1. In closing Mr Crowley submitted that there were "pointers" that Mrs Kane's knowledge of the risk of damage to the Khan's property from those trees was more than she was willing to accept. I do consider that submission is correct. Mr Crowley made valiant efforts to elicit evidence of Mrs Kane's actual knowledge by referring to articles she might have read in newspapers or experiences she might have had or things she might have seen but on each occasion her answers demonstrated a genuine lack of knowledge of what was being put to her, although she had obviously acquired some knowledge as a result of the facts of this case.

44. As a result, the question is whether the risk of damage to Mr and Mrs Khan's property caused by T1 and H1 would have been foreseeable to a reasonable person in the position of Mrs Kane. What has to be considered is the position of reasonably prudent landowners who have trees on their properties. The evidence relied on to establish what a reasonably prudent landowner would know consisted, in this case, of expert evidence from arboriculturalists, media articles and matters of common knowledge.

45. So far as expert evidence is concerned, it is obviously important that the standard imposed on landowners is not simply that of a reasonably prudent arboriculturalist. However arboriculturalists can provide evidence of what was generally known in 2006 about risks of damage cause by tree roots. The arboriculturalists agreed that the problem of tree-related subsidence on clay soils has had widespread coverage in the media. Mr Calder, the engineering expert on behalf of Mrs Kane said that there would be a general awareness that large trees can cause subsidence damage during extremely hot, dry weather. I was referred to a number of articles in the media in or prior to 2006 which show that damage caused by tree roots was a matter which was reported on a significant number of occasions. I was also provided with the results of a survey carried out by Zurich Insurance in April 2005 which, even treating the actual statistics with caution, indicated significant awareness by homeowners of the risk of subsidence

damage caused by trees. I was, in addition, referred to the fact that houseowners have insurance policies which, it was submitted, they would know covers them against the risk of subsidence damage.

46. Mr Crowley submits that this evidence is sufficient to establish the reasonable foreseeability of subsidence damage caused by trees.

47. Mr Bowling says that the media evidence contains only vague, occasional and non-specific reference to tree damage occurring elsewhere. He submits that the evidence demonstrates that the vast majority of the population would not foresee the risk of subsidence cause by trees. He submits that this is insufficient to impose a duty on all landowners for subsidence damage caused by trees.

48. I consider that the evidence goes further than Mr Bowling contends but not as far as Mr Crowley submits. It goes to the general awareness of the risk of subsidence damage caused by trees. Based on that evidence, I accept that a reasonably prudent landowner with trees on their land ought, in the period leading up to 2006, to have been aware that there is a risk of subsidence damage to property caused by tree roots, particularly on clay sub-soils. I note that in the more recent Court of Appeal decision in a tree roots case in Berent v Family Mosaic Housing [2012] EWCA Civ 961, Tomlinson LJ observed, consistently with what I find the position based on the evidence in this case, as follows at [6]:

> "*It is well known that shrinkage subsidence may occur where trees extract moisture from the soil causing it to shrink – clay based soils are particularly prone to moisture-related shrinkage.*"

49. Whilst the expert and media evidence establishes the general risk of subsidence damage caused by trees, I do not consider that it is sufficient on its own to establish foreseeability of the risk in particular trees. If knowledge of the general risk were sufficient to found liability then, I accept that as Mr Bowling submits, this would mean that "everyone knows" the risk and that would be tantamount to strict liability. In my judgment, the general risk that trees pose in terms of settlement damage is not sufficient without more to impose liability in nuisance for subsidence damage caused by tree roots. There has to be more and therefore the central issue here is whether the particular risk posed by T1 and H1 in this case was reasonably foreseeable. Obviously, the general risk forms the background to consideration of the particular risk.

50. I have been referred to a number of decisions where the question of foreseeability of subsidence damage by tree roots has been considered. I do not gain much assistance from the County Court decision in Butcher v Perkins (1994) 10 Const LJ 67, relied on

by Mr Crowley. In that decision at 70 to 71 there is an analysis of reasonable foreseeability based on the particular evidence and the facts in that case.

51. I do gain more assistance from a passage in the judgment of Lloyd LJ, with whom the other members of the Court of Appeal agreed, in Kirk v Brent London Borough Council [2005] EWCA Civ 1701. When considering when the risk of damage ought to have been known the council, he said this at [29]:

> *"I see the force of Mr Makey's submission, which commended themselves understandably to the judge, that you cannot say that simply because here is a mature plane tree, in London, on London clay, whose height is greater than its distance from a neighbouring property, therefore you are on notice that there is a risk that the roots may have encroached upon the foundations of the neighbouring property and you are therefore liable in nuisance. That would be arguably an argument that is far too wide and would, as the judge said, amount almost to strict liability. But it seems to me that the judge has not dealt, and indeed has not attempted to deal, with the particular facts relied on by the claimants for putting the defendants on, as it were, constructive notice of the risk, in particular the March 1998 letter. "*

52. This must however be considered in the light of what was said in Delaware Mansions v Westminster City Council [2002] 1 AC 321 at 334 by Lord Cooke of Thorndon, with whom the other members of the House of Lords agreed:

> "*Having regard to the proximity of the plane tree to Delaware Mansions, a real risk of damage to the land and the foundations was foreseeable on the part of Westminster, as in effect the judge found.*"

53. In this case Mr Crowley relies on the general risk and various particular matters in relation to H1 and T1. However, he also says that knowing the general risk, a reasonably prudent landowner could and would then obtain expert advice to assess the extent of the risk and the steps needed to manage the risk. Mr Bowling relies on the fact that none of the experts said that they had ever been contacted by houseowners based merely on what they had heard in the media but they were generally consulted when there had been a trigger event such as damage. He says that there has to be a trigger event before a houseowner would seek further advice.

54. I accept Mr Bowling's submissions. It would be surprising if, based on a general risk of the type identified above, a reasonable houseowner would, without more, consider

that the risk was sufficient to justify engaging the services of an expert to advise on the risk of subsidence damage caused by trees on their property. However, given the general risk which is foreseeable, I consider that it is the features of the particular trees relied on by Mr Crowley which would be relevant to whether the risk for that tree was reasonably foreseeable. As the authorities show, much depends on the particular facts of each case.

55. In establishing the particular risk in relation to H1, Mr Crowley relies on the very close proximity of the Lawson Cypresses to the Property and the dominating position of those trees as being factors which would inform a reasonably prudent landowner about the risk. He refers to the photographs of the trees forming H1 which do clearly establish the closeness and dominance of those trees. He also refers to the evidence of the poor condition of the trees. In relation to T1, Mr Crowley refers to its height. He also says that the existence if fungus on the tree should have led Mrs Kane to instruct an arboriculturalist to advise her and she would then have been advised of the risk of subsidence to her property.

56. Mr Bowling on the other hand says that these matters do not go much further than the submissions referred to by Lloyd LJ in Kirk v Brent. He also says that there are counterbalancing factors. He refers to the fact that the trees are mature and that H1 had been there for 30 years and T1 for 50 years. He also relied on the fact that Mrs Kane's gardener had not mentioned likely problems and that there was nothing special about the summer of 2006 to alert landowners to risk.

57. In my judgment, there is a difference in this case between the risk of damage which was reasonably foreseeable in relation to H1 and in relation to T1. The Lawson Cypress trees which form H1 are not only very close to the Property but they dominate that side of the property. Looking at the trees and their condition in 2006 I do not consider that the fact they had been there for 30 years would reduce the perception of the obvious risk posed by those trees. With knowledge of the general risk, the location, size and condition of those trees would, I consider, mean that a reasonably prudent landowner would be put on notice of the particular risk which that tree posed to the neighbouring property. It would cause the reasonably prudent landowner to appreciate that there was a real risk, not just a mere possibility, of subsidence damage caused by this tree.

58. When looking at T1, I do not consider that there is any particular feature of the tree such as its position or height would put a reasonably prudent landowner on notice of any real risk of subsidence damage being caused by this tree. It had been there for a longer period than H1 and, subject to the existence of fungus, looked to be a healthy tree in a good condition. Whilst the photographs show the fungus, I do not consider that this was knowledge which Mrs Kane had or which, as a reasonably prudent landowner, she ought to have had. The tree was in a corner of the garden which there would be no reason to visit.

59. I do not therefore consider that the reasonably prudent landowner would have appreciated that there was a real risk, as opposed to a mere possibility, that subsidence damages might be caused by this tree.

60. If I were to be wrong about the impact of the fungus, I am by no means persuaded that if Mrs Kane had sought advice she would have been advised that the tree posed a real risk of subsidence damage to Mr and Mrs Khan's property. As can be seen, when PBA Consulting were first involved as engineers in April 2007 their recommendation was to remove H1 but also stated that it would be prudent to commission an arboricultural report. This led to an arboricultural report being produced by Marishal Thompson & Co (Environmental) Ltd in July 2007 in which they stated that H1 should be removed to achieve a minimum distance from the property but considered that for T1 and T2 they should not be allowed to exceed their current dimensions to avoid a future risk. The conclusion of Dr Dobson when he first reported in June 2009 was that H1 was most likely to be the material cause of damage to the right hand side of the property. He did not identify any risk arising from T1 and T2, although their theoretical zone of influence just reached the property, the zone of influence of T2 being greater than T1. He also commented that none of Mr Khan's own vegetation, which would have included T2, was a material cause of damage. Therefore if the fungus on T1 had led to an arboricultural investigation, I consider it improbable that it would, in turn, have led to a recommendation that T1 was likely to cause damage to the property.

61. Mr Crowley also submitted that, in considering the foreseeability of damage caused by tree roots, other damage caused by trees in other ways was foreseeable. He referred to damage to property being reasonably foreseeable from Mrs Kane's trees shedding their limbs, falling over or being blown over and pressing up against the property. He referred to passages in Clerk & Lindsell on Torts (20th Edition) at paras 2-148 and 2-149 which stated, based on the decision of the House of Lords in Hughes v Lord Advocate [1963] AC 837, that the precise accident need not be foreseeable provided that the accident falls within the foreseeable risk. However, as Mr Bowling submits, the risk of damage by a falling limb or tree or a tree pressing against the property is not of the same kind or type of damage as damage caused by tree roots. The foreseeable risk of damage to property by falling trees or damage caused by contact to a building does not, in my judgment, make damage caused by desiccation of the soil by encroaching tree roots foreseeable.

62. Damage caused by a lighted lamp may be foreseeable as in Hughes whether caused by fire or explosion but the Wagon Mound (No1) [1961] AC 388 establishes that there is a difference in kind between damage caused by fire and damage caused by pollution. Like the latter, damage by desiccation by tree roots is different to damage by falling trees.

63. As a result, I have come to the conclusion that a reasonably prudent landowner would have appreciated that there was a real risk not just a mere possibility that subsidence damage might be caused by H1 but would not have appreciated that there was a real risk of subsidence damage by T1. On this basis I now proceed to consider the effect of that conclusion.

**Did Mrs Kane act reasonably to prevent damage?**

64. Mr Crowley submits that Mrs Kane did nothing to prevent damage to Mr and Mrs Khan's property before the damage occurred. He submits that the steps which should have been taken by removing H1 were reasonable and inexpensive. Mr Bowling submits that until Mrs Kane was put on notice of damage caused by H1 she was under no duty to take any steps and that when she received the letter from Kennedys in June 2009 asking her to remove H1 she acted quickly and appropriately to remove H1.

65. Given that the risk of damage caused by H1 was foreseeable, Mrs Kane was under a duty to take steps to eliminate that risk and, for the reasons set out below, I do not consider that notice is required. Where risk of damage is reasonably foreseeable then, as Lord Reid said in the Wagon Mound (No 2), it is justifiable not to take steps to eliminate a real risk if it is small and if the circumstances are such that a reasonable person, careful of the safety of a neighbour, would think it right to neglect it. However he pointed out that a reasonable man would not neglect a risk if action to eliminate it presented no difficulty, involved no disadvantage and required no expense.

66. In this case the cost of removing H1 has been agreed by the arboricultural experts as being in the region of £700 to £800. H1 was not an attractive feature and its removal presented no difficulty or disadvantage to Mrs Kane. The risk of tree root damage by H1 cannot be described as small and I do not consider that a reasonably prudent landowner would think it right to neglect it. In those circumstances, I consider that Mrs Kane failed to take the appropriate steps to eliminate the risk of subsidence damage caused by the roots of H1 and is therefore liable in nuisance for the damage caused by her failure to eliminate that risk.

67. If contrary to my findings set out above I had held that a reasonably prudent landowner would have appreciated that there was a real risk that subsidence damage might be caused by T1 then that, again, raises questions as to what action Mrs Kane should have taken under her duty to eliminate or reduce the risk. There is a Tree Preservation Order (TPO) on T1. Mr Crowley submits that the existence of that TPO is irrelevant on the basis of the Court of Appeal decision in Perrin v Northampton BC [2008] 1 WLR 1307 at 1328 to 1330. He submits that Mrs Kane should have undertaken a 35% linear reduction of T1 which, as agreed by the arboriculturalists, would have cost £1000 and would have been advised by them. He says that the work should have been carried out before Summer 2006 and, if the Council had refused permission to remove T1, then there is a compensation mechanism for any loss suffered by Mrs Kane.

68. Mr Bowling submits that the existence of the TPO has an impact on this issue. He says that the decision in Perrin v Northampton BC on the effect of a TPO on a claim for damages for nuisance was *obiter* and that the case was concerned with the grounds for refusal of consent to remove a tree which was subject to a TPO. He also submits that, on the expert evidence, proof of actual damage would have been needed before the Council would have given permission for the removal of T1 and that therefore Mrs Kane cannot be criticised for failing to remove T1 before it caused damage. He says that the existence of the TPO must affect the duty of Mrs Kane to take steps to eliminate the risk and the fact that statutory compensation may be payable to Mrs Kane cannot affect the issue.

69. The statutory provision referred to in this case is s.198(6)(b) of the Town and Country Planning Act 1990 ("the 1990 Act") which provides:

> "*Without prejudice to any other exemptions for which provision may be made by a tree preservation order, no such order shall apply—…*
>
> *to the cutting down, uprooting, topping or lopping of any trees in compliance with any obligations imposed by or under an Act of Parliament or so far as may be necessary for the prevention or abatement of a nuisance.*"

70. In Perrin the claimants had sought the consent of the local authority to cut down a tree and that had been refused. They then brought proceedings for a declaration that for the purposes of s. 198(6) of the 1990 Act a tree on the neighbours' land was causing subsidence by root encroachment into the claimants' land and it was necessary to cut down the tree to prevent and/or abate that nuisance. The local authority contended that, although the claimants' property had suffered damage to a limited extent, that damage had not been caused by the tree and that it was not necessary to cut it down to prevent or abate any nuisance.

71. In giving a judgment with which the other members of the Court of Appeal agreed, Chadwick LJ said at [53]:

> "*In so far as the nuisance cannot be abated or prevented by cutting roots or branches on B's land or (by agreement with A) by operations to the tree on A's land, B's remedies (under the general law) are (i) to seek an injunction requiring A to abate or prevent the nuisance by something done on A's land (which might be the cutting down, uprooting, topping or lopping of the tree), (ii) to seek an order for damages against A in respect of the damage suffered (including the prospective cost of remedial works) or (iii) to carry out remedial or preventative works on his own land and seek to recover the costs of*

> *those works from A: see the Delaware Mansions case. Absent the ability to rely on section 198(6)(b) of the 1990 Act, the existence of a tree preservation order may restrict what A can do to the tree on his own land; and so may restrict B's ability to obtain an injunction. But there is nothing in section 198, as it seems to me, which alters B's remedies under heads (ii) or (iii). There is no substance in the argument that, unless section 198(6)(b) of the 1990 Act is interpreted in such a way that it is simple for B to decide whether he can cut down a protected tree, B will be deprived of an effective remedy.*"

72. At [15] Chadwick LJ referred to the reasons given by the Council for refusing permission to fell the tree under the provisions of the TPO made in 1974. He then commented at [16] as follows:

> "*It must be kept in mind, first, that—in making the application for consent—the applicant must be taken to have accepted that it was not necessary to fell the tree in order to prevent or abate the nuisance. If it were necessary to fell the tree for the prevention or abatement of the nuisance the 1974 order would have no application: section 198(6)(b).*"

73. In this case there is a difference in expert opinion as to what the attitude of Harrow Borough Council ("the Council") would have been to a request to approve removal or reduction of T1, covered by a TPO. Ms MacQueen considered that, without clear evidence of the involvement of T1 in actual subsidence, the Council would have refused permission. Dr Dobson disagrees although his views were modified in cross-examination in terms of the need for proper support for an application for permission.

74. I consider that Perrin does give persuasive guidance on the way in which the existence of a TPO is to be interpreted in relation to causes of action for damages for nuisance caused by a tree which is subject to a TPO. Chadwick LJ was clearly of the view at that, even without s.198(6)(b), the provisions of s.198 relating to TPOs would only prevent the remedy of an injunction but would not prevent a remedy for damages for nuisance. If it is necessary for the tree to be cut down, uprooted, topped or lopped to prevent or abate a nuisance then, as Chadwick LJ pointed out, there is no need to seek consent under s.198(6)(b).

75. In these proceedings if I had found that it was foreseeable that T1 would cause damage to Mr and Mrs Khan's property, the question would have been whether as a prudent landowner Mrs Kane should have taken steps to eliminate the risk of damage. The expert arboriculturalist evidence, as stated above, is that such work would have involved a 35% linear reduction of T1. To carry out that work s.198(6)(b) could have been relied on and on the evidence before me that work was "*necessary for the prevention or abatement of a nuisance*" and therefore nothing would have prevented

the work from being carried out. Therefore, on the facts of this case, the TPO would not have prevented Mrs Kane from carrying out the necessary work to T1 and she would have been under a duty to carry it out.

76. For the reasons set out above and given that I have only held that damage to the Property by H1 was reasonably foreseeable, I find that Mrs Kane failed to take steps the appropriate steps to eliminate the risk of subsidence damage caused by the roots of H1 and is therefore liable in nuisance for the damage caused by her failure to eliminate that risk.

**Notice**

77. Mr Bowling submits that Mrs Kane was only on notice of the risk of damage caused by H1 when she was put on notice in June 2009 by receipt of the letter from Kennedys and in relation to T1 when she was informed in early 2010 of the need to remove T1.

78. Mr Crowley submits that the question of notice is irrelevant to liability. He says that it is foreseeability of the risk of damage and a failure to take steps to eliminate the risk which forms the basis for liability not any question of notice. In closing Mr Bowling accepted that notice was not necessary to found liability.

79. I was referred to passages in Delaware Mansions and in Kirk v LB Brent which refer to notice. It is clear from the judgment of Pill LJ at [37] and Lloyd LJ at [26] in Kirk v LB Brent that express notice is not a necessary part of liability in nuisance. Equally, as set out by Lord Cooke in Delaware Mansions at [34] that a party cannot be liable for "*a large bill for underpinning without giving them notice of the damage and the opportunity of avoiding further damage by removal of the tree*". He added that "*the defendant is entitled to notice and a reasonable opportunity of abatement before liability for remedial expenditure can arise.*"

80. In my judgment the question of notice is relevant to two related aspects. First, if the risk of damage caused by the roots of a particular tree is not foreseeable to a prudent landowner so that there is no liability in nuisance, then if damage is caused and the landowner is put on notice of the damage then that landowner would be liable for the continuing nuisance based on that actual knowledge. Secondly, if a neighbour contends that damage has been caused to their property by a landowner's trees then the neighbour should give notice to the landowner of any proposed remedial work so that the landowner can take any necessary steps to abate the nuisance, otherwise remedial works may not be recoverable.

81. In the present case as I have held that the risk of damage caused by H1 was foreseeable then notice to Mrs Kane is not necessary to impose liability on her. If I had found otherwise then it would have been necessary to consider when she was put on notice. In relation to that, I accept Mrs Kane's evidence that the letters which were sent to her by Mr Hadley of Carmichaels were not received by her. He said and I accept that he sent letters to her on 11 September 2007 and 27 May 2008. However those letters were incorrectly addressed as set out above. First they were sent to No 66 Dennis Lane. Mr and Mrs Khan live at No 68 Dennis Lane and Mrs Kane lives at No 62 Dennis Lane. It seems that No 66 is in fact an address more likely to be associated with Mr and Mrs Khan's property although there is no house with No 66 on it. Secondly they were not addressed to Mrs Kane but to the Owner/Occupier at that address. I accept Mrs Kane's evidence that she would have opened any letter out of curiosity. It seems highly likely that the letters were not delivered to Mrs Kane's house. Where they went is a matter of speculation but it is evident that letters addressed to an owner/occupier at a non-existent address are of a type likely to be treated as junk mail or as not being of any importance. It is also significant that when Kennedys wrote a letter to Mrs Kane in July 2009 with the correct name and address, she responded to it.

82. In relation to T1, agreed action was taken soon after Mrs Kane became aware of the damage caused by its roots and there is, in my judgment, no liability based on continuing nuisance on the facts of this case. Further, this is not a case where any lack of notice is said to have made any remedial works irrecoverable.

## Contributory Negligence

83. In Mrs Kane's defence she pleads matters relied on as amounting to contributory negligence or, in the alternative, failure to mitigate. It is said that, despite warnings and recommendations in September 2007 and November 2008, Mr and Mrs Khan did not ask to remove H1 until mid-2009 and it was not until early 2010 that T1 and the oak tree belonging to Mr and Mrs Khan, T2, were removed. It is pleaded that, as a result, Mr and Mrs Khan cannot recover for damage caused by their failure to act in the period from September 2007 to July 2009. It is also said that knowledge of foreseeable damage from T1 was equally available to Mr and Mrs Khan.

84. In closing Mr Bowling sought to expand his case, which he accepted would need an amendment, to say that, if Mrs Kane were liable, then the damage was as foreseeable to Mr and Mrs Khan as it was to Mrs Kane and they failed to ask her to remove or prune H1 and/or T1 or offer to do it themselves and they did nothing to put Mrs Kane on notice between 2006 and 2009.

85. Mr Crowley, on the other hand, submits that as originally pleaded, it was only a failure to remove T2 which was relied on. He says that Ms MacQueen's evidence was that, prior to damage occurring, she would not have advised the removal of T1 or T2 as a precautionary measure and so Mr and Mrs Khan cannot be criticised for failing to

remove T2 before Summer 2006. After that date he says that they were entitled to rely on advice from their professional team.

86. In relation to the amended case he says that the blameworthiness of Mr and Mrs Khan is much less than that of Mrs Kane. In particular he says that Mrs Kane is more blameworthy because she allowed uncontrolled growth of trees, especially H1, in close proximity to the neighbouring property.

87. Under the Law Reform (Contributory Negligence) Act 1945 damages are to be reduced "*to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage*".

88. As stated by Chadwick LJ in Loftus-Brigham v London Borough of Ealing [2003] EWCA Civ 1490 at [29], the apportionment for contributory negligence has to be based on liability, not simply on causation. There is no dispute that contributory negligence is applicable to cases of nuisance such as this.

89. The element of responsibility of Mr and Mrs Khan relied on by Mr Bowling arises from their failure to communicate the risks of Mrs Kane's trees causing damage to their property or the fact that they had caused damage to their property. In essence, therefore, this is a case where it is alleged that Mr and Mrs Khan failed to inform Mrs Kane of risks of damage or of damage which I have found were reasonably foreseeable to her. Mr Bowling contends that this makes Mr and Mrs Khan equally responsible and so he submits that there should be a 50:50 apportionment.

90. Mr Crowley submits that the blameworthiness of Mr and Mrs Khan cannot be based on the failure of the professional team and that Mrs Kane is far more blameworthy. He submits that an 85:15 apportionment would be appropriate to take account of any blameworthiness.

91. I consider that Mr Bowling should be allowed to rely on the additional matters set out in his closing. They are matters which are a development of the original case in the light of the evidence and where it was evident that matters were in issue. It is a surprising aspect of this case that there was no communication between Mr and Mrs Khan and Mrs Kane directly concerning the trees and, in particular, the damage caused to their property by the tree roots from Mrs Kane's trees. As was stated by Lord Cooke in Delaware Mansions at [29] there is a concept of reasonableness between neighbours. In relation to H1 it is evident that the major share of the responsibility for the damage to Mr and Mrs Khan's property must fall on Mrs Kane. However it would have been reasonable for Mr and Mrs Khan to have communicated with Mrs Kane and inform her of the risks of damage and of damage to their property.

It seems to me that the appropriate apportionment is 15% to reflect the responsibility of Mr and Mrs Khan for the overall damage to their property caused by that failure.

92. If contrary to what I have found above, Mrs Kane had been liable in nuisance for the damage caused by T1 then I consider that likewise Mr and Mrs Khan's responsibility for the damage caused by T1 would have been 15%. They would, of course, be liable for any damage caused by T2.

**Mitigation of damage**

93. Although this is, in law, a separate consideration, Mr Bowling relies on the same matters both in relation to contributory negligence and also a failure by Mr and Mrs Khan to mitigate their loss. Having dealt with matters of contributory negligence above, he does not seek to take the matter further by way of failure to mitigate.

**Damages**

94. Mr and Mrs Khan claim damages under a number of heads. First, they claim damages for remedial work in the sum of £64,846.03. Secondly, they claim loss adjuster's fees of £2,193.16 and thirdly they claim general damages for distress and inconvenience.

95. The engineering experts have put forward an apportionment of the remedial works to the various trees. They were agreed on Areas A and C but, as stated above, I have found that H1 contributed to the damage to Area B. That is the basis on which Mr Kirwin has prepared his calculation and has apportioned the damage H1: 29.3%, T1: 35.35% and T2: 35.35%.

96. The sum of £64,846.03 includes £2,526.86 and £1,803.40 in respect of two invoices (1467 and 1633) from PBA Consulting. Mr Bowling submits that these invoices should be reduced to £976.80 and £157.45 to take account of the fact that work carried out by PBA Consulting on an abortive underpinning scheme. Mr Bowling relies on Mr Kirwin's evidence that if the reason why the underpinning work was pursued was because there was no cooperation from Mrs Kane and this, in turn, was because of delay by Carmichaels, it would change his view as to whether it was reasonable to carry out work in relation to underpinning. Mr Crowley submitted that this work was incurred because of the damage caused by the nuisance and that, as referred to by Dyson LJ in LE Jones v Portsmouth City Council [2003] 1 WLR 427 at [26] by reference to the speech of Lord Macmillan in Banco de Portugal v Waterlow & Sons Ltd [1932] AC 452 at 506: "*the measures taken by the innocent party to extricate himself from the difficulty in which he has been placed by the wrongdoer ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty.*"

97. In the present case it seems that the work in relation to underpinning was carried out at an earlier stage than September and December 2009 when it was invoiced. I consider that, as a result of the damage caused by the tree roots, it was reasonable for PBA Consulting to investigate an underpinning scheme and Mr Kirwin's evidence supported that approach. I do not consider that this depended on there being co-operation with Mrs Kane or, at the time with the other defendant and, in any event, Mr Kirwin's evidence was more tentative as to the effect of any lack of cooperation.

98. I therefore consider that the costs of the two PBA Consulting invoices are recoverable in full. On that basis, the total sum claimed by Mr and Mrs Khan is £64,846.03 and having found that Mrs Kane is only liable for the effect of the roots on H1 which represented, on my findings, 29.3% of the damage, the appropriate sum is £18,474.87, after deducting £1,791.87 which only related to trees T1 and T2 from the sum of £64,846.03.

99. In addition there is a claim for loss adjuster's fees of £2,193.16. Mr Bowling submits that this sum is not recoverable because they represent the cost of managing the relationship between the insured and insurer and are not a subrogated claim. Mr Crowley submits that these fees are in fact fees for investigating the damage and organising the specification for remedial works and putting them out for tender and not adjusting the loss for insurers. I consider that this is supported by the dates of the invoices although they do not specify the work. On that basis I allow a sum of £642.59, being 29.3% of £2,193.16 to represent the appropriate proportion of these costs.

100. Mr and Mrs Khan also claim general damages for distress and inconvenience. In Berent v Family Mosaic Housing [2012] EWCA Civ 961, Tomlinson LJ, with whom the other members agreed, considered the level of awards under this head in the context of tree root claims. At [40] he referred to the decision in Eiles v London Borough of Southwark [2006] All ER (D) 237 as establishing the benchmark. In that case there was a figure of £200 per year with an increased sum of £1250 to cover two years when remedial works were carried out. In this case I consider that an award based on these figures would be £800 for 2006 to 2010 and £1250 for 2010 and 2011 when work was carried out, making a total of £2050 each for Mr and Mrs Khan. As I have found that 29.3% of the remedial costs are recoverable, it is also appropriate to discount this figure and I allow about 29.3% of £4100, awarding a total of £1,200.

101. The total damages are therefore £20,317.46 (£18,474.87 + £642.59 + £1,200.00). As I have found that Mr and Mrs Khan are responsible for 15% on the basis of contributory negligence, the sum I award as damages is therefore £17,269.84.

## Summary and conclusions

102. As set out above I have found that Mrs Kane is liable in nuisance for damage caused to Mr and Mrs Khan's property caused by the cypress hedge H1 but not damage caused by the oak tree T1. I find that there was 15% contributory negligence by Mr and Mrs Khan and on that basis I award Mr and Mrs Khan damages in the sum of £17,269.84.

103. On this basis I would ask the parties to seek to agree interest and costs. If they cannot be agreed I will deal with those and any other matters either at the handing down of judgment or at a later date convenient to the parties.