Case No: B2/2013/2677

Neutral Citation Number: [2015] EWCA Civ 30
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM SHEFFIELD COUNTY COURT
HHJ Robinson
1SE00423

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/01/2015

Before:

LADY JUSTICE ARDEN
LORD JUSTICE CHRISTOPHER CLARKE
and
LORD JUSTICE BEAN

- -

Between:

	Coope and Others	**Appellants**
	- and -	
	Ward and Another	**Respondents**

- -
- -

Ms Jessica Brooke (instructed by **Best Solicitors**) for the **Appellant**
Ms Brie Stevens-Hoare QC and Ms Morayo Fagborun Bennett (instructed by **Bar Pro Bono Unit**) for the **Respondent**

Hearing dates: 28th October 2014; additional material supplied 11th – 14th November 2014

- -

Judgment **Lord Justice Christopher Clarke:**

1. This is an appeal from the judgment of His Honour Judge Robinson, given in the Sheffield County Court on 17 July 2013, following a hearing between 8 and 12 July 2013. The central issues in the case are (i) whether the Appellants, owed to the Respondents a "measured duty of care" which, in certain circumstances, may arise as between adjoining landowners in respect of a hazard arising on their land without their fault; (ii) what that duty amounted to; and (iii) whether the appellants were in breach of it.

The properties and their owners

2. Armstead Road and Orchard Lane are two streets in Beighton, Sheffield which are

broadly parallel to each other. Armstead Road is largely composed of terraced houses. Orchard Road which is to the west of Armstead Road is composed of terraced houses to the north and semi-detached houses further south. Part of the back garden of number 58, the whole of the back garden of number 60, and about one third of the back garden of number 62 Armstead Road abut the back garden of number 41 Orchard Lane.

3. Numbers 58, 60 and 62 Armstead Road were built in about 1898. In 2010 and thereafter number 58 was owned by Mr and Mrs Staniland, the third and fourth defendants, and number 62 by Mr and Mrs Coope, the first and second defendants, who are now the appellants ("the Coopes"). The Coopes moved into number 62 as tenants in 1988 and by October 1990 had bought the freehold from the landlord's mortgagee when the latter obtained possession as against the landlord for non-payment of the mortgage.

4. At the end of the gardens of the Armstead Road houses there was a wall ("the Armstead wall"), part of which divided number 41 Orchard Lane from numbers 58, 60 and 62 Armstead Road. It was built at some unknown date, but by at least 1953, and from that date it had, as the judge found, provided some supporting function for land about four feet deep [47]. It appears to have been owned by the owners of the Armstead properties. At some stage toilet blocks had been established along the wall, which extended beyond those three houses, at periodic intervals. Those at number 62 had become dilapidated by 1988 and by 1990 had been removed.

5. Prior to 1973 the land on which numbers 33-53 Orchard Lane now stand was waste land called "The Herbs". Number 41 was built in about 1973 when it was acquired by the parents of Mrs Ward, who had formerly owned number 62 Armstead Road. They erected first a fence, and then a double skinned wall ("the Orchard Wall"). Mr and Mrs Ward, the claimants and now respondents ("the Wards"), bought the house from them in 2001. During the course of the trial the Wards and the Stanilands came to terms. Nothing is known about the terms of the settlement, which are confidential, save that part of the agreement provided that "*any rights of support which may have existed are hereby extinguished*".

6. The layout of the streets and houses is shown on the plan annexed to this judgment. Number 41 Orchard Lane occupies the southernmost hatched plot on Orchard Lane. Numbers 60 and 62 occupy the two plots in Armstead Road whose gardens are hatched on the plan.

The judge's findings

7. The Herbs was significantly higher than Armstead Road. In 1973 the level of The Herbs adjacent to numbers 60 and 62 was about 4 feet higher than the Armstead Road ground level so that the level of the Herbs was about 3 feet below the level of

the top of the Armstead wall, which was about 7 foot/2.15 metres high at this point.

8. In 1973 the builders of number 41 built up the land at The Herbs by an additional 3 feet to the top of the Armstead wall, which, had, therefore, 7 feet of earth on the Orchard Road side of it.

9. Sometime after 1973 a wall was built on the land at 41 Orchard Lane. It began as a double skin wall nine inches thick, to which was added a single skin wall 4 ½ inches thick in 1990 or 1991.

10. By 1973 there was – by virtue of at least 20 years of support - an easement of support acquired by number 41 in respect of 4 feet of land at Orchard Lane. But the addition of a further 3 feet of land in 1973 had the effect of imposing an additional burden. It was impossible to separate the increased burden from the earlier one; and whatever easement had previously existed was, therefore, extinguished: see *Gale on Easements* 19th Edition para 12-37.

11. By the time that the single skin part of the wall was built in 1990 or 1991 the level of the land at number 41 had increased to 9 feet/2.74 m. The increased load in 1990, even if it only consisted of the building of the single skin wall which involved an increase in ground level of at least 25 cm/10 inches, was sufficient to extinguish whatever easement had previously existed.

12. The works in 1990 were probably performed in the spring or autumn so that by January 2010 the 20 year prescription period had not elapsed and there was no easement of support in favour of number 41.

13. On 16 January 2010, after heavy snowfall with snow accumulating on the ground, part of the Armstead wall collapsed into the gardens of numbers 60 and 62 Armstead Road. The collapse was catastrophic. At the time of the hearing bricks from the wall were on the gardens together with some soil from number 41.

Responsibility

14. The judge found that prior to the collapse there was no sign observable by a lay person of the Armstead wall, which had functioned perfectly adequately from 1898 up until 2010, being under distress. The Armstead wall did not collapse as a result of anything done by the Coopes. They had done nothing to interfere with the earth retaining capability of the wall or to interfere with any easement of support that might exist.

15. The cause of the collapse of the wall was the additional loading on the wall, as the

depth of earth behind it increased from 4 feet to 9 feet, operating on a 9 inch thick wall which was "*doomed from the outset, with only the timing of any failure open to debate*". The trigger for the collapse was the loading by the snowfall. Removal by the Coopes of rubble from the roof and lateral walls of the toilet block which abutted the Armstead wall in 1990 had had no discernible effect so far as the collapse was concerned.

16. The judge also held that the Wards were not responsible for the addition of the loading against the Armstead wall [60]. They were not liable in nuisance since they had neither created any nuisance nor continued it when they knew or ought to have known that their property constituted a nuisance or hidden danger to the properties below: see the authorities cited at *Clerk & Lindsell on Torts* 20th Edition para 20-99; *Ilford Urban District Council v Beal and Judd* [1925] 1 KB 671.; *St Anne's Well Brewery Co v Roberts* (1928) 140 LT 1; *Wilkins v Leighton* [1932] 2 Ch 106. The Coopes' counterclaim against the Wards, based on their alleged failure to take steps to ensure that the Orchard wall and their wall were properly supported, accordingly failed.

17. I am quite satisfied that it was open to the judge to find that the Wards were not responsible for the additional loading. They had done nothing to bring it about and were not the creators, or knowing continuers, of any nuisance. The judge found Mr Ward whose evidence was that he did not assist in the wall building works in 1990/1 an honest witness and that it may not have been he who was assisting in the works at that juncture. The Wards were not legally responsible for the actions of their predecessor in title, even though she was Mrs Ward's mother.

18. The judge did not deal in terms with the claim in trespass (to which the Coopes' skeleton argument for trial had made no reference). Such a claim was not well founded. An entry onto land which is involuntary and without intention or negligence is no trespass: *Smith v Stone* (1647) Style 65; 82 ER 533 (where it was held to be a defence to an action for trespass *pedibus ambulando* that the defendant was carried onto the plaintiff's land by force and violence of others and was not there voluntarily); *Public Transport Commission of NSW v Parry* (1977) ALR 273 – per Gibbs J; *Clerk & Lindsell* 21st Edition 19-07. The movement of a person's land which he neither intends, brings about, foresees, nor ought to have foreseen falls into the same category.

The measured duty of care

19. The judge found in favour of the Wards by holding that the Coopes and the Wards owed to each other a measured duty of care in respect of the consequences attendant upon the collapse of the Armstead wall.

20. The judge was satisfied that no duty of care arose on the part of either the Coopes or the Wards *prior* to the collapse. Neither of them were aware of the risk of damage occurring. There was nothing to put the Coopes on the alert to the imminent danger of collapse of the Armstead wall; or to put the Wards on notice that the condition of their land was such that the wall was in danger of collapse.

21. However, once the wall had collapsed there was, the judge held, an obvious danger of more of the Wards' land falling on to that of the Coopes if nothing was done. If the Coopes or the Wards took any steps to remove from the Armstead Road land the bricks of the Armstead wall and the spoil from the Wards' land there was an obvious risk that more spoil from the Wards' land would cascade onto the land of the Coopes.

The authorities

22. The judge found it difficult to discern any clear expression of principle from the cases that were cited to him.

23. In order to trace the origin of the concept it is necessary to go back to *Goldman v Hargrave* [1967] AC 645. In that case a tree in the centre of the appellant's land was struck by lightning on February 25 and caught fire. The tree was cut down on February 27 but no steps were taken to prevent the fire from spreading. The fire was left to burn itself out when it could have been extinguished with water. On 1 March the weather changed; the fire revived and spread to the respondents' properties which were damaged. The Privy Council, upholding the decision of the High Court of Australia, and following *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, held that an occupier of land was under a general duty of care in relation to hazards, whether natural or man-made occurring on his land, to remove or reduce such hazards to his neighbour; that the existence of such duty must be based on knowledge of the hazard, ability to foresee the consequences of not checking or removing it and the ability to abate it; and that the standard of care applicable was what it was reasonable to expect of the occupier in the circumstances. The appellant's method of burning the fire out after February 27, i.e. leaving it to burn out, brought into operation a fresh risk of a revival of the fire if the weather changes. He could have foreseen that risk and taken the necessary action to put out the fire on February 26 or 27 and was liable in negligence for the loss sustained.

24. Liability in that case arose where the original hazard (lightning) was not one for which the occupant was responsible but where his failure to do anything in relation to it created a new hazard of which he should have been aware and which he could reasonably be expected to have taken steps to avert. Negligently he permitted it to continue. Lord Wilberforce, giving the judgment of the Board, approved the recognition of "*a measured duty of care by occupiers to remove or reduce hazards to their neighbours*": 662G. He made clear that by that he meant that the standard of what was required of the occupier should be that which it was reasonable to expect of him in his individual circumstances. It is clear from this and subsequent cases e.g.

Leakey (see para 26 below) that the duty is not dependent on the existence of any form of easement; nor does the existence of an easement preclude the existence of such a duty. Contrary to the submission made by the Coopes the Court's rejection of the Wards' claim to a right of support is, therefore, not a ground for denying the existence of the duty claimed.

25. In *Duke of Westminster & Ors v Guild* [1985] AC 688 the defendant tenant had an easement of drainage by which he had the right to carry out works of repair to a drain under the plaintiffs' land; but that easement was held to impose no duty on the plaintiffs, as servient owners, to repair the drain; and, as the court held, there was no duty of care that could impose on them an obligation to repair the drain. The case was determined by reference to the law of easements ("*The general law of easements applies and ... clearly imposes no such obligation*" to repair: 703A). Ms Jessica Brooke for the Coopes contends that, if there was no duty of care even when there was an easement, the Wards, who lack any easement, can obtain no greater right than the beneficiary of an easement would have enjoyed. *Goldman* was not cited in this case, nor was this case cited in the cases to which I am about to refer.

26. In *Leakey v National Trust* [1980] QB 485 the plaintiff's two houses were at the foot of a large mound – Burrow Mump - on the National Trust's land. The Trust knew that the instability of their land was a threat to the plaintiff's properties because of the real possibility of falls from it of soil and other material. In 1976 a large crack opened in the mound above the house of the first two plaintiffs. They drew the Trust's attention to the danger to their house from a major fall of soil. The Trust said that it was a natural movement of land for which they had no responsibility. The plaintiffs successfully sued the Trust for an order to carry out the necessary works to prevent soil from moving onto their properties; and recovered damages in nuisance - which were modest because the works had been carried out.

27. The Court of Appeal upheld the judgment, saying that the action was properly brought in nuisance rather than negligence although the distinction was of no practical significance. In effect this Court held that the law as explained by Lord Wilberforce in *Goldman* was part of the law of England. The Court identified the existence of the duty of care as underpinning the long established right to abate a nuisance: 523F – 524D. Megaw LJ's judgment made plain that the extent of the individual occupier's duty depended, *inter alia*, on his/its financial resources and what he/it could – on a broad brush assessment - reasonably be expected to do.

28. In *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] QB 836; [1980] 2 All ER 705 the claimants owned a hotel which stood on a cliff overlooking the sea. Between the hotel and the cliff was land owned and occupied by the local authority. Such land provided natural support to the hotel. Due to maritime erosion the cliff was inherently unstable. Slips occurred in 1982, 1986 and 1993. The 1993 slip was massive and caused the ground under the hotel's seaward wing to collapse as a result

of which the rest of the hotel had to be demolished. The judge held that the local authority was, or ought to have been, aware of the hazard caused by the potential failure of support for the hotel, and that it had breached a measured duty of care by failing to investigate the danger to the claimants' land after the 1986 slip when, if such investigation had been carried out, it would have discovered that a slip of the type that took place in 1993 was imminent.

29. The Court of Appeal allowed the appeal holding that an occupier's duty to prevent a potential hazard to the claimant's land arises if the defect was patent and was or should have been observed. In the case of a latent defect the occupier would not be liable merely because he would have discovered the defect on further investigation. The local authority in that case had not foreseen a danger of anything like the magnitude of what had occurred and it was neither just, fair nor reasonable to impose liability for damage which was greater in extent than anything foreseen or foreseeable without further geological investigation [51]. The authority's duty was to take care to avoid damage which it ought to have foreseen without such investigation. That duty might also have been limited to warning the adjoining occupiers of such risk as it was aware of or ought to have foreseen rather than carrying out expensive and extensive remedial work itself [54].

30. Although the claim thus failed on the basis that the local authority could not have foreseen damage of the magnitude that occurred, the Court took the view that there was no difference in principle between damage due to lack of support and danger due to the escape or encroachment of a noxious thing so far as the principle in *Sedleigh-Denfield* was concerned [38]. As Ms Brie Stevens-Hoare QC for the Wards rightly observed any danger due to lack of support must be a danger to the property needing support arising from the state of the property from which support was necessary.

31. Ms Brooke submits that the view summarised in the previous paragraph was *per incuriam* and that, had the *Duke of Westminster* case been cited to the Court, a different conclusion would have been reached. The owner of the servient tenement can, she submits, only be liable if he has done an act which causes support to be lost.

32. In *Holbeck Hall* the court noted that in *Bond v Nottingham Corp* [1940] 1 Ch 429 the Court of Appeal had held *obiter* that the owner of the servient tenement was under no obligation to repair that part of the building which provided support for his neighbour, and that that case, and others to similar effect, had not been cited in *Leakey*. It referred to two cases since Leakey, namely *Bradburn v Lindsay* [1983] 2 All ER 408 and *Bar Gur v Bruton* [1993] CA Transcript 981; where the courts had applied the principles in *Leakey* to a claim for loss of support. (*Duke of Westminster* does not appear to have been cited in either). In the latter case Dillon LJ observed that the trial judge had rightly recognised that in the light of *Leakey's* case the

statement in *Bond v Nottingham* was no longer good law.

33. In *Abbahall Ltd v Smee* [2003] 1 WLR 1472 the defendant was the owner of a flying freehold which she had acquired by adverse possession and which comprised the first and second floors of a building and its roof. (The second floor was little more than the roof space). As a result of the defendant's failure to maintain the roof there was a danger of masonry falling onto visitors to the ground floor and water leaked into the ground floor premises which were owned by the claimant. The defendant was not subject to any covenant to repair and, subject to any duty she owed to her neighbours, was entitled not to repair her own property. The claimant obtained a court order enabling it to enter the defendant's property to carry out repairs but the order was silent about who should pay for them. The judge held that both parties were responsible for repairing the roof and taking into account their respective financial resources ordered the defendant to contribute one quarter of the cost.

34. On appeal this court held that an occupier of property was under a duty to do what was reasonable in the circumstances to prevent or minimise the known risk of damage to his neighbours or their property and that in determining how the burden of meeting the cost was to be borne the court should strive for a result which was fair, just and reasonable, applying the concept of reasonableness between neighbours. Where the roof served to protect more than one owner common sense, common justice and reasonableness as between neighbours suggested that the owners of the properties should share the burden of paying for its repair and that it was reasonable to apportion the benefit to be derived from the repair of the common roof between the owners on a broad basis having regard to a comparison of the space which each owned. On that basis the defendant and the claimant should contribute equally to the appropriate works since they would derive equal benefit therefrom. Apportionment was an appropriate way of reaching a fair, just and reasonable result which was what the court should strive to achieve.

35. Munby J (as he then was), who gave the principal judgment, referred to the fact that in *Delaware Mansions Ltd v Westminster City Council* [2002] 1 AC 321, the House of Lords had held that where there was a continuing nuisance of which the defendants knew or ought to have known, reasonable remedial expenditure could be recovered by the owner who had been required to incur it in the course of abating the nuisance [28]. He also referred to the fact that in that case Lord Cooke had said [34] that "*reasonableness between neighbours is the key to the solution of problems in this field*".

36. Munby J, with whom Chadwick LJ agreed, was at pains to observe that Abbahall's claim would at one time have been thought unmaintainable because of the observations of Lord Greene in *Bond v Nottingham Corp* and Lord Denning in *Phipps v Pears* [1965] 1 QB 76 but held that matters had been "*transformed*" by the developments in the law of nuisance and negligence heralded in *Goldman* and

developed in *Leakey*, *Holbeck Hall* and *Bybrook Barn Centre Ltd v Kent County Council* [2001] BLR 55 and *Rees v Skerrett* [2001] 1 WLR 1541. The two cases first mentioned remained good authority on the law of easements but, as he put it, "*they tell us nothing about the proper content of the modern law of nuisance and negligence*".

37. In those circumstances I decline to regard the *Duke of Westminster* case as precluding the existence of any duty of care relating to lack of support. The argument that, since there can be no duty if there was an easement of support, there can be no duty if any easement has been extinguished, does not, therefore, arise. (If valid it would appear to mean that, no measured duty of care could arise in circumstances where an easement of support might have arisen but had not). Whether or not such a duty of care exists is to be determined by the law of negligence, not the law of property, and it is plain that such a duty can exist where no question of easement arises e.g. *Goldman*. The fact that tortious principles lead to a liability when principles of property law would not does not render the law incoherent, as was suggested.

38. The circumstances of the *Duke of Westminster* case were also markedly different. There was a contractual relationship between the parties the effect of which might be said to limit the existence of a duty of care or what could reasonably be required of the lessor. Secondly the tenant had the right to drain on to the landlord's premises and the blockage in the drain was on those premises. Ms Stevens-Hoare submitted that the only thing that created any hazard was the exercise by the tenant of the easement whereby effluent drained into the Duke's land. It could not, therefore, be said that there was any hazard on that land, which might give rise to duty of care. Ms Brooke submits that the hazard was the drain through which water could not flow. It may be that the case is distinguishable on either of these grounds (on which I express no view); but, whether it is or not, the case cannot, in the light of the development of the law of nuisance and negligence in the authorities to which I have referred stand in the way of the existence of a measured duty of care if the circumstances contemplated by those cases are applicable.

39. *Abbahall* was a case in which the risk plainly originated on the defendants' land (the roof). This, Ms Brooke submitted, was a critical feature: the occupier of the higher land which collapses ought not to be able to rely on any duty of care by the occupier of the adjoining land onto which it falls. I do not, however, regard that proposition as consistent with *Holbeck Hall*.

40. In *Abbahall* Munby J observed that none of the cases which had followed *Leakey* was precisely on all fours with the facts of that case. One important distinction is that the earlier cases were not ones in which (i) both adjoining occupiers were held to owe duties to each other; or (ii) where the conditions to be satisfied by an occupier who did not owe any duty in order to be entitled to any relief against the

neighbouring occupier were specifically dealt with.

41. As to (i), in *Holbeck Hall* [56] Stuart-Smith LJ considered what the position would be if both parties knew of the relevant defect and the potential risk on their respective lands. He described himself as far from persuaded that each would then owe a duty of care to the other and rather thought that each would have consented to the risk as regards themselves and that each would have a defence of *volenti non fit injuria*.

42. As to (ii), in *Abbahall*, where there was no defect on Abbahall's ground floor premises, Munby J characterised the applicable duty of the defendant not as a duty to repair the roof, or to pay the claimant a sum equal to the defendant's share of the cost of the work, but a duty to make the appropriate contribution to the cost of the appropriate works always assuming that the works were actually carried out [43]. The defendant was, he held, under no duty to do anything at all unless the claimant, i.e. Abbahall, was prepared either:

    i) to pay his contribution in which case the defendant was in principle either under a duty to carry out the works or to contribute her proportion of the cost of having the works carried out; or

    ii) to carry out the works in which case the defendant would in principle be under an obligation to pay the claimant the proportion of the cost appropriately to be borne by her.

I do not regard Munby J as having held that Abbahall were under any free standing duty to the defendant; rather, if they sought to enforce her duty to them they would have to carry out the works or pay their share. If, therefore, the Coopes are to be regarded as in the same position as Abbahall, i.e. not themselves under any duty, they would be able to recover contribution from the Wards if they (the Coopes) were prepared to carry out the work or contribute to its costs, but would not themselves be under an obligation to do either of these things.

43. In the present case the judge has held that both the Wards and the Coopes were under a duty to their respective neighbours. He held it to be fair, just and reasonable to impose upon each set of landowners an obligation to do what was fair just and reasonable to prevent or minimise the known risk of future collapse of the Wards' land on to the land of the Coopes.

44. That begs the question as to whether there was, after the collapse, what can properly be said to be a hazard on both properties. As to that there was, on the judge's findings, clearly a hazard on number 41 Orchard Lane, since there was a danger of the land at number 41 falling on to number 60 or number 62, to the detriment of the

occupiers of all three properties. This risk existed even if nothing was done.

45. In respect of number 62 the judge found that if the Coopes or the Wards took steps to remove from the Armstead Road property the bricks of the Armstead wall and the spoil from the Wards' land there was an obvious risk that more of the Armstead wall and of the Wards' land behind it would cascade on to the land of the Coopes.

46. It could be said that, in those circumstances, there was no *existing* hazard on number 62 Armstead Road because that risk would only arise if steps were taken to remove what had already fallen on to the land. I regard this approach as unacceptably narrow for two reasons.

47. First, even if nothing happens there is an existing risk to the Wards' land arising from the present state of the Coopes' land. The collapse of part of the Armstead wall has removed support from the Wards' land and with what remains of the wall that land is at risk of falling. Ms Brooke submits that a failure of support cannot be a relevant risk or hazard. That failure occurred when the wall collapsed, and it was only *after* that collapse that any measured duty of care was found by the judge to arise. The hazard was not the failure of the wall but the fact that the Wards' land and the Orchard wall were unstable. There is no danger, she submits, that the Armstead wall will break: it has already done so. The Wards' land will only collapse under the force of its own weight and instability (a hazard arising on the Wards' land) and not for any lack of support.

48. Attractively though this submission was presented I do not think it to be determinative. The current position is that it is the state of the Coopes' land arising from the collapse, namely that it provides insufficient support to the Ward land, which risks yet further collapse of the Ward land. In the light of *Holbeck Hall Hotel* a measured duty of care can arise where there is a lack of support provided by the defendant's land.

49. An example of a case in which the condition of the land after a collapse gave rise to a measured duty of care is to be found in *Rees v Skerett* [2001] EWCA Civ 760. In that case, when the defendant demolished his house, No 14, he became liable, in addition to liability for withdrawal of support for No 14A, to liability under the principles in *Holbeck Hall Hotel* and *Leakey* for the consequences of demolition namely that, by virtue of the fact that No 14 had been demolished, No 14A was exposed to rain which fell on the wall of No 14A and permeated through because of its unprotected state. This caused damage different in kind to that constituted by the removal of support which caused cracks through which rain penetrated. Liability was based, not on any aspect of the law of easements, but by virtue of the fact that the defendant knew or ought to have known of the risk of damage likely to result from the demolition works if not accompanied by weatherproofing and because the

damage would have been prevented by work which it would have been reasonable in all the circumstances for him to carry out.

50. In that case the demolition was carried out on behalf of the defendant on his land; but there seems to me no reason why a measured duty of care could not arise if the defendant's building had been demolished by lightning or a bomb, resulting in a condition of the land (not brought about by anything for which the defendant was responsible) which would put adjoining property at risk in the absence of preventative action. It is no bar to the imposition of a measured duty of care that the risk has arisen without the fault of the person from whose land it derives. Such a duty may involve an occupier having to deal with a hazard that has been "*thrust upon him through no fault of his own*" (per Lord Wilberforce in *Goldman*). The risk of further collapse of number 41 arising from the post collapse state of number 62 seems to me no different in kind to more tangible risks such as fire, overhanging trees, or mobile land.

51. Secondly, the bricks and spoil on number 62 ought not to be where they are and are likely to be moved some time. At the very least there is a risk that they will be. It is, I infer, only because the parties have not been able to resolve who is responsible for payment for what is necessary that nothing has happened since 2010.

52. The essence of the situation is that, after the collapse, there was, on account of the defective condition of both properties (which resulted from circumstances for which neither owner was legally responsible), a real risk that damage would be done to both of them by the Wards' land falling on that of the Coopes, even if nothing was done, as well as if steps were taken to clear up the collapse that has already occurred.

53. In those circumstances the judge was, as it seems to me entitled to find that there were measured duties of care on both sides. At the very lowest the Coopes would be obliged to allow access to their land to enable the Wards to carry out any work that might be necessary to shore up their land or protect it from further falling.

54. A more difficult question is the extent of any such duty and, in particular whether it was reasonable to require the Coopes to contribute to the cost of reconstruction involved.

The Coopes' submissions

55. The Coopes contend that the judge was wrong to impose on them any financial contribution. Nothing which they did or should have done caused the collapse of the Armstead Road wall. That wall collapsed and spoil from the Ward land came with it because the occupiers of number 41 had built up the land on their side. It was not reasonable to require the Coopes, who were the victims of the collapse, to pay the

cost of clearing it up, although they might have had a duty to warn of the need to do so, if it was not obvious (as it was), and to allow access to their land for the necessary works. Such hazard as there was on the land after the collapse was the result of the overloading from the land of their neighbour for which they were not responsible. They were in a different position to that of a farmer or landowner with a fire or a defective grating on his land, or a landowner the instability of whose land was, prior to its collapse, a threat to his neighbours, or one who has demolished a building.

56. In *Leakey* Shaw LJ described the underlying theory as being "*the correlation of control and responsibility. As the owner of the land is normally in the best position to obviate or to contain or to reduce the effect of nuisance arising on his land, he should be primarily responsible for avoiding the consequences of such nuisance or compensating those who suffer by their occurring*". Here, on the judge's findings, the Coopes had no control over events that led to the collapse. 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.

Subsidiary arguments

57. The Coopes contend that the Wards or their predecessors had the right, when they enjoyed an easement of support to enter onto the Coopes' land to carry out any work of maintenance or repair on their land and that any such right survived the extinguishment of the right of support. Alternatively the Wards had a right of access pursuant to the *Access to Neighbouring Land Act 1992* section 1.

58. As to the former it does not seem to me that a right of access appurtenant to an easement of support continues if the easement is extinguished. At the same time if the Coopes owed a measured duty of care to the Wards it seems to me that the Court could order the Coopes to give them access to their land (as happened in *Abbahall*). This approach could involve buttressing or other work being carried out on the Coopes' land.

59. As to the latter the Act provides that someone who wants to carry out works on the dominant land (e.g. that of the Wards) and for that purpose desires to enter upon any adjoining or adjacent land (the servient land) e.g. that of the Coopes, may apply for an access order. This approach would involve the work being carried out on the Ward's land.

60. Alternatively it is said that the Wards could have reconstructed the land at the end of their own garden and rebuilt the Orchard wall with proper foundations set in the

ground or by constructing a tiered or terraced solution.

61. As to these subsidiary arguments, the fact that the Wards could, before the collapse, have carried out work which would have prevented it did not however mean that they were obliged to do so and the judge has found that they were not at fault.

62. Before I address this question further it is convenient to consider how the judge approached the question of apportionment.

Apportionment

63. After dealing with the question of liability the judge turned to the question of apportionment, observing at this stage in his judgment that he had not had the benefit of full argument on how the burden of funding an engineering or other solution to the problem should be shared. He invited further submissions.

64. The absence of such submissions in advance may well reflect the fact that the Wards' pleaded case, relying on an easement of support, which the judge has held they did not enjoy, was that it was for the Coopes to rebuild the Armstead wall as a supporting wall and to pay damages for the cost of remedial work to the Orchard wall (which has not collapsed although it has been damaged): (see (3) and (4) of the prayer. In his closing submissions counsel for the Wards, who was not Ms Stevens-Hoare, limited their claim to a contribution from the Coopes. The Coopes contend that they should have been given earlier notice of this way of putting the case, that there should have been amendment to the pleadings, and that they should have been given time to consider their position.

65. As to that, it seems to me that the Wards were in principle entitled to pursue their claim to damages (based on the measured duty of care that had always been pleaded: see para 16 of the Particulars of Claim) on a more limited basis than their original claim. If the Coopes regarded themselves as put at an unacceptable disadvantage because of this limitation they should have sought an adjournment. They did not do so, but submitted that their liability should be limited to about 10% of the cost of an appropriate wall or engineering solution.

66. However, this state of affairs produced the unsatisfactory result that there was before the judge no clear proposed solution to the problem of the collapse. The question was touched on in the report of Mr Gooud for the Wards of 28 October 2010. He considered three options:

i) propping of the Orchard Wall off land belonging to numbers 60 and 62, which would involve vertical timber bearers to be taken down to the

ground of the gardens;

ii) demolition of the Orchard Wall and fence, and of the land behind it and, once the wall had been removed down to its foundation the battering back of the ground at an angle of approximately 30° back to the garden;

iii) allowing the Orchard wall to collapse into the rear of numbers 60 and 62.

He did not recommend (i) without more thought because propping could itself generate collapse. Nor did he recommend (iii).

67. In a report of 25 June 2012 Mr Evans for the Coopes gave three "*broad recommendations at this stage*":

a) building a new wall along the line of the original wall of reinforced concrete or reinforced masonry;

b) the provision of a proprietary retaining wall system making use of interlocking concrete or timber elements which contained loose stone fillings;

c) adjusting the levels of the grounds on the two sides of the wall to create a stepped terrace between the properties.

68. After further submissions, the judge decided (i) that it would not be fair to impose equal burdens on both parties; and (ii) that the Coopes should not be obliged to contribute beyond the cost of providing a wall to retain four feet of land. That seemed to him fair, just and reasonable since the balance of the height of any retaining wall was a benefit which was far more to the advantage of the Wards such that they should pay for that balance or for any alternative solution such as ramping. So, as he held, the potential liability of the Coopes was limited to paying a rateable proportion of the cost of a suitable engineering solution having regard to the proportion of the retaining wall benefiting the Wards' land that shared a boundary with number 62. He then indicated that further matters such as on whose land would a new wall be built and whether it would be a party wall might have to be put over for further argument and indicated that he would hear counsel further. What exactly happened immediately thereafter is unclear.

69. In the event the judge prepared a working draft of his proposed order which was

circulated to the parties. On 14 December 2013, after considering a short written response to it in a letter from the Coopes' solicitors of 5 November 2013, the judge made an order in the terms of his draft. It declared, *inter alia*, that the Wards and the Coopes owed to each other a measured duty of care in respect of the consequences attendant upon the collapse of the boundary wall and that:

> "*3….in respect of any engineering or other solution which may be devised to deal with the consequences attendant upon the collapse of the Boundary wall, the contribution of the Coopes shall be a rateable proportion of the cost of such solution by reference to the length of that part of the collapsed Boundary Wall which is contiguous with the properties at 41 Orchard Lane and 62 Armstead Road and in any event such contribution shall not exceed the cost of providing a wall capable of retaining land to a depth of four feet along the length of that part of the collapsed wall which is contiguous with the properties at 41 Orchard Lane and 62 Armstead Road.*"

The order gave liberty to apply for further or other relief arising out of the judgment, in particular the method of calculating the rateable proportion referred to in paragraph 3 of the order.

70. The exact meaning of the words used in the order is not transparently clear. But I take it to mean (as, I understand, do the parties) that the Coopes were to pay the proportion that (i) the length of their garden contiguous to number 41 bore to (ii) the total of (a) that length and (b) the length of the garden of number 60 (all of which was contiguous to number 41), divided by 2. If, therefore, (i) was one third of (ii) the proportion of the cost of the engineering solution which the Coopes would have to bear was 1/6th. The order as drafted does not refer in terms to the need to divide by 2 but, unless that is done, the Wards do not, under the first part of the order (before the cap) end up paying any part of the cost. This cannot have been intended.

71. The Coopes' contribution is then subject to the limit of the cost of providing a wall capable of retaining land to a depth of four feet. The judge had before him figures from the experts which estimated the cost of such a wall calculated on the basis that the method of wall construction was "traditional" at £ 5,000 + VAT. The judge recorded that, beyond a retaining capability of five feet of soil what would be required was a much more expensive reinforced wall.

72. The Coopes submit that the judge's order is in terms which are difficult to interpret and unsatisfactory because (a) the order does not define what is meant by "*the consequences attendant upon the collapse of the Armstead wall*", which they say simply means the destruction of the Armstead wall and the Coopes' shed (in fact it must refer to the entire situation resulting from the collapse including the removal of support and the risk of further collapse); (b) the reference to "*such engineering or other solution which may be devised to deal with the consequences attendant upon*

the collapse of the Armstead wall" left open whether the solution might involve a wall, terracing or other solution, and on whose land, or whether it was to be on a combination of both, without which it was impossible to say what it might be reasonable to require; (c) there is no justification for their having to pay a proportion of costs up to 4 feet when any right of support in respect of that 4 feet had been lost by subsequent building. Further the order appears to acknowledge that the problem may not be solved by the construction of a wall given the large difference between the land at number 41 and number 62. Lastly the settlement with the Stanilands means that it is unclear whether they will be involved in any work of reconstruction of a supporting wall, whether on their land or that of the Wards. If they are not to be involved it is entirely unclear whether any engineering solution could be achieved if it related just to the boundary between number 41 and number 62.

73. That the appellants should now be making these submissions is, itself, somewhat unsatisfactory. The judge drew attention at the end of his judgment to the complicating factor of the Stanilands; to the fact that he had not considered the possible implications that might arise from possible engineering situations; and that such matters might have to be put over for further argument. No further submissions appear to have been made to him by either party about these matters or about the form of order which the Coopes now criticise: their solicitors' letter of 5 November 2013 only addressed very minor points of detail. Further the submission they made that, if the court was against them on liability, they should not have to pay more than about 10% of the cost of an appropriate wall or engineering solution is very close to the 15% figure produced by the judge's calculation which is itself subject to the cap.

74. Whether the cap would in fact reduce the amount is unclear. Although we have had no evidence on the issue we were told after the hearing that there were quotes for the rebuilding of the Armstead wall between £ 30 - 40,000, 15% of which is between £ 4,500 and £ 6,000. The figure given to the judge for a 4 foot retaining wall was £ 5,000 to which VAT was to be added.

Conclusion

75. In my judgment, it was not just and reasonable to impose on the Coopes a liability to contribute to the cost of some as yet unspecified engineering solution. I have reached that conclusion for a number of reasons.

76. First and foremost the cause of the collapse was the overloading of number 41 Orchard Road over the years with earth which, as we now know, was highly likely to lead in the end to this result. *Prima facie* it does not seem to me reasonable to require the Coopes to pay for what was neither their fault nor within their control when what happened was caused by the use of number 41 Orchard Road by those who built up the land there so as to become nearly double the height of The Herbs. Whilst the Wards were not personally at fault, responsibility for the collapse lay on their side of

the fence and arose from the additions of earth made by the occupiers to their land.

77. I recognise that in *Abbahall* the costs were ordered to be shared in equal shares although the roof that was the source of the trouble was owned by the defendant. But that was a case where the parties were living under the same roof which served equally to protect the premises of both of them. In the present case the parties live apart and the Coopes derive no benefit comparable to the roof from the accumulated land next door. Munby J took pains to say that he was saying nothing about different topographical circumstances [39] and that other solutions might be appropriate where the properties in dispute were arranged side by side [77].

78. Second, it seems to me unreasonable to require a contribution to a "solution" which is entirely unspecified. Because the Wards' claim was for the whole cost of replacing the Armstead Wall and repairing the Orchard Wall there is no clarity as to what solution will or can in fact be put into effect. Any solution may involve (a) rebuilding the Armstead Wall on the Coopes' land; (b) strengthening the Orchard Wall on the Wards' land, with or without support on the Coopes' land; (c) creating a new party wall; or (d) cutting back the garden at number 41. Which of these may be chosen may, itself, depend on whatever has been or will be agreed with the Stanilands, which is unknown.

79. Whilst I sympathise with the difficulties facing the learned judge, and understand why he sought to cut through the matter in the way that he did, it does not seem to me acceptable for the Wards to claim (at the very end of the hearing) a contribution to a solution without identifying with some specificity what solution they proposed, in particular because the reasonableness of requiring any contribution could depend on what the solution was to be. One very likely solution is that the rebuilding will take place entirely on the Wards' land, not least because prior to the hearing the Wards offered to settle the case and bear "*the full cost of rebuilding the wall on their land*". It would not seem to me to be reasonable for the Coopes to have to contribute to the construction of a wall which was entirely on the Wards' land and from which they would derive no benefit other than the removal of the risk of a further collapse because the burden of the Wards' land which had caused the first collapse was reduced. In addition, if a solution which only involves work on the Wards' land is possible it does not seem to me reasonable to adopt a different solution which involves use of the land of the Coopes. It may be that the implications of possible solutions would give rise to further considerations, as the judge recognised.

80. Third, the judge thought that a fair, reasonable and just result was reached by reason of the limitation on what was required of the Coopes to "*the cost of providing a wall capable of retaining land to a depth of four feet along the length of that part of the collapsed wall which is contiguous with the properties at 41 Orchard Lane and 62 Armstead Road.*" There are, as it seems to me, a number of difficulties with this.

81. As to that, first, the cap may bear no relationship to the work that is carried out. If the solution involves work wholly on the Wards' land, the cost of the provision of a wall along the length of the collapsed Armstead wall capable of retaining land to a depth of four feet is something of an irrelevancy.

82. Second, it is not apparent to me that the Armstead wall which was retaining land that was 7 feet in depth is in its present condition in fact incapable of retaining land to a depth of 4 feet. In that case a payment representing the cost of such a wall would seem superfluous.

83. Third, the judge chose this limitation on the footing that 4 feet was the depth of the earth on the Orchard Lane side when number 41 was built. But that was over 30 years ago. Things have moved on. Any easement of support in respect of 4 foot of earth has, on the judge's findings, been extinguished, albeit that, in the context of a duty of care, that circumstance is not conclusive.

84. That does not mean that the Coopes can have no obligations on account of a measured duty of care towards the Wards. It may, for instance, as I have indicated, 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.

85. I would, accordingly, allow the appeal and set aside paragraphs 2 – 5 of the judge's order. The fact that paragraph 2 is to be set aside should not, however, be taken as a decision that there are no obligations which the Coopes may owe to the Wards as part of a measured duty of care (see the previous paragraph). It is, however, inappropriate to make a declaration of any such duty in the abstract and in the absence of any established breach.

Costs

86. The judge gave judgment on 17 July 2013 in respect of the costs, each side having claimed that they were entitled to their costs from the other. No transcript of that judgment was provided to us at the appeal hearing but a satisfactory note provided by both trial counsel was provided on 11 November 2014. The order which the judge made was that the Coopes should pay the Wards 50% of their costs.

87. The judge recorded the fact that in July 2012 the Wards had offered to settle the dispute on the basis that the parties made equal contributions to the cost of the necessary works. Then, by a letter dated 16 November 2012, written without prejudice save as to costs, the Wards offered to pay "*the full cost of rebuilding the wall on their land upon agreement that your clients will remove the shed/rubble and allow our clients and their instructed contractors all necessary access in order to*

carry out such works. In addition each party is to bear their own legal fees". The judge rejected the suggestion that that was an offer only to reconstruct the wall originally built on the Wards' land "*i.e. a wall situated 1.7m above Armstead Road*" viz the Orchard Wall. (This is the height above the ground level at number 62 at which the Orchard Wall begins). He treated the offer as an offer to build a retaining wall between the properties.

88. If my Lord and my Lady agree that this appeal should be allowed the judge's order as to costs cannot stand. It will not then be necessary to determine whether, if his decision on the merits stood, the costs order that he made was appropriate.

89. The judge's order does not deal with the counterclaim, in relation to which, although the judge is said by the Coopes to be in error, there is no cross appeal. No one seems to have drawn attention to this; or addressed argument on the question of the costs relating to it. I would formally dismiss the counterclaim and invite submissions in writing in relation to the costs here and below.

Lord Justice Bean

90. I agree.

Lady Justice Arden

91. I also agree.

Annex A