The cost of nature – the burden on local authorities

As if it is not difficult enough for local authorities having to cope with the world's finance falling off a cliff and the resultant austerity the country's climate has now turned against them. Events assessed as likely to occur only once in a hundred years or even less frequently are now occurring. This is impacting on the country's natural and man-made features. It is not just that there are problems such as flooding, rock falls, land slips and surface collapses. It is the scale on which they are occurring. This creates serious headaches for local authorities. What responsibility do local authorities have for such events and what steps do they need to take to avoid or mitigate the risk of such events in the future?

1. Ownership - The first issue that may need to be addressed is ownership. Does the local authority own the feature causing the problem? The answer can be surprisingly difficult to ascertain. Conveyances executed in the Victorian period may need to be hunted for in the authority's archives. Private Acts of Parliament may need to be consulted if the feature was originally man-made such as with the construction of the first railway tunnels now no longer used for their original purpose. The course of rivers may change over the years.

The issue is not just concerned with ownership of significant areas of land. Determining the precise line of a boundary is notorious generally for throwing up disputes. With the type of features owned by authorities it is even harder. This can be material when attempting to determine on whose land a fault lies.

This is a crucial issue but not conclusive. Ownership carries with it greater responsibilities but not owning the problem is not the end of the matter for the relevant authority. This paper will consider each set of circumstances separately.

2. Authority owns land causing problem –

2.1 General duty – the law use to take a very restricted view of the scope of the duty imposed on a landowner. The problem had to be man-made or as a result of an act of the landowner to result in liability. In Victorian and Edwardian times legal disputes often centred on whether a right of support existed and if so whether it had been wrongly interfered with. This changed with the Privy Council decision in Goldman v Hargrave [1967] 1 AC 13 which was adopted and followed in Leakey v National Trust [1980] 1 QB 485. The former imposed liability on a landowner who failed to properly dampen down the remains of a redwood tree set on fire by lightning. The Leakey case made the National Trust responsible for falls from a hill caused by a combination of the hill's composition of Keuper marl, its layout and the effect of weathering on it. A measured duty of care by occupiers of land "to remove or reduce hazards to their neighbours" (Lord Wilberforce in the Goldman case) was held to be owed to the householders at the foot of the hill. In doing so Lord Wilberforce stated that account must be taken of the fact that this hazard has been "thrust upon [the occupier] through no seeking or fault of his own". Neither the hazard being a natural feature nor the absence of any human activity was a defence to the claim for damage caused by the fall. The duty was broken by the failure to act to stop such falls.

It means that when there is a fall or slip or other event due to a hazard on land owned by an authority any resultant claim cannot be defended on the basis that there is no duty owed by the authority. It can even cover naturally draining water if causing damage to a lower owner (Arscott v the Coal Authority [2004] EWCA Civ 892). However, it does not follow from the existence of such a duty that the authority is automatically liable for the loss caused.

2.2 Scope of duty – The duty is most certainly not a duty of strict liability nor is it a straightforward duty of care. In the Leakey case Megaw LJ stated (at page 524) that the "duty is a duty to do that which is reasonable in all the circumstances, and no more than what, if anything, is reasonable, to prevent or minimise the known risk of damage or injury to one's neighbour or to his property." What makes it different is the factors that are taken into account when carrying out a balancing exercise between the landowner and the neighbour. In particular unusually the individual circumstances of the landowner can be taken into account.

The factors which are to be taken into account include

2.2.1 the nature of the hazard;

2.2.2 the harm that it may cause and the chances of such harm occurring. If there is a risk to life or limb then a heavier duty is likely to be imposed;

2.2.3 the knowledge of the landowner (see section 4 below);

2.2.4 whether remedial action is practical to prevent or minimise the happening of any damage and if there is a practical remedial course of action how difficult will it be, how long will it take and what will be the cost;

2.2.5 the circumstances of the owner of the land with the hazard and the neighbour and in particular the owner's financial resources. When the cost of the remedial action is not significant or difficult then an inquiry as to the budget of, in that case, the highway authority and the backlog of work is not appropriate (Bybrook Barn Centre v Kent CC (1st December 2000)).

In the case of a local authority owner the fact that it is a local authority may impact in at least two respects.

First it has been stated by Jackson LJ in Vernon Knight Associates v Cornwall CC [2013] EWCA Civ 950 at para. 49 (iii) that "Where the Defendant is a public authority with substantial resources, the court must take into account the competing demands on those resources and the public purposes for which they are held. It may not be fair, just or reasonable to require a public authority to expend those resources on infrastructure works in order to protect a few individuals against a modest risk of property damage."

Second the Court may need to bear in mind that the authority has to take into account the interests of the ratepayers in general and is subject to the operation of the democratic process. For example, in Page Motors v Epsom and Ewell BC [1981] 80 LGR 337

some delay in removing gypsies squatting on the council's land was accepted as reasonable by the Court because the authority was subject to a need to consult and additionally until an alternative site was found the likelihood was that the squatters would move to other land in the area.

2.2.6 availability of insurance – it has been suggested that the availability of insurance to the claimant householders was a relevant factor in not imposing a duty to carry out works on the authority in Lambert v Barratts Homes and Rochdale BC [2010] EWCA Civ 681. However, consideration of the insurance position was strongly rejected by both Jackson LJ and Sir Stanley Burnton in Vernon Knight Associates v Cornwall CC supra. One of the reasons put forward for this general exclusion in tort law of the consideration of the impact of insurance was not just that it would increase premiums but that it could lead to insurers excluding certain risks such as flooding from cover. The split in the decisions leaves open the point for the moment.

2.3 Varied duty - This balancing exercise means that there is a greater variation in the scope of the duty than is the case with a claim based on negligence. What will be expected from the owner of the hazard will depend far more than is normal on the particular circumstances. At one extreme there may just be a duty to warn and to co-operate with action taken by the neighbour. In Lambert v Barratt Homes and Rochdale BC supra surface water draining from the authority's land was accumulating on land previously part of a playing field sold by the authority and developed by Barratts and then occasionally flooding. The cause of this was the blocking of a ditch by Barratts as part of the development works. The Court of Appeal set aside the judgment at first instance against the authority. The authority was not responsible for the cause of the flooding and the remedial work would be costly. It accepted that the authority would have funds far in excess of those available to the householders but the authority's resources are to be held for public purposes and are not generally available for the benefit of private citizens. Consequently the Court of Appeal considered that the authority had no duty to carry out remedial work or to pay for them. However, this did not mean that it was under no duty. The Court considered that it had a duty to co-operate in reaching a solution which meant that it should allow works such as the construction of a catch pit on its land at no cost to it and should assist with the obtaining of consents.

It is not possible to set out comprehensively all the different types of duty that might arise from the existence of a hazard on the authority's land. The duty has to be formulated by reference to the particular circumstances and needs to be carefully pleaded on behalf of the claimant. For example, in the Lambert case the claim was put on the basis that the authority was under a duty to carry out the remedial work but as stated above this was rejected by the Court of Appeal. The claim was not dismissed because the Court considered that it was possible the authority had been in breach of a duty which had not been pleaded and so the possibility of amending the claim was left open to the claimant.

It is, however, possible from the authorities to set out a list of possible duties so as to give an idea of the range of duties that can arise. It has also to be remembered that as circumstances change over a period of time so can the scope of an authority's duties. Various possibilities that have been considered include:-

3.1 warn neighbour and monitor hazard;

3.2 warn neighbour and offer the threatened neighbour access to carry out the remedial work;

3.3 warn neighbour and offer to share costs of remedial action – although suggested as a possibility in some of the cases concerning local authorities there is no decision on this. It has arisen for consideration as between freeholders of different floors of a building with regard to the cost of repairing the roof of the building (Abbahall Limited v Smee [2003] 2 EGLR 66). A robust and broad brush approach to the enquiry into individual financial circumstances was suggested by the Court of Appeal in that case. This decision could be used by landowners to develop cost sharing when remedial action is needed to tackle a hazard as a means of mitigating the burden faced.

3.4 carry out the remedial work as professionally advised and keep neighbours informed of progress. This may require assistance to be given to the neighbour with any disruption caused by the works and if requested the provision of a certificate of satisfactory completion (considered in judgment of Briggs J. in Willis v Derwentside DC [2013] EWHC 738 (Ch);

3.5 relocate buildings at risk on the neighbour's land;

3.6 continue to monitor after the work has been carried out.

4. Foreseeability – if the hazard is latent then there will be no liability for the damage caused by the hazard. The hazard has to be patent. In Holbeck Hall Hotel v Scarborough BC [2000] LGR 412 Stuart-Smith LJ stated at para. 39 that in "order to give rise to a measured duty of care, the defendant must know or be presumed to know of the defect or condition giving rise to the hazard and must, as a reasonable man foresee that the defect or condition will, if not remedied cause damage to the plaintiff's land."

That case concerned the dramatic loss of a hotel due to a landslip involving the lower land owned by the authority. There had been a number of smaller slips along the coast prior to this event. The authority succeeded on appeal because it was held that the magnitude of the loss could not have been foreseen as the full extent of the defect was latent. The fact that it could have been discovered by further expert geological investigation was not material. The outcome meant that the Court of Appeal did not have to grapple with the implications of the defect being partly on the authority's land and partly on the hotel land.

The case failed on the pleaded duty to carry out remedial action to remove the hazard but it was suggested by Stuart-Smith LJ that the authority would have been under a duty to warn the hotel owner that there was a risk to the extent known and to share such information as they had in the report obtained. It was felt that even if there had been a breach of this much more limited duty it would not be possible to prove that such a breach had caused loss.

It was known that there was a problem and that it would be likely to progress so that in some indeterminate date in the future it would adversely affect the hotel land. That was

not enough. To succeed it had to be shown that the full extent of the problem was appreciated and it was reasonably foreseeable that the hotel owner would suffer the type of loss actually suffered.

5. Defences - the principal defences to any claim against an authority for breach of the measured duty of care are:-

5.1 Latent hazard – it is a complete defence if the authority had no knowledge of the hazard;

5.2 Extent of hazard not foreseeable – even if it is known that a hazard exists if the authority did not know the true extent then liability may be avoided.

5.3 Extent of damage – if the loss suffered was not reasonably foreseeable then the authority will not be liable.

5.4 No breach – such action as has been taken by the authority with regard to the hazard may suffice. This depends on the precise scope of the measured duty of care imposed on the authority in the circumstances. The giving of a warning and co-operation with the neighbours may be sufficient.

5.5 Breach but not causation of actual loss – in a number of cases it has been suggested that an authority has been in breach of a duty different to that pleaded but that there was no evidence to show that that breach had caused loss.

6. Authority not owner – even if the local authority is not the owner of the land on which the hazard is situate the authority may still have a responsibility with regard to the hazards in its area. Section 79 Environmental Protection Act 1990 requires the authority to inspect its area from time to time for statutory nuisances. These include any premises, accumulations or water covering land in such a state as to be prejudicial to health or a nuisance. If found then the local authority is obliged to serve an abatement notice under section 80 1990 Act. As premises includes land (sub-section (7)) some of the hazards caused by natural features will constitute a statutory nuisance and the local authority will have to be involved in ensuring that the necessary remedial steps are taken.

7. Occupier's Liability Act 1957 – separate from consideration of the measured duty of care there could also be the issue of liability owed by the local authority to visitors to its land under the provisions of the Occupiers Liability Act 1957. It is important not to forget this potential liability but it is one that will have been anticipated and insurance cover arranged.

8. Future action – in the light of recent events it would be sensible for authorities to review

(1) ownership of features which may constitute or contain a hazard;

(2) review whether any hazards are known;

(3) if there are known hazards ensure that adequate warnings have been given to the neighbours and review precautions taken to reduce or remove hazard;

(4) arrangements for inspecting area for hazards and regularity of inspections;

(5) insurance cover to ensure all features are included;

(6) whether offer to co-operate with neighbours should be made to take further action in relation to known hazards.