In the Consistory Court of the Diocese of Worcester

Archdeaconry of Dudley: Parish of Lye and Stambermill: Christ Church

Faculty petition 15-49 relating to the felling of two beech trees

Judgment

1. This petition has been submitted by Dudley Metropolitan Borough Council, which seeks a faculty for the felling of two beech trees in the churchyard of Christ Church at Lye. I consider later in this judgment why the Council is the petitioner. The proposed felling is not recommended by the DAC; and it is opposed by the PCC and by various local residents.

The trees

2. I have not visited the site recently, but I have seen excellent photographs of it on Google Maps Street View. These were taken on a sunny day in April 2015, and show clearly the two trees, which are on the western boundary of the churchyard. That boundary adjoins a way through to a car park, on the other side of which lies no 41 High Street, Lye. The churchyard is closed for burials, and responsibility for its maintenance has been passed to the Council under what is now section 215 of the Local Government Act 1972.

3. The trees are extremely attractive. Many of those who have responded to the petition have noted that the trees are a significant element in the appearance of the High Street – "a lovely green spot in an otherwise busy High Street environment"; "they stand out and give character and shade"; "beautiful"; "much loved by many people". I have no reason to question that assessment; nor the comment that "they would be sadly missed". The two trees have, not surprisingly, been protected by the Council, as

local planning authority, by the making of a tree preservation order under the Town and Country Planning Act 1990. They appear to be in a healthy condition.

The damage, its cause, and possible remedies

4. The petition is accompanied by a technical report, in a standard form, produced by Crawford, structural engineers instructed by the insurers of No 41 High Street, in December 2011. This notes that there is cracking visible throughout the interior. This damage is categorised as "moderate" in the terms of BRE Digest 251. The conclusion of the report is as follows:

> "The pattern and nature of the cracks is indicative of subsidence. The cause of the movement appears to be clay shrinkage.
>
> The timing of the event, the presence of shrinkable clay beneath the foundations and the proximity of vegetation where there is damage indicates the shrinkage to be root induced. This is a commonly encountered problem, and probably accounts for around 70% of subsidence claims notified to insurers.
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> Fortunately, the cause of the problem (dehydration) is reversible. Clay soils will re-hydrate in the winter months, causing the clays to hydrate and the cracks to close. Provided the cause of the movement is dealt with (In this case, vegetation) there should not be a recurrence of movement."

5. In the light of those conclusions, the report recommends as follows:

> Although the cause of the movement needs to be dealt with, we note the vegetation is subject to a preservation order. Unfortunately, current legislation requires certain investigations to be carried out to support an application for tree works.
>
> Typically, these investigations would involve trial pit(s) to determine the depth and type of footings, boreholes to determine the nature of the subsoil / influence of any roots, and monitoring to establish the rate and pattern of movement. The monitoring data must be sufficient to show a pattern of movement consistent with the influence of the vegetation and therefore it may be necessary to carry out the monitoring for up to a 12-month period.
>
> It will also be necessary to obtain a specialist arboricultural report.
>
> We will report further once those investigations have been completed."

6. In line with that recommendation, it appears that Marishal Thompson, arboricultural consultants, also produced a report for the insurers of no 41, but I have not seen that.

7. A further report was produced in January 2014 by Paul Harris, chartered engineers acting for the Council's insurers (Zurich Municipal). This notes the further testing carried out by Crawford since its initial report; it also records the result of soil analysis, root identification and level monitoring over an 18-month period – all of which would be expected in a case of this kind. The report considers carefully the various possible causes of the clay shrinkage that has caused the subsidence and consequential property damage. It concludes as follows:

    1. "The damage is the product of subsidence of the front of the house in relation to the remainder of the building (although there appears to be at least some subsidence at the rear left of the building as demonstrated by the monitoring).
    2. There is good negative evidence from the absence of other potential causes to indicate that the subsidence is the result of drying shrinkage of the clay subsoil beneath the foundations of the property.
    3. There is good positive corroborative evidence of this contention in the form of partial uplift of the building demonstrated by the level monitoring readings. The negative and positive evidence is sufficient to establish that the subsidence is the result of drying shrinkage of the clay subsoil.
    4. The drying shrinkage might be the result of under-draining of the clay by a granular layer (as demonstrated by the fact that drying up of underground flowing water has reportedly coincided with the subsidence) or moisture extraction by the roots of vegetation, or both.
    5. The pattern of movement (significantly greater nearest to the trees than elsewhere) indicates that moisture extraction by the roots of the Council's trees is a substantial contributory factor in the drying shrinkage."

8. As for recommended action, the Harris report concludes as follows:

    "Insofar as the trees are involved in the subsidence damage, their effect can only be removed by either removing the effect of the trees (by felling or root barrier) or by extending the foundations below the zone of influence of the trees by underpinning. It is therefore to be expected that, if the trees are involved in this matter are not removed, Crawford will underpin. Crawford has suggested a likely cost of £40,000 for underpinning but, given that it will need to be deeper than 3 metres to be effective, I am inclined to the view that a completely effective scheme would be more expensive."

9. The report considers the cost of installing a root barrier, which it estimates as "in excess of £30,000", although it may be cheaper than underpinning. But it notes that, as with all root barriers, there is a risk of failure, such that the insurers acting for the claimant owner of No 41 may not be willing to accept a barrier as a possible solution. I concur with that hesitation. The report also considers and effectively rejects the possibility of pruning as an adequate solution. I agree with that too.

10. The Council's own tree officer would like the trees to remain, as would the Diocesan Advisory Committee, the parish and those local residents who have made representations in opposition to the proposed felling. I have no doubt that they would; I am sure that others would too. However, none of them has offered any evidence to contradict the technical evidence produced in support of the proposed felling.

11. In the light of the evidence summarised above, I therefore conclude, on the balance of probability, as follows:

    (a) the proximity of the two trees has caused damage to 41 High Street in recent years;

    (b) if remedial action is not taken promptly, such damage will recur indefinitely in the future;

    (c) the most effective, indeed arguably the only entirely satisfactory, remedies to avoid such future damage are either to remove the trees or to underpin the building; and

    (d) the cost of underpinning the building will be in excess of £40,000 (plus fees if not included in that figure).

Liability for remedial action or damages

12. Where a tree encroaches by its roots into the soil of a neighbouring property, that constitutes "nuisance" at common law. The same is true where the proximity of tree roots impairs the load-bearing qualities of neighbouring residential land (see *Delaware Mansions Ltd v Westminster City Council* (1998) 88 BLR 99 at [33]). Where such a nuisance occurs, the owner or occupier responsible can be sued for damages – which will in practice be the cost of remedying the harm (see, for example, *Bunclark v Hertfordshire County Council* [1977] 2 EGLR 114).

13. A churchyard is owned by the incumbent, by virtue of his office. However, as noted above, the responsibility for maintenance was transferred some years ago to the Council. Section 215 of the 1972 Act thus provides, so far as relevant, as follows:

> "(1) Subject to subsection (2) below, where … a churchyard has been closed by an Order in Council, the parochial church council shall maintain it by keeping it in decent order and its walls and fences in good repair.
>
> (2) A parochial church council which is liable under subsection (1) above to maintain a closed churchyard may—
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> …
>
> (d) … serve such a request on the council of the district or London borough in which the churchyard is situated;
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> and, subject to subsection (3) below, the maintenance of the churchyard shall be taken over by the authority on whom the request is served … three months after service of the request."

In other words, once the relevant local authority has accepted a notice under subsection (2), it has the same responsibility for maintenance as previously lay with the PCC under subsection (1).

14. The implications of this are that the Council is in this case is liable for the maintenance of the trees. The consequences of such liability were explored by the Court of Appeal in *L E Jones v Portsmouth City Council* [2003] 1 WLR 427, CA:

> "11. In my view, the basis for the liability of an occupier for a nuisance on his land is not his occupation as such. Rather, it is that, by virtue of his occupation, an occupier usually has it in his power to take the measures that are necessary to prevent or eliminate the nuisance. He has sufficient control over the hazard

> which constitutes the nuisance for it to be reasonable to make him liable for the foreseeable consequences of his failure to exercise that control so as to remove the hazard. Similarly, control lies at the heart of the liability of a non-occupying owner for liability when the nuisance is attributable to a breach by him of the covenants of a lease, or a failure to exercise his right to enter and carry out repairs. …
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> 12. In my judgment, it is not necessary to decide whether Portsmouth was an occupier of the highway in this case. What matters is that it had the right and duty to maintain the trees, and that this included, where necessary, the right and duty to reduce their height so as to prevent damage being caused to nearby properties. The agency agreements gave it sufficient control over the trees, both in fact and in law, to prevent any nuisance from occurring, and to eliminate any nuisance that did occur. Mr Bebb submitted that the control exercised by Portsmouth arose from the performance of its contractual obligations to [Hampshire County Council]. This is true, but in my view irrelevant. What matters is that it exercised control, not the legal basis on which it came to do so."

15. So too, in the case of a closed churchyard, the control over the trees lies with the Council, which in turn means that it is liable in any action for nuisance. That is no doubt why it is petitioner in the present case.

16. There is the additional complication that, were the owner of No 41 (or insurers on her behalf) to seek consent under the TPO to carry out the works, and if the Council were to refuse such consent, it would be liable to pay compensation, in practice equal to the costs of the underpinning works made necessary by the refusal.

The issue before the Court in this case

17. One way or another, therefore, if a faculty were to be refused, so that the trees could remain, the house would need to be underpinned, and the Council would be liable for the cost of those works, which I have accepted as being a sum in excess of £40,000, and possibly considerably greater.

18. I note that the Council has decided that, notwithstanding the understandable concern on all sides as to the loss of amenity, and in spite of its own tree officer's opposition, it

is not prepared to pay out a sum of that magnitude; and I can understand that, in the light of the no doubt numerous other calls on its finances.

19. The general practice of the consistory courts is not to go against the decisions of secular authorities unless there is a specifically ecclesiastical dimension to a problem not otherwise taken into consideration. Thus in *White Waltham (No 2)* [2010] Fam 146, a case relating to the construction of a detached building in a churchyard, which required both planning permission (which had been granted) and a faculty, Bursell Ch reviewed a number of decisions in which chancellors had considered this problem, and concluded that:

> "If the matter has been properly aired before such an authority or inspector the consistory court is entitled in my view to accept the planning decision as a reasoned starting point from which to begin its own deliberations. In such circumstances it is insufficient for an objector merely to voice dissatisfaction with a decision: any objection must itself be reasoned and supported by proper evidence."

20. It seems to me that a similar principle should apply in a case such as this. The Council has carried out a perfectly proper balancing exercise, and has concluded that it is not willing to pay the damages that would be payable if it were to refuse to fell these trees – however desirable that might otherwise be from the point of view of their undoubted amenity value. In those circumstances, I do not see that it is appropriate for this Court to force it to do so.

Replacement tree

21. I note too that it may be possible to plant suitable replacement trees, which will in time provide a similar level of amenity – although I of course realise that they will be for some while in no way an exact substitute for the trees that have been lost.

Decision

22. A faculty should issue to authorise the proposed felling, subject to a condition that within 12 months of the works being carried out two replacement trees should be planted in the churchyard, at a location to be approved by the DAC, and of size and species to be approved by it (or in default of such approval by this court).

CHARLES MYNORS

Chancellor

6 October 2015