From: Baxendale, Eleanor
To: Metrowest1
Subject: Request for Counsel"s Opinion
Date: 14 April 2021 15:29:58
Attachments: Leigh Woods Counsel"s Opinion.pdf

Hello

Further to the request for further information from Ms Dowling please find attached the Counsel's Opinion. The National Trust are in the process of agreeing an offer letter with North Somerset District Council which will be forwarded alongside the Statement of Common Ground by WBD.

Kind Regards

Eleanor
Eleanor Baxendale MRICS
Estate Manager

Tel: 01275 378443 / [redacted]

RE: LEIGH WOODS

OPINION

1. Background

1.1 The National Trust owns land at Leigh Woods, near Bristol. The Trust's charitable purpose is for the permanent protection and preservation of places of historical interest and natural beauty for the public benefit. The site is a national Nature Reserve and a site of Special Scientific Interest. There are two areas of rock faces at the site, at Nightingale Valley and the Avon Gorge. The latter overlooks a railway line (the Portishead Branch Line) which has until now been used only for freight purposes. There is an active proposal outstanding to convert the line to passenger use in which case it is generally agreed that the risks from rock falls from the National Trust property will need to be reassessed and further preventive measures introduced.

1.2 The proposal to alter the usage of the railway line is at present the subject of a DCO process which involves both Network Rail and NE Somerset District Council. I understand that, while Network Rail and NE Somerset District Council have indicated that they intend to install catch fencing and carry out certain other works, their position is that the Trust will need to be solely responsible for the maintenance of the fencing and other mitigation and solely liable for the consequences of any rock fall.

1.3 The Trust is very concerned about the additional expense that such maintenance will involve and the potential liabilities which may arise out of the change of usage of the railway line.

1.4 I am instructed to advise in relation to the responsibilities of the Trust in this difficult situation. In so doing I consider both the Trust's responsibilities as a landowner adjoining the railway

line and its duties towards members of the public who may be affected by rock falls. This inevitably involves consideration of the parallel responsibilities of Network Rail.

2. Legal Framework and Foundation Cases

2.1 The potential hazard which exists on the Trust's property has not arisen as a result of the Trust's activities. It is a natural feature of the landscape, independent of any human intervention. As such it falls squarely within the boundaries of the situation considered in the leading cases of *Goldman v Hargrave* [1967] AC 645 and *Leakey v National Trust* [1980] QB 485.

2.2 These cases are so well-known that no useful purpose would be served by my rehearsing in detail the facts or principle established by them. *Goldman* involved damage to adjoining property by fire, which was started as the result of a lightning strike, and *Leakey* involved damage to houses long-established at the foot of a mound from which earth was liable to slide. The measured duty of care which the cases established is familiar both to the Trust and to Network Rail and it is unnecessary to rehearse it in detail for present purposes.

2.3 What is of greater significance in the light of the present position of the parties is that both of these early cases plainly envisage a situation in which a sharing of the burden of alleviating a nuisance may be appropriate. This is an approach which has been developed in more recent cases but was clearly foreshadowed in these early landmark authorities.

2.4 So in *Goldman*, Lord Wilberforce said:

> "So far it has been possible to consider the existence of the duty, in general terms. But the matter cannot be left there without some definition of the scope of his duty. How far does it go? What is the standard of the effort required? What is the position as regards expenditure? It is not enough to say merely that these must be reasonable since what is reasonable to one man may be very unreasonable, and indeed ruinous to another: the law must take account of the fact that the occupier on whom the duty is cast, has, *ex hypothesi*, had this hazard thrust upon him through no seeking or fault of his own. His interest and his resources whether physical or material, may be of a very modest character either in relation to the magnitude of the hazard or as compared with those of his threatened neighbour. A rule which required of

him in such unsought circumstances in his neighbour's interest a physical effort of which he is not capable, or an excessive expenditure of money would be unenforceable or unjust……In such situations the standard ought to be to require of the occupier what it is reasonable to expect of him in his individual circumstances. Thus…..the owner of a small property where a hazard arises which threatens a neighbour with substantial interests should not have to do so much as one with larger interests of his own at stake and greater resources to protect them: if the small owner does what he can *and promptly calls on his neighbour to provide additional resources {emphasis added]*, he may be held to have done his duty: he should not be liable unless it is clearly proved that he could, and reasonably in his individual circumstances should, have done more".

2.5 This approach to the solution of problems of this kind was applied by Megaw LJ (with whom the other members of the Court agreed) in *Leakey.* He said:

"The defendant's duty is to do that which is reasonable for him to do….and in arriving at a judgment on reasonableness a similar broad assessment may be relevant in some cases as to the neighbour's capacity to protect himself from damage whether by way of some form of barrier on his own land *or by way of providing funds for expenditure on agreed works on the land of the defendant*. [*Emphasis added*]

Take, by way of example, the hypothetical instance which I gave earlier: the landowner through whose land a stream flows. In rainy weather, it is known the stream may flood and the flood may spread to the land of neighbours. If the risk is one which can readily be overcome or lessened-for example by reasonable steps on the part of the landowner to keep the stream free from blockage by flotsam or silt carried down, he will be in breach of duty if he does nothing or does too little. But if the only remedy is substantial and expensive works, then it might well be that the landowner would have discharged his duty by saying to his neighbours, who also know of the risk and who have asked him to do something about it, "You have my permission to come on to my land and to do agreed works at your expense"; or, it may be "on the basis of a fair sharing of expense"…..the question of reasonableness of what had been done or offered would fall to be decided on a broad basis, in which, on some occasions there might be included an element of obvious discrepancy of financial resources."

2.6 It is therefore evident from these cases that a pragmatic solution to problems arising in this kind of situation is to be encouraged and such a solution may, in appropriate circumstances, involve an adjoining landowner bearing or contributing to the cost of alleviating a hazardous situation.

3. <u>Development of this approach</u>

3.1 The approach foreshadowed in these early cases has been applied in a number of different contexts.

3.2 In *Holbeck Hall Hotel v Scarborough Borough Council* [2000] QB 836, the claim arose as a result of a landslip. The defendant Council were owners and occupiers of land between the hotel and the sea and the slip occurred as a result of a geological fault common to both the land on which the hotel stood and that owned by the Council. In considering the scope of the measured duty of care, reliance was placed on *Caparo Industries v Dickman* [1990] 2 AC 605, as well as on *Goldman* and *Leakey,* for the proposition that both the existence of the duty and its scope must be fair, just and reasonable. Stuart-Smith LJ (with whom the other members of the Court agreed) said this:

"The requirement that it must be fair, just and reasonable is a limiting condition where foreseeability and proximity are established. In my judgment very similar considerations arise whether the court is determining the scope of a measured duty of care or whether it is fair, just and reasonable to impose a duty or the extent of that duty. (paragraph 51)

He went on to add:

"…. I conclude that the scope of Scarborough's duty was confined to an obligation to avoid damage to the Claimants' land which they ought to have foreseen without further geological investigation. It may also have been limited by other factors, as the passages from *Goldman* and *Leakey* cited…make clear, so that it is not necessarily incumbent on someone in Scarborough's position to carry out extensive and expensive remedial work to prevent the damage which they ought to have foreseen; the scope of the duty may be limited to warning claimants of such risk as they were aware of or ought to have foreseen and sharing such information as they had acquired in relation to it".(paragraph 54)

3.3. As noted, a particular feature of this case was that the underlying geological fault was present on both parcels of land and that the extent of the damage liable to be caused could not have been foreseen without extensive geological investigation. Nonetheless, in finding for the defendant Council, it is clear that the court considered that a flexible, pragmatic approach was appropriate in cases where a measured duty of care existed. As Stuart-Smith LJ observed:

"In considering the scope of the measured duty of care, the courts are still in relatively uncharted waters. But I can find nothing in the two cases where it has been considered, namely *Goldman* and *Leakey*, to prevent the Court reaching a just result." (paragraph 49).

3.4 In *Abbahall Ltd v Smee* [2003] 1 WLR 1472, the (two Judge) Court of Appeal applied a similar approach, tailored to the particular circumstances of the case, in the context of a flying freehold in which the occupant of the lower floors claimed against the occupant of the upper floor (a freeholder through adverse possession) for damage occasioned by the disrepair of the property's roof. Munby J (with whom Chadwick LJ agreed) applied *Goldman*, *Leakey* and *Holbeck Hall* in concluding that the occupant of the upper floor, Miss Smee, owed: "not…. an absolute duty to prevent the ingress of water: it is a restricted duty to do what is reasonable in all the circumstances" (paragraph 26). He went on to say:

"Once Mr Ticciati's formulation of the duty as absolute and unqualified has been rejected, as in my judgement it must be, the way is open to the possibility that, in the particular circumstances of this type of case, the cost is one which ought in principle to be shared.

That there may be circumstances in which the cost should be shared is plainly recognised in the authorities.

In my judgment there are therefore three broad principles which emerge from the authorities:

i) First, the duty on Miss Smee was, as Megaw LJ expressed it, to do what was reasonable in all the circumstances

ii) Secondly, in determining how the burden of meeting the cost of the repairs is to be borne by or as between Miss Smee and Abbahall, the court must strive to achieve a result which is fair, just and reasonable. Lord Wilberforce, after all, was pointing to the need to achieve the *just* outcome when he commented that a rule which required of the defendant "an excessive expenditure of money" would be "unjust". In the same way. Megaw LJ focussed on "reasonableness" as the governing criterion and referred, as we have seen, "to a fair sharing of expense". Stuart- Smith LJ in the *Holbeck Hall* case identified the court's duty as being to reach "a just result" and expressly adopted in this context the *Caparo* test of what is "fair, just and reasonable".

iii) Thirdly, in determining what is reasonable, or what is fair, just and reasonable, the key to the solution is Lord Cooke of Thorndon's concept of "reasonableness between neighbours."

3.4 The Court determined that in this situation the just and reasonable solution was for both parties to contribute equally to the cost of roof repairs. Munby J concluded his judgment as follows:

"The other[observation] is a caveat as to the potential ambit of this decision. As I have made clear my decision is confined to the situation where the owner of a flying freehold shares with her neighbours below the protection of a common roof. Other solutions may be appropriate

where the properties are arranged side by side rather than one on top of the other. I would also wish to reserve the question of what Miss Smee's duty might be were the cost of the necessary repairs to be of a wholly different and very much greater order of magnitude than is in fact the case. It may be that it would make no difference. It may be that it would---"

3.5 It is useful to note that the Claimant, Abbahall Ltd, owed no free -standing duty to Miss Smee unless it sought to enforce her duty to Abbahall. In those circumstances Abbahall would have to carry out the necessary works or pay its share. (See *Coope v Ward*, below, at paragraph 42, comment by Christopher Clarke LJ).

3.5 In *Coope v Ward* [2015] 1 WLR 4081, the Court of Appeal set aside a rather indeterminate cost-sharing arrangement, ordered by the County Court Judge, on various pragmatic grounds. The case involved the collapse of a wall, and consequently land, between two properties, the back gardens of which abutted each other. The wall, situated on one property, supported the land of another. That land had been built up over the years by predecessors in title and, eventually, caused an unforeseeable collapse of the wall. The Court of Appeal (Christopher Clarke LJ, with whom the other members of the Court agreed) upheld the County Court Judge's finding that each landowner owed the other a measured duty of care <u>after</u> the wall had collapsed. Further measures were then needed to prevent <u>foreseeable</u> further damage. As to the extent or scope of the duty, the Court concluded that it was not just and equitable to impose on the landowner on whose land the wall stood a duty to contribute to its repair. A number of reasons were given. These were:

- The collapse of the wall was not the result of any activity by that landowner but had occurred because of the build-up of land on the adjacent property; i.e. the collapse arose from the use made of the adjacent property, albeit by predecessors in title of the present owners;

- The landowner on whose land the wall stood derived no benefit from the wall that could be said to be comparable to the shared roof in *Abbahall,* where equal sharing had been ordered; the benefit lay with the adjacent property's land which the wall was supporting;
- It was unreasonable to require a contribution to a "solution" which was unspecified. There was no clear plan with regard to what works were to be carried out; the reasonableness of any contribution might depend on what the solution actually was.

3.6 Christopher Clarke LJ concluded his judgment with the following words:

> "That does not mean that the Coopes [the owners of the land on which the wall stood] can have no obligations on account of a measured duty of care towards the Wards. It may…. be incumbent on them in the future to allow the Wards access to their land in order to enable works to be carried out on the Wards' land and to remove whatever impedes such access, or to allow their land to be used for propping or otherwise" (paragraph 84).

3.7 All of these cases involve very different factual scenarios and all show the Court feeling its way towards a just solution in the individual circumstances of the case. They all seem most naturally categorised as nuisance-type cases where the broad unifying principle has now been authoritatively stated to be "reasonableness between neighbours" (See *Network Rail Infrastructure Ltd v Williams & Waistell* [2018] EWCA Civ. 1514 paras 40-45, Sir Terence Etherton MR, "the Japanese Knotweed case").

3.8. There is no relevant distinction between duties owed in nuisance and negligence for these purposes. An illustration of the same approach in a case involving negligence is provided by *Gilman v UPS Ltd & Network Rail Infrastructure Ltd* [2013] EWHC 2341(TCC). The case involved the incursion of a vehicle from adjoining premises onto a high -speed railway line as a result of which a derailment occurred. The vehicle had rolled onto the line as a result of negligence on the part of its owner. Issues were raised in contribution proceedings by the vehicle owner's motor insurers as to the existence and extent of any duty on the part of the adjoining landowner (UPS) and Network Rail to prevent incursion. In a careful, reserved Judgment HH

Judge Stephen Davies, sitting as a Judge of the High Court, held that both owed duties of care, albeit that the contribution claims against them failed on the facts.

3.9 It had been argued on behalf of Network Rail that "it would be a strong thing" to hold Network Rail liable in tort to users of its railway network for dangers created on neighbouring land over which Network Rail had no direct responsibility or control. (paragraph 141). The Judge, however, concluded that it was necessary to examine what Network Rail knew about the risks of vehicle incursion from previous years. At paragraph 147 he said:

"I am satisfied that Network Rail did owe a duty of care to at least consider and investigate what steps it could practicably take in relation to private sites….In my judgment it would not be a sufficient answer for Network Rail to say in effect "it is not our problem or responsibility, it is solely the problem and responsibility of the private landowners"…. In my judgment, given Network Rail's position as operator of the rail network and its unique knowledge of the risks to rail users from vehicle incursion from private land and having regard to the HSC and DfT recommendations, there was sufficient prospect that it would be feasible to devise and implement some steps to identify very high risk private sites and then for some steps to be taken to mitigate the risks to rail users arising from these sites, that it would be fair, just and reasonable to require Network Rail to do something more than nothing."(paragraph 147).

3.10 As to what might have needed to be done if inspection and evaluation had shown this site to be high risk, and the landowner declined to take preventative measures, the Judge said:

"Network Rail would then have had to consider whether it could or should act itself. I am satisfied that it could not have installed a crash barrier on its own steeply sloping land. It would thus have needed either to seek to persuade or if necessary compel UPS to install one on its land, either completely at its own cost or perhaps on a cost sharing basis, and if necessary either by involving the HSE or possibly through court proceedings." (paragraph 155).

3.10 The case is therefore illustrative of a very similar approach evident in the nuisance-type cases.

4. <u>Application to the present situation</u>

4.1 Does the just outcome in the present case suggest a contribution from Network Rail to the solution of the problems created by rock falls in the Avon Gorge? In Leakey the owners of the affected houses made no contribution and in *Coope v Ward* Christopher Clarke LJ remarked:

"There was in *Leakey*-rightly- no suggestion that the occupiers at the foot of the mound should contribute provided the Trust had (as it did have) the money for repairs. If the Trust had not been able to shoulder the bill, those occupiers would have had to do so, not because of any duty to the Trust but because that was the only way to get their property repaired" (paragraph 56).

4.2 In *Leakey* the houses were long-established and there was clearly a large disparity in resources between the householders and the Trust. The householders had not contributed in any way to the problem and the Trust appears to have taken, no doubt on advice as to what the law then was, a somewhat inflexible attitude. (Indeed, at an earlier stage, one of the householders had offered to contribute half of the cost of remedial works).

4.3 In the present case the situation is very different. Network Rail is a large commercial concern and the problem arises because it wishes to change, for the best of motives, the use of the railway line from freight to passenger use. Its proposed activities will necessitate the increased expenditure on the Trust's estate. And Network Rail has much more to gain, from the effect of the further measures to prevent rock fall, than the Trust.

4.4 All of these seem to me to be very powerful arguments that the cost of installing and maintaining protective measures should be shared. I understand that that is the position the Trust are taking. Network Rail have, I believe, come some of the way towards this position by agreeing to contribute to the cost of installing preventative measures and I note the suggestion that there *may* be a sum available for maintenance. It is not easy to see a distinction between sharing the cost of installation and the cost of future maintenance.

4.5 Both Network Rail and the Trust would in my view owe duties of care to users of the railway in the event of future liabilities arising as a result of rock fall.

30 January 2021 WILLIAM HOSKINS

Temple Garden Chambers