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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2021] EWHC 2663 (Admin)



No. CO/2032/2021

Royal Courts of Justice

Thursday, 23 September 2021

Before:

SIR ROSS CRANSTON

(Sitting as a Judge of the High Court)

B E T W E E N :

THE QUEEN
on the application of
UPTON

Claimant

- and -

OXFORD CITY COUNCIL

Defendant

- and -

1) HARRIET GREEN
2) GRAHAM CLARKSON

Interested Parties

MISS K. ZIYA appeared on behalf of the Claimant.

MR M. FRY QC appeared on behalf of the Defendant.

MR R GREEN appeared on behalf of the Interested Parties.

J U D G M E N T

SIR ROSS CRANSTON:

- 1 This is an application to vary an injunction granted on 1 September 2021 on the papers by Mr Tim Straker QC sitting as a Deputy High Court Judge. The injunction restrains the interested parties from felling, maiming or otherwise injuring the oak tree situated at 26 Lathbury Road, Oxford. The interested parties own a home adjacent to the tree and have been concerned about the damage it is causing to the structure of their home. The claimant is a member of an unofficial group called Oxford Canaries, who lives on the opposite side of Oxford. The tree has been subject to a Tree Preservation Order which the Council made in 2011.
- 2 On 17 February 2021, the interested parties made an application to fell the tree, supported by technical data in the form of movement monitoring recordings.
- 3 The Council granted consent to fell the tree, subject to a condition that a tree be planted to serve as a replacement to mitigate the level of harm to the local public visual amenity caused by the loss of the tree.
- 4 The tree was due to be felled on 25 May 2021, following the grant of the consent by the Council, but the claimant and a number of other persons disrupted the work which had been begun. The work was aborted due to the concerns as to the health and safety of the tree surgeon's employees and the public.
- 5 This claim was then issued on 10 June 2021. On 6 August 2021, permission was refused on the papers by His Honour Judge Gore QC. The claimant made an application to renew, which is listed for hearing early next month, on 6 October 2021.
- 6 Meanwhile, on 31 August 2021, the claimant applied for the urgent interim injunction which Mr Straker issued. In a witness statement, she said that he understood that preparations were underway to fell the tree because parking bay suspension notices had been placed in the area surrounding the tree for 2 and 3 September 2021. That, in fact, was not the case. Rather there were to be crown reduction works because the tree had been weakened by the partial dismantling of the crown, which had been aborted in May.
- 7 On 20 September 2021, the interested parties made the current application to seek a variation of the injunction to enable crown reduction risk mitigation work to be undertaken. That work is in line with the recommendations of a report dated 14 July 2021 by Dr Dealga O'Callaghan. The interested parties submit that this work cannot be postponed until the outcome of the renewal hearing on 6 October 2021.
- 8 Dr O'Callaghan's report was commissioned by the interested parties' insurers. He was to report on whether the partial reduction of the crown on 25 May had given rise to an unacceptable risk of serious harm to persons and property.
- 9 Dr O'Callaghan's report is based on his expertise, which is extensive, and a site visit he made in early July. In his report, he opines that the tree has serious structural flaws that predisposes it to failure, exacerbated by the partial dismantling of the crown in May. In his view, the tree constitutes an unacceptable level of risk to pedestrians and vehicles using Lathbury Road, to parked vehicles, and to the house and garden of the interested parties. He states that the failure of codominant leader number one is "certain" in periods of high winds,

to be expected from September through to November. He states at paragraph 3.8.5 the following:

“In order to mitigate the risk, there are only two options available. One, severe crown reduction by retrench pruning and, two, complete removal of the tree. Retrenchment pruning is a phased form of crown reduction which is intended to emulate the natural processes whereby the crown of a declining tree retains its overall biomechanical integrity by becoming smaller through progressive shedding of small branches and development of the lower crown. This will involve removal of both codominant leaders, leaving the tree at about 10m in height, such that it will develop a lower crown. Removal of only one codominant leader one is not an option as this would leave the tree with an unbalanced crown and increase the torsional stress on the remaining codominant leader two.”

10 Dr O’Callaghan then sets out what he regards as the level of risk:

“The tree poses an unacceptable level of risk to the identified targets and the likelihood of failure and impact is very likely and this situation will continue until the codominant leader fails with significant severe consequences or risk mitigation works are implemented.”

As I said previously, he opines that the mitigation work cannot be postponed until the outcome of the judicial review.

11 At paragraph 3.8.8, he considers the statutory exception in regulation 14 of the Town and Country Planning (Tree Preservation) (England) Regulations 2012, 2012 SI No 605 to the prohibited activities in regulation 13. Regulation 14 (1)(c) provides that nothing in regulation 13 shall prevent

“the cutting down, uprooting, topping or lopping of a tree, to the extent that such works are urgently necessary to remove an immediate risk of serious harm, or to such other extent as agreed in writing by the authority prior to the works being undertaken;”

12 In Dr O’Callaghan opinion

“...the tree is on the cusp of meeting the requirements of the statutory exception. Currently, in July 2021, the tree poses an unacceptable level of risk to the identified targets, but in the prevailing summer weather conditions the failure of codominant leader one is less likely than in high winds. However, as autumn approaches, periods of high wind can be expected from September through November, which will bring strong gale force winds and likely storms. In those conditions, the failure of coordinate leader one becomes certain, in my opinion.”

13 The claimant disputes that the works recommended by Dr O’Callaghan are necessary and contends that the balance of convenience lies in favour of maintaining the injunction or, if it is varied, to be varied in the light of a report by Mr Julian Forbes-Laird. Mr Forbes-Laird is the principal in an arboricultural consultancy. For the claimant, he prepared a less detailed report than Dr O’Callaghan where he stated that the necessary works for the tree were not as much as those recommended in the O’Callaghan report. With reference to a photograph of the tree, he states:

“The pruning should be set approximately at the dash red with the exact position of pruning cuts being most suitably determined by the tree surgeon.”

He then went on to opine that the defects in the tree were unlikely to result in a failure of the codominant leader within the recommended one-year interval to the next inspection, except under very exceptional weather conditions. Mr Forbes-Laird did not inspect the tree.

- 14 In a short reply to Mr Forbes-Laird’s report, Dr O’Callaghan states that the extent of pruning as shown in Mr Forbes-Laird’s diagram, would not, in his opinion, reduce the risk to an acceptable level.

“Both leaders would be retained, codominant leader one would still have the crack and the bucking of the wood fibres and would still be prone to failure in strong winds.”

He added that Mr Forbes-Laird had made no comment on the structural condition of the tree or his (Dr O’Callaghan’s) analysis of it.

- 15 The test in relation to an interim injunction is well known: the test in *American Cyanamid* modified in public law cases e.g., *R (on the application of Medical Justice) v. Secretary of State for the Home Department* [2010] EWHC 1425 Admin).
- 16 For the claimant, Miss Ziya opposes the interested parties’ application with three main arguments. First of all, she contends that the works recommended by Dr O’Callaghan are inconsistent and ambiguous. In particular, she highlights that the statement that the pruning would leave a tree at 10m did not accord with the actual height of the codominant branches which began at 5m. Miss Ziya also refers to the report of Mr Forbes-Laird. In her submission, here is an expert view that the works recommended by Dr O’Callaghan go beyond what is necessary to mitigate the risk.
- 17 Thirdly, Ms Ziya contends that, should the claimant’s judicial review be successful, the tree, again, would be the subject to a Tree Preservation Order. Only safety works within the scope of the exemption at regulation 14(1)(c), which I have quoted, would be permitted. Given the language, “on the cusp”, used by Dr O’Callaghan, that seemed to be his opinion as well.
- 18 In my view, the application must be granted. I note at the outset that Mr Fry, for the Council, has stated that the Council is content with both Dr O’Callaghan’s report and also with the works that he has proposed.
- 19 The court has before it a detailed report of an expert, Dr O’Callaghan, who has inspected the tree and who has made a clear recommendation as to what should be done. In my view, the ambiguity in relation to the height of the remaining tree after those works does not undermine the very clear recommendation that Dr O’Callaghan has made. Nor does Mr Forbes-Laird’s analysis in any way undermine the thrust of the O’Callaghan report. In fact, he endorses the major aspects of the O’Callaghan report.
- 20 As to the application of the regulation 14(1)(c) exemption, it seems to me a proper reading of the O’Callaghan report that in July the matter was “on the cusp”, as he put it. However, in the remaining part of that paragraph, he makes clear that, once we reach September, the situation as to the risk from the tree would become much clearer, in other words, would no longer be on the cusp but within the terms of the regulatory exemption.

21 Given the expert's report and given the stance of the Council on this matter, it seems to me clear that the only order that the court can make is to modify the injunction along the lines in the application. I grant that application.

CERTIFICATE

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This transcript has been approved by the Judge.