



LCA/167/2006

LANDS TRIBUNAL ACT 1949

COMPENSATION – tree preservation order – refusal of consent to fell oak tree – subsidence and heave insurance refused for nearby bungalow – bungalow unsaleable except at substantial discount – whether blight caused by refusal of consent for felling – claim dismissed – Town and Country Planning Act 1990, s.203

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN

DAVID T WOODHAMS

Claimant

and

**CHICHESTER
DISTRICT COUNCIL**

**Compensating
Authority**

**Re: “Camellia”
Chalk Road
Ifold
Nr Loxwood
West Sussex RH14 0UA**

Before: N J Rose FRICS

**Sitting at Procession House, 110 New Bridge Street, London, EC4V 6JL
on 24 January 2008**

Claimant in person

Paul Stinchcombe, instructed by District Solicitor, Chichester District Council for the
Compensating Authority

The following case is referred to in this decision:

Perrin and another v Northampton Borough Council [2007] EWCA Civ 1353

DECISION

Introduction

1. This is a reference to determine the compensation payable to Mr David T Woodhams, pursuant to section 203 of the Town and Country Planning Act 1990, for loss resulting from the refusal of consent by the compensating authority, Chichester District Council (CDC), to fell an oak tree (T2). The tree is the subject of a tree preservation order (TPO) and is situated in the grounds of the claimant's freehold bungalow, "Camellia", Chalk Road, Ifold, near Loxwood, West Sussex, RH14 0UA. The claimant has been unable to obtain insurance cover for his bungalow in respect of subsidence and heave and, as a result, he has been advised that the property is unsaleable other than as a building plot. He claims compensation of £155,000, including costs of £5,000. The compensating authority's case is that no compensation is payable.

2. Mr Woodhams appeared in person and gave evidence. CDC was represented by Mr Paul Stinchcombe of counsel, who called no witnesses. In the light of Mr Woodhams's evidence and the submitted documents, I find the following facts.

Facts

3. "Camellia" comprises a four bedroom bungalow, built in the 1940s with some subsequent additions. It sits centrally on a plot on the north side of the junction between Plaistow Road and Chalk Road in the village of Ifold. In this area the properties are mainly large detached houses and bungalows with fairly substantial gardens containing numerous mature trees and site boundaries are marked mainly by hedges and rural style fencing. Adjacent to the north-east boundary of the site of Camellia, at approximately the mid-point, is a single storey brick-built garage with a pitched roof, facing south-west. The tree known as T2 is located some 9m south-east of the eastern corner of the bungalow, and 7m from the front of the garage.

4. The claimant purchased the property in 1971. In 1993 he decided to build an additional property on the site, which is one of the largest plots in the area. He submitted a planning application and shortly afterwards, on 3 August 1993, CDC as planning authority made a TPO under the Town and Country Planning Act 1990 in respect of five oaks (T1 to T5) and four other trees on the site.

5. Some six or seven years later Mr Woodhams submitted an insurance claim for subsidence damage to his garage. The insurance assessor considered that the garage was not worth repairing and the claim was settled in the sum of £11,000. The insurance company, Royal and Sun Alliance, then asked for a detailed report on all the trees protected by the TPO. On Mr Woodhams's instructions such a report was prepared in December 2001 by Mr Derek

Patch of the Arboricultural Advisory and Information Service. It included the following commentary and recommendations with regard to T2:

“Standing 1m from the edge of the sunken drive. The main fork at approximately 15m is a potentially very weak structure with the trunk becoming two more or less upright stems. The crown is thinning at its apex and there is significant dead wood in the crown suggesting that this tree is lacking vigour and under stress.

The trunk is clothed with many young shoots, which again suggests a stressed tree. At the base of the trunk there are two wounds which appear to have been caused by removal of two major branches. One of these wounds has soft decayed wood to a depth of about 50mm, but the other was sound and callus is developing around the edges of the wound. There was also a patch of dead bark at ground level on the east side of the trunk.

The root area appeared free from fungal activity, but construction of the drive is likely to have severed roots and may be the cause of the stress symptoms visible in the crown.

Consider as having a limited safe useful life. Inspect regularly.”

6. In February 2002 the insurance company added an endorsement to the policy covering Camellia, requiring T2 and another protected oak, T5, to be removed within two months as a condition of continued insurance in respect of loss or damage caused by subsidence.

7. On 10 May 2002 Mr Woodhams submitted an application for permission to fell T2 and T5. CDC failed to determine this application within the eight week statutory period and, on 12 July 2002, Mr Woodhams appealed to the Government Office for the South East on the following grounds:

“Failure to issue a decision. Householder not able to insure property. Condition of the trees.”

8. CDC made written representations to the Government Office in respect of the appeal. They included the following observations:

“In submitting the application, the appellant attached a brief report commenting on the condition of both trees. This report appears to be reasonably balanced in its findings and recommendations. In respect of T2, whilst noting that the tree lacks vigour and may be under stress, there is no conclusion that the tree, at this stage, requires or justifies felling. The report states that whilst the tree may have a limited safe useful life, there was no need, at this stage, to do anything more than inspect it regularly. Reference in the report to the possible impact of changes to the drive arrangements relate to a planning permission granted consent in 1999 under application ref PS/99/02259/DOM. This granted planning permission to construct an extension on the north western side of the existing garage building to provide for an additional car port and gymnasium. The construction of this extension would require minor changes

to the alignment of the driveway in order to gain access to the car port. These changes are not considered to be of any overriding significance in respect of the health and viability of the T2 tree... The site has been visited by the Arboricultural Officer at West Sussex County Council. His views are to be the subject of a separate report as part of this appeal. His verbal conclusions, following the site meeting, were that whilst the two oaks were not necessarily in the prime of health, they were nonetheless not in such a seriously poor condition as to warrant felling.

For the reasons outlined in the preceding statement, the Inspector is asked to uphold the District Planning Authority's decision to refuse consent by dismissing this appeal. However, notwithstanding the above, if the Inspector is minded to allow the appeal the District Planning Authority considers that the conditions set out in Appendix D should be imposed on any consent. Such conditions are presented on a 'without prejudice' basis."

9. These representations were submitted to the Government Office under cover of a letter dated 20 August 2002, which included the following paragraphs:

"Since the preparation of the Council's statement, late comments have been received from the Arboricultural Adviser to WSCC [West Sussex County Council] who acts also as adviser to the District Council. His comments are attached. The Council has not had the opportunity to formally consider these comments.

It is of course for the Inspector to determine the weight which he will give to this consultee's views and whether he wishes to either dismiss or allow the appeal or alternatively to make a split decision upon the proposal."

10. The comments of the arboricultural adviser, Mr Turner, were written in manuscript and bore the date 9 August 2002. They were sent to CDC from the offices of West Sussex County Council Planning Department by facsimile transmission, timed at 9.18 am on 20 August 2002 and read as follows:

"As a result of our site visit the tree on the boundary with Rosehill Cottage was looking very thin. I would not object to its removal subject to replacement planting.

The tree to the west of site closest to the house did not look too bad to me. It had some dead wood but not under major stress. I would be surprised if it were this tree that was causing settlement problems to garage. However the applicant did state that he was prepared to do some replacement planting particularly on the south of the site. Planting here would be important in the long term providing cover adjacent to the road. Subject to the detail of species and location, I would accept this application."

11. On 13 September 2002 Mr Patch, on behalf of the claimant, sent to the Government Office a written response to CDC's representations. The first two paragraphs read as follows:

“The statement from the Chichester District Council indicates that, had they been mindful to issue a decision on the application made by Mr Woodhams (owner of Camellia, Chalk Road, Ifold), it would have been a refusal.

Also submitted by the District Council with the statement is copy of a long-hand note submitted to the Council from the arboricultural adviser based in the West Sussex County Council, which indicates a recommendation for approval of the application subject to replanting elsewhere on the site.”

12. The response concluded:

“The application for permission to fell two oak trees was made in order to safeguard the safety of people and property. The Council’s failure to issue a decision, and therefore deemed refusal, which is confirmed in their statement, was without and contrary to the advice of their arboricultural adviser. The recommendation from the Council’s arboricultural adviser is to permit the felling subject to replanting elsewhere on the site – a requirement the applicant had offered in the original application. We ask that the Inspector and the Department overrule the Council’s decision by granting permission for the felling of two oak trees (T2 and T5) at Camellia, Chalk Road, Ifold.”

13. Mr R D D Grainger, an arboriculturalist, was the Inspector who was asked to visit the site and advise the First Secretary of State on the merits of the appeal. He submitted his report on 13 December 2002. In paragraph 1, he said:

“This report contains a description of the appeal trees and their surroundings and my appraisal (on the basis of my observations and the written representations of the parties) of the likely impact to the proposal. It is illustrated by various photographs, which are appended.”

14. Paragraphs 2 to 8 contained a description of the site and surroundings and of the trees in question. The report then continued:

“APPRAISAL

9. When travelling along Plaistow Road and approaching its junction with Chalk Road from either direction, at distance, the appeal trees are not visible (photos A and D). However, when close to the junction, tree T2 is clearly visible where it forms part of a group of scheduled oak trees in the eastern part of the garden (photo B). Appeal tree T5 also forms part of this group but is screened by other trees and is not significant from this viewpoint. From Chalk Road, when close to the access to Camellia both appeal trees are less prominent, being screened by the boundary hedge and other trees in this part of the garden (photo D). When approaching Camellia along Chalk Road from the east, at distance, neither of the appeal trees is visible (photo E) but when close to Rosehill Cottage tree T5 can be seen above the garage of this property (photo F). As such, both appeal trees make a positive contribution to visual amenity as part of the group of trees in the

eastern corner of Camellia but as individuals have limited public amenity value. If either appeal tree were to be removed this would reduce the size of the group but there are sufficient trees in the immediate area to mitigate this loss, which would not be significantly damaging to the character or landscape of the local area.

10. With regard to the appeal trees' condition, in the case of tree T2, its condition as described in Mr Patch's report does not justify felling on grounds of safety. However, oak tree T5 has extensive crown dieback from which, in my view, it is unlikely to recover and therefore felling would be appropriate.
11. The appellant has appended an extract from insurance policy RH-RTTO54473 and in response to my question indicated this forms part of other insurance documents dated 28 February 2002. This appears to be a policy operative endorsement relating to subsidence damage and the removal of both appeal trees as a condition of the insurance. Whereas tree roots can contribute to subsidence damage to buildings, where subsidence has occurred a detailed investigation is required to determine the level of involvement of trees and the appropriate remedial action. From my observations made on site, there is some step cracking in the brickwork of the garage at Camellia and a crack in the render of the garage at Rosehill Cottage but no information has been provided to conclude that the damage to either building has resulted from the appeal trees, or any other tree, in the vicinity. Without this information, it cannot be concluded that either tree is involved in any damage to nearby buildings that could be rectified by their removal, or that the appeal trees are likely to cause damage in the future.
12. The felling and pruning of scheduled trees should always be justified and the need for such works based on the specific requirements of the individual tree and its situation and not by the previous treatment of other trees in the area. Where an application is made for planning permission trees are a material consideration and the local planning authority will normally take into account the effect of any proposed development on existing trees when determining the application.
13. If this appeal is allowed it would be appropriate to impose a condition requiring replacement planting. As suggested by the appellant, new planting would be beneficial adjacent to the southwest boundary where in time the new trees would be clearly seen from Plaistow Road. Any replacement trees should be large growing trees of normal nursery stock size, the species and siting subject to the Council's agreement.

CONCLUSIONS

14. The appeal trees are not individually significant but have collective value as part of a group of trees in the eastern part of the garden of Camellia. The condition of oak tree T2 does not justify its removal but oak tree T5 is suffering extensive crown dieback and its removal would be justified. Although the appellant's insurance policy requires the removal of both appeal trees, no information has

been provided indicating any damage to buildings or implicating the involvement of the two appeal oak trees. The felling and pruning of trees should always be based on the requirements of the individual tree and not by precedent and the local authority would normally assess the implications of any development proposals on trees as part of their assessment of a planning application. If this appeal is allowed it would be appropriate to impose a condition requiring replacement planting.”

15. The decision on the appeal was dated 4 March 2003. It said:

“1. I am directed by the First Secretary of State to refer to your client’s appeal, made under the above mentioned Tree Preservation Order. You appealed against the refusal of Chichester District Council to grant consent for the removal of two oak trees on land at Camellia, Chalk Road, Ifold, Loxwood, West Sussex, identified as T2 and T5 in the above order.

2. The Secretary of State has taken into account your client’s representations to the Council. He has considered the reasons given in support of the appeal proposal, and whether it is justified in the light of the trees’ contribution to the amenity of the local area.

3. An Inspecting Officer visited the site on 6 November 2002. A copy of his report is appended to this letter. The Secretary of State considers that both appeal trees make a positive contribution to visual amenity as part of a group of trees, but as an individual T5 has limited public amenity value since it is screened by other trees. He agrees with the Inspecting Officer that no information has been provided to indicate whether either tree is the cause of subsidence damage to nearby garages as a result of root action. The Secretary of State accepts the judgment of the Inspecting Officer that T5 has extensive crown dieback from which it is unlikely to recover, and that the felling of this tree would be appropriate. He also accepts the Inspecting Officer’s judgment that the condition of T2 does not justify its removal.

4. For the reasons given above, the Secretary of State hereby dismisses your client’s appeal with regard to T2 and allows your client’s appeal with regard to T5...”

16. On 7 April 2003 the Valuation Officer, Worthing District, altered the valuation list entry in respect of Camellia, reducing its value from band G to band E. On 16 July 2003 Mr Woodhams, accompanied by his then surveyor Mr Crawford Clarke, attended a meeting with Mr Whitby, the then arboricultural advisor to CDC. Mr Woodhams expressed concern that he had been unable to insure the proposed building to replace the existing garage. Mr Whitby said that, without new evidence, the authority could not change its view regarding the felling of T2, unless the tree became unhealthy or hazardous. He suggested that the claimant should pursue one of the following options. Either apply for consent for pruning work to the tree, or submit a new application to fell the tree accompanied by reports from an arboricultural consultant and a consulting engineer, a letter from the insurance company stating why they were refusing insurance and a proposed planting scheme.

17. Mr Woodhams submitted a further application for permission to fell T2 on 28 May 2004. The letter accompanying the application said:

“With further reference to the above I hereby make application to have tree T2 to be felled, the reason being that I still cannot get insured on my property for subsidence.

Since the refusal of this I have had the Valuation Officer from Worthing downgrade the property in value by two bands, this being solely on your decision.

I have also been informed by estate agents that the property now would be very hard to sell as a potential buyer would find great difficulty in obtaining a mortgage where subsidence is removed from insuring the same property.

They also informed me that you, the Council, have blighted this property and the value would be considerably reduced.

I think you will appreciate that this is a ridiculous situation and I hope the Council will see their way clear to have this tree removed immediately.”

18. On 8 July 2004 Mr Woodhams attended a further meeting with Mr Whitby to discuss the outstanding application. CDC’s file note recorded Mr Whitby as saying:

“the information provided is not really material facts that CDC can consider when processing this application. I asked Mr Woodhams for a structural engineer’s report to state the stability of the house and if any damage or possible damage could occur due to subsidence. So depth foundations, soil type, any evidence of subsidence, roots within or adjacent to property. I said that the structural engineer’s report would clarify the state of the building and if there is or potentially the possibility of the tree causing harm to the building. This information may take a while and I suggested that Mr Woodhams should withdraw and resubmit once he has a structural engineer’s written report.”

19. In a telephone conversation on 9 July 2004 Mr Woodhams informed Mr Whitby that he wanted CDC to determine his application on the grounds set out in the application letter of 28 May 2004. On 26 July 2004 the compensating authority refused consent for the felling of T2 for the following reasons:

“The tree is a significant feature in the local landscape and appears to be in adequately sound and healthy condition. Its proposed felling would result in undue loss and detriment to the visual amenities of the locality. The reasons submitted by the applicant to support his case to fell the tree are not material justification why the tree should be felled. The Secretary of State within the appeal ref GOSE/107/1/CHIC/23 of a previous application PS/02/01272/TPO stated ‘that no information has been provided to indicate whether either tree is the cause of subsidence damage to nearby garages as a result of root action.’ The applicant has not provided any material evidence or information why the tree should be felled and for this reason the District Council refuses the felling of Oak tree T2.”

20. Mr Woodhams applied once again for permission to fell T2 on 5 March 2005. He wrote:

“With further reference to the two applications and the subsequent refusal thereof re the above I now enclose engineer’s report which you have stated you require for the above.

This clearly states that this tree reference T2 is a threat to my home and justifies the felling of same.

To alleviate the phenomenon known as heave they suggest that this tree should be taken down over two/three years which I also had confirmed by my arboriculturalist, and this is what I would do.

However, I have been instructed to inform you that whilst this tree is still standing and I have not been able to commence with the felling of this tree under the guidance of the consulting engineer and arboriculturist I will hold you, the Chichester District Council, fully responsible for any costs on this property due to subsidence as I cannot insure this property until felling proceedings have commenced.”

21. The reference to an engineer’s report related to one prepared by Mr Stephen Brewster of Rushby Brewster Associates dated 23 September 2004. It referred to the receipt of instructions to inspect Camellia with a view to appraising its structural condition with particular reference to the nearby trees. It contained the following conclusions:

“3.0. Evident distress

3.1 Internal. Apart from minor defects to the ceiling in some rooms and an ill-fitting door to the lounge, no internal distress has been noted. All floors appear level and uniform and no doors appear out of square.

3.2 External. Some minor distress is evident to areas of brickwork but this would largely appear as a result of the alteration works and extensions. Some vertical cracking above window heads can be seen, but this defect is common, resulting from minor thermal movements of small areas of masonry, manifesting themselves at lintel bearings.

4.0. Tree influence

In the absence of intrusive investigation, it is possible that the clay founding medium would be affected by tree growth to such an extent that movements within the property could manifest themselves in the form of cracks or floor settlements. The proximity of the tree denoted T2 in the arboriculturalist report would suggest, according to NHBC guidelines, that foundations up to 2.5m at the closest point would be required if the property were to be built now. It is unlikely that the existing footings are this deep.

In order to mitigate the possibility of subsidence, removal of the most adjacent tree should be carried out. We understand that the health of this tree is in question and that its lifespan is anticipated to be short. In our view, as no

distress to the property is in evidence, tree removal would be an option to obviate potential future subsidence.

We would, however, emphasise that such tree removal may allow clay recovery (a phenomenon known as heave) and, as such, very adjacent walls (on shallow foundations) and floor slabs could be adversely affected. This could be somewhat mitigated by the removal of the tree in stages and, to a degree, could be offset by the adjoining oak trees that remain.”

22. Mr Whitby then wrote to Mr Woodhams on 3 May 2005 as follows:

“I refer to your current application mentioned above. I have had your structural engineer’s report reviewed by my colleague in Building Control. He has made a few comments which I hope can be clarified by your structural engineer.

These are:-

1. There is a naturally high water table where your property is within this part of Ifold meaning that the stability of the clay may not be in question.
2. The property and trees existed in 1976 without any adverse distress.
3. What are the foundations of the main building like/consist of?
4. If the tree was allowed to be felled it would be more normal to remove the tree over a 5-10 year period.”

23. On 11 May 2005 Mr Brewster responded to Mr Whitby on behalf of Mr Woodhams. He said:

- “1. It is unlikely that a high water table exists in view of the site topography and the consistently dry ditch at lower level.
2. We do not see the relevance of the reference to 1976 et al.
3. We have not undertaken intrusive investigations to ascertain the foundations. Your own archives should serve in this regard.
4. Extending the time for felling may help, but the adjoining trees should mitigate, in some way, any instantaneous soil recovery.

We remain firmly of the view that the tree in question represents a risk to the property. In view of the health of the tree, the remaining threat to the property and the remnant trees in the event of felling we can see no reason for the retention of this particular tree.”

24. Consent for the proposed felling was again refused by CDC on 7 June 2005. The reasons given were as follows:

“The tree is a significant feature in the local landscape contributing to the wooded character of Ifold and appears to be in adequately sound and healthy condition. Its proposed felling would result in undue loss and detriment to the visual amenities of the locality. The District Planning Authority have taken into account the applicant’s additional evidence in reaching this decision but have not been satisfied that the tree poses an actual or immediate threat to the stability of the dwellinghouse that would justify the loss of this important tree.”

25. On 16 October 2006 Mr Woodhams submitted a reference to this Tribunal to determine the amount of compensation. It is agreed that he is entitled to compensation in respect of loss or damage caused or incurred in consequence of the refusal of consent for the felling of T2.

Mr Woodhams’s Case

26. Mr Woodhams relied upon four pieces of evidence to support his case. The first was the report from his structural engineer, Mr Brewster, dated 23 September 2004, from which I have quoted in paragraph 21 above. The second was the decision by the valuation officer, in April 2003 to change the valuation list entry of the bungalow from band G to band E. The third was a report from Mr A G Dawkins BSc, MBEng MRICS of Messrs Peter N Dickin & Co, chartered surveyors and valuers of Horsham. Mr Dawkins’s report was dated May 2006. It valued Mr Woodhams’s property, assuming subsidence and heave cover were available at a “normal” premium, at £500,000. Without such cover the value of the property was reduced to £350,000, indicating a diminution in value of £150,000. Finally, Mr Woodham relied upon a letter dated 3 November 2006 which he had received from Mapp & Co, estate agents of Horsham. This letter reported that they had been marketing the bungalow without success for approximately six months. Potential purchasers had all withdrawn their interest when they learned about the lack of insurance cover.

27. Mr Woodhams said that CDC’s building regulations proved that T2 was a threat to the bungalow. The NHBC guidelines required foundations in a new property to be 2.5m deep, whereas the present foundations were only 30ins deep. He continued:

“What more evidence do Chichester District Council want for a sub-standard tree with a limited lifespan which was in my arboriculturalist’s report and which Chichester District Council first agreed with? All four arboriculturalists’ reports are different on tree T2, so what is the point of getting professional opinions on anything? (That was a reference to the reports of Mr Patch, Mr Turner, Mr Grainger and Mr Whitby). The fact is we cannot get insurance at flat rates on our house with the tree T2 standing ... we cannot get fully insured and are unable to move as our house is now blighted and nobody wishes to buy as matters stand.”

28. In the course of his oral evidence Mr Woodhams accepted that T2 was not currently causing damage to his bungalow. Nor did he suggest that the tree presented a risk of damage. The insurers considered that it was a risk and he wanted to obtain insurance.

29. Mr Woodhams said that he had retired in 2004. Neither he nor his wife had a pension. Their pension fund was their house. They had been looking forward to selling the house, moving to a smaller one and living off the surplus funds released. His inability to dispose of his house meant that he was now facing the possibility of bankruptcy.

The case for CDC

30. Mr Stinchcombe submitted that the question whether the retention of T2 had caused, was causing, or was in the future likely to cause any damage to Mr Woodhams's property was one of fact to be determined on the balance of the evidence, the burden of proof being upon the claimant. When Mr Woodhams had appealed against the deemed refusal of consent to fell T2, his appeal failed because he had not undertaken the underground investigations needed to demonstrate whether or not T2 was causing any damage to his property. Despite that finding, Mr Woodhams had still not instructed anyone to undertake any such underground investigations, and had still not adduced any expert evidence linking the retention of T2 to any damage to his property. CDC understood that this may have been due to a lack of resources. As a result, and as an act of generosity to Mr Woodhams, CDC had offered, in a letter dated 25 May 2007, to undertake the necessary underground investigations at the property at CDC's own expense. Mr Woodhams had refused to take up this offer. He had, accordingly, failed to adduce any evidence to prove that the damage to his property, if any, was attributable to the retention of T2. It followed that he had not proved any entitlement to compensation in respect of the refusal by CDC to permit T2 to be felled.

31. Furthermore, even if the retention of T2 had caused, was causing, or was likely in the future to cause any damage to Mr Woodhams's property, in the absence of the necessary investigations being undertaken it was impossible to attribute any value to the compensation which would be payable. In particular, Mr Woodhams was under a duty to mitigate his loss. This would include a consideration of whether works other than cutting down the tree might remedy any problem caused to the property by the tree, securing its insurability and value but at lower cost than the compensation claimed. In this connection, Mr Stinchcombe relied upon observations of Sir John Chadwick and Blackburne J in the Court of Appeal judgment in *Perrin and another v Northampton Borough Council* [2007] EWCA Civ 1353. Mr Stinchcombe said that Mr Woodhams had failed even to contemplate the possibility of alternatives to cutting down the tree in question, so the Tribunal could have no idea what might be their cost and effect. Moreover when, in a letter to Mr Woodhams dated 25 May 2007, CBC offered to undertake the necessary underground investigations at the property at their own expense, they also offered to reconsider any future application to fell T2 in the light of what such investigations might reveal. It was quite possible, therefore, that should such underground investigations be undertaken and proved the roots of T2 to be proximate to Mr Woodhams's property, then consent to fell T2 would be granted, so that there would be no claim for compensation at all. In refusing this offer, Mr Woodhams had therefore failed to take such reasonable steps as might mitigate his loss, potentially to nil. He had therefore not proved any entitlement to compensation in the sum claimed, or at all.

Conclusions

32. CDC have repeatedly refused consent to fell T2 because, they say, no proof has been provided that the tree has caused, or risks causing damage to the bungalow. Mr Woodhams disagrees, and points to the report of his structural engineer, Mr Brewster, dated 23 September 2004. The paragraph of Mr Brewster's report which seems to me to be crucial reads as follows:

“In the absence of intrusive investigation, it is possible that the clay founding medium would be affected by tree growth to such an extent that movements within the property could manifest themselves in the form of cracks or floor settlements. The proximity of the tree denoted T2 in the arboriculturalist report would suggest, according to NHBC guidelines, that foundations up to 2.5m at the closest point would be required if the property were to be built now. It is unlikely that the existing footings are this deep.”

33. It is to be noted that Mr Brewster did not say there was a real risk that tree growth would lead to cracks or settlement. He said that it was “possible” that it “could” do so. The reason for the lack of certainty was that Mr Brewster had not carried out intrusive investigations to ascertain what was happening to the tree roots and the building below ground level. In the absence of such investigations, I agree with CDC that Mr Brewster's report does not provide the required level of proof that the presence of T2 is causing, or risks causing damage to Mr Woodhams's property. Nor, without information as to the location of the roots of T2, does the fact that the existing foundations do not comply with current requirements for newly built properties mean that those roots necessarily pose a danger to the bungalow.

34. Mr Woodhams also places weight on the decision of the valuation officer, in April 2003, to reduce the valuation of the bungalow in the valuation list. The reasons for the valuation officer's decision were explained in a letter he wrote on 10 February 2006 to Messrs George Ide Phillips, the solicitors then acting for Mr Woodhams, as follows:

“Thank you for your letter dated 13 January 2006 in which you request details regarding the Council Tax assessment for the above mentioned property. Following correspondence from the owner Mr Woodhams I visited the property to carry out an inspection on 25 March 2003. As stated in your letter the property was suffering from subsidence and damage due to the proximity of two trees within the curtilage of the dwelling. During my inspection I noted these trees together with the damage and I was advised that no buildings insurance would be granted to cover the property.

After considering the situation and taking further advice the decision was taken to reduce the Council Tax banding from G to E to take into account the loss of value due to the planning restrictions that prevented the removal of the trees and non availability of buildings insurance. As you quite rightly state in your correspondence the reduction was due to the subsidence problems and not that the property was over valued from 1 April 1993 when Council Tax came into force. The reduction was effective from 1 April 2002 and a notice was served accordingly on Mr Woodhams and the Local Authority Chichester were informed at the same time.

Valuation Office policy is to dispose of records for these types of cases after 18 months which unfortunately means that I no longer hold any paperwork connected with the case.

I would hope that the above will be of assistance to you and that I have covered the relevant points.”

35. Thus the re-banding of the bungalow was because of the planning restrictions and the lack of insurance. It is self-evident that the value of a property will be reduced if it is uninsurable. It is therefore entirely understandable that the valuation officer decided to reduce the banding. However, the unavailability of insurance was due to concern on the part of Royal and Sun Alliance – subsequently shared by other insurers following their lead – that the trees might place the bungalow at risk. If an intrusive ground investigation were carried out in the relevant area, it would become clear whether or not that concern was justified. Until then, I consider that CDC are right to describe the risk of damage to the bungalow as being merely speculative. Should the investigations show that there is no risk, insurance cover would presumably then be available at normal premium rates and the bungalow would become saleable at its full market value. At that time the valuation office would no doubt wish to consider whether the Council Tax assessment should again be reviewed.

36. I have not overlooked the fact that the valuation officer stated that the property was “suffering from subsidence and damage due to the proximity of two trees within the curtilage of the dwelling”. The valuation officer is a valuer, not an engineer, however, and it is clear from Mr Brewster’s report, prepared after the valuation officer’s inspection, that no significant damage to the bungalow was evident.

37. The valuation officer’s approach was referred to by Mr Dawkins in his valuation report submitted to Mr Woodhams in May 2006. Mr Dawkins said:

“We are in receipt of documentation extending back over the previous planning applications for the felling of tree T2. In particular, we feel the letter from Mr Martin Simpson of the Valuation Office at Worthing is particularly poignant. In this letter he states that ‘after considering the situation and taking further advice the decision was taken to reduce the Council Tax banding from G to E to take into account the loss of value due to the planning restrictions that prevented the removal of the trees and non-availability of buildings insurance. As you quite rightly state in your correspondence the reduction was due to the subsidence problems and not that the property was over-valued.’ Taking into account the drop in the bands from G to E, this produces a de-valuation of the property of up to £200,000.

We understand that your present insurance has had subsidence and heave excluded. We understand that you have attempted to gain insurance cover for these items but to no avail. We feel that it is likely that cover could be arranged but at a substantial premium and in our experience this would be well in excess of £2,000 per annum over a normal premium. The central problem is that it will be extremely difficult for someone to obtain a mortgage on the property and that anyone interested in this

property is unlikely to proceed because of the issues regarding tree T2. The property is therefore severely blighted.

In this situation we feel that the valuation of the property is reduced to that of a plot. As a plot value we would assess the value at £350,000.

The property in its present condition require some upgrading and we feel its present value by analysis of comparables is £500,000.”

38. The fourth piece of evidence adduced by Mr Woodhams consisted of correspondence from Mr Skelton of Mapp and Co, estate agents, who were instructed to offer Camellia for sale. In a letter dated 29 April 2006 Mr Skelton said:

“Further to our recent meeting we write to thank you for your kind instructions for us to offer your above-mentioned property at the asking price of £595,000 freehold.

Due to the fact that neither you or any future owner is able to obtain acceptable insurance for subsidence/ground heave until T2 oak tree is removed, it is likely that developers are going to be the only viable buyer; demolition negates the need to remove the tree. Selling to a developer will be subject to planning consents being obtained and could involve some considerable time while the various buyers discuss their proposals with the planners. I would suggest that you should persist in your negotiations with the Council to remove the tree and thus obtain insurance, because a residential purchaser will be a great deal easier for yourself, your neighbours and ultimately the planning department.”

39. Mr Skelton wrote to Mr Woodhams again on 3 November 2006, as follows:

“I write to summarise our progress in marketing your property to date. We began marketing your bungalow at the beginning of May this year. During that time the following has been achieved:-

- 7 viewings
- 4 advertisements in West Sussex County Times
- 10,900 views on Rightmove.

Several people have asked why the property has been on the market for a long time, others have asked about the workshop and others have asked if there are any problems which we are aware of. In these instances, we as agents are obliged under the Property Misdescriptions Act to mention subsidence to the garage/workshop which may have been caused by the trees nearby (one of which I believe has been removed), and having mentioned this we would fall foul of the law by not going on to mention the lack of buildings insurance due to the close proximity of the particular oak tree in the front garden. This has tended to put people off the property and in order to effect a sale we should either make a very substantial reduction or resolve the dispute finally with the council and remove the tree.

It is my sincere hope that both you and the council can find a successful resolution to the dispute which is currently putting potential buyers off and will almost undoubtedly prevent any exchange of contracts with anyone other than a developer who demolishes the property and rebuilds, thus removing once and for all the problem of buildings insurance.”

40. The views expressed by Mr Dawkins and Mr Skelton therefore were strongly influenced by the absence of adequate insurance cover. Mr Woodhams fairly summarised the position when he said:

“I don’t say there is a real risk of damage. The insurance company says so and I want to get insured.”

In the absence of adequate evidence that the insurance company’s decision was based on an informed consideration of the risk of damage to the buildings by T2, that decision is inadequate to establish Mr Woodhams’s claim for compensation.

41. As I have said, if the excavation and soil analysis which CDC has requested is carried out and shows that the roots of T2 are not in close proximity to the bungalow, so that the tree does not pose a threat to the building, this should enable Mr Woodhams to obtain insurance at a reasonable rate. The difficulty which hindered Mapp and Co’s attempts to sell Camellia would disappear. If, on the other hand, the investigations show that the roots pose a real threat to the property, either a further application to fell T2 would be considered favourably by CDC or, if it were again refused, Mr Woodhams’s case for compensation – based on diminution in value or the cost of reasonable protective works – would seem to be unanswerable.

42. For these reasons, the claim for compensation fails. I would add that Mr Woodhams was extremely critical of CDC’s approach to the future of T2 and, in particular, to his first application for permission to fell both T2 and T5, submitted in 2002. The relevant history is as follows. CDC informed Mr Woodhams that his application had been received on 14 May 2002 and that they would endeavour to reach a decision within the statutory period of 8 weeks. If at the end of that period he had not received a written decision and had not agreed to extend the period in which the decision must be given, he could appeal to the Secretary of State. Not having received a decision within the 8 weeks, Mr Patch submitted a formal appeal on Mr Woodhams’s behalf on 12 July 2002. CDC asked Mr Turner to advise on the merits of the application. His manuscript observations on the proposal were dated 9 August 2002. They are reproduced in paragraph 10 above. Mr Turner expressed doubt as to whether T2 was causing settlement problems to the garage (he did not mention the bungalow), but indicated that he would support the application provided satisfactory replacement planting were provided. As for T5, Mr Turner advised that it was looking very thin and he would not object to its removal subject to replacement planting.

43. During the course of August 2002 CDC prepared their submissions on the appeal. They described Mr Turner’s verbal conclusions as being simply that, while the trees were not necessarily in the prime of health, they were not in such a seriously poor condition as to warrant felling. The difference between Mr Turner’s views as expressed in his written

memorandum and as described in CDC's submission is startling. Two explanations for this disparity are possible. The first is that Mr Turner changed his mind after expressing his initial views verbally to CDC but, having put his revised opinions in writing, he sat on them until 11 days later, only faxing CDC his notes on the day they finalised their written submissions. The second explanation, as it seems to me, is that CDC's written submissions misrepresented the views which had been previously expressed by Mr Turner. Neither explanation reflects credit on CDC.

44. The reason I consider this matter to be significant is this. Although the Inspector concluded that the condition of T2 did not justify its removal and that no information had been provided indicating any damage to buildings or implicating the involvement of the two oak trees, he did not make a firm recommendation on the application. His conclusion was:

“The felling and pruning of trees should always be based on the requirements of the individual tree and not by precedent and the local authority would normally assess the implications of any development proposals on trees as part of their assessment of a planning application. If this appeal is allowed it would be appropriate to impose a condition requiring replacement planting.”

45. If Mr Turner's recommendations dated 9 August 2002 had been communicated to CDC on the day they were written, and if CDC had considered those recommendations before completing their written submission, it is in my view likely that they would have accepted them and informed the Inspector accordingly. Had the Inspector been advised that CDC were in favour of the proposed felling subject to satisfactory replanting, there is every chance that the Secretary of State would have accepted the judgment of the local planning authority. In fact, at no time did CDC consider the final recommendations of their arboricultural adviser and, contrary to those recommendations, they asked the Inspector to uphold their decision to refuse consent.

46. I would make two further observations on Mr Turner's written memorandum. Firstly, Mr Woodhams suggested that its date had been changed and it had in fact been written in May 2002. There is no evidence to support that allegation, which I reject. Secondly, at the hearing CDC sought to minimise the significance of Mr Turner's recommendations, on the grounds that he was not an arboriculturalist but a landscape adviser. Again, I reject that suggestion. Whatever Mr Turner's precise professional qualifications, CDC relied on Mr Turner's opinion in their submissions to the Inspector and described him in the covering letter as the “Arboricultural Adviser to WSCC who acts also as adviser to the District Council.”

47. As I have mentioned, on 25 May 2007 CDC offered Mr Woodhams

“to arrange and pay for an excavation by an independent firm to ascertain the conditions of the soil near to the bungalow. If this showed that the tree roots were close to the bungalow, CDC would consider what remedial work was needed in order to protect the foundations of the building. In addition, they would be prepared to reconsider a fresh application to fell T2.”

48. That was a constructive suggestion by CDC with a view to resolving a problem which was by then 5 years old, was causing serious hardship to Mr and Mrs Woodhams and concerned a tree which in 2002 had been agreed to have a limited life expectancy. Mr Woodhams rejected the offer, partly because he was advised that the new investigations could take a long time and he was anxious to resolve the matter quickly. CDC, on the other hand, considered that the excavation and reports

“can be commissioned and completed within a few weeks, not months.”

49. In answer to a question from me, Mr Stinchcombe said that CDC would still be prepared to honour the offer they made on 25 May 2007 if Mr Woodhams’s compensation claim failed. It is to be hoped that Mr Woodhams will now permit CDC to commission the necessary investigative works and that CDC will then cooperate fully with Mr Woodhams in his efforts to obtain either satisfactory insurance, permission to fell T2 or adequate compensation without further delay.

50. A letter on costs accompanies this decision, which will take effect when the question of costs is determined.

Dated 14 March 2008

N J Rose FRICS