his carefully reasoned judgment may give the Commission food for thought as it prepares its Report.

C.A. HOPKINS

A CONTINUED NUISANCE

IT is well established that in the tort of private nuisance an occupier of land is liable not only for those nuisances which he has created, but also for those which he has continued. An occupier continues a nuisance which exists on his land if, with actual or constructive knowledge of its existence, he fails to take reasonable steps to eliminate it. Two recent decisions, in the rather different contexts of root encroachment by a London plane tree and flooding from a sewer, have provided guidance on the legal consequences of continuing a nuisance.

In *Delaware Mansions Ltd. and another* v. *Westminster City Council* [2001] UKHL 55, [2002] 1 A.C. 321, the roots of a plane tree had encroached underneath blocks of flats in Maida Vale, desiccating the soil, and causing substantial structural damage. The defendant Council was the owner of the tree, and as highways authority was responsible for it. The trial judge found that the encroachment was reasonably foreseeable, that the Council had failed to take reasonable steps to abate it, and that in principle there was an actionable nuisance. However, a complication arose from the fact that the claimant did not become owner of the flats until after the damage had occurred. The structural damage took place not later than March 1990, at which time the reversionary interest in the blocks of flats was owned by the Church Commissioners (the individual flats having been let on long leases). The claimant, Flecksun Ltd., did not become owner of the freehold reversion until June 1990. (Flecksun was a wholly-owned subsidiary of the leaseholders' management company, Delaware Mansions Ltd. Delaware's own claim against the Council was dismissed at first instance on the ground that Delaware had no interest in the land and so, following *Hunter* v. *Canary Wharf Ltd.* [1997] A.C. 655, could not sue in nuisance. There was no appeal against this finding, and Delaware played no further part in the proceedings.)

In 1992 Flecksun undertook remedial work at a total cost in excess of £500,000. It sought to recover this expenditure from the Council as damages for nuisance. The trial judge dismissed the claim on the basis that the remedial expenditure was in respect of damage which had occurred before Flecksun became owner of the

property, and for which only the Church Commissioners could sue. Flecksun had no claim, unless it could point to fresh damage arising after it became owner.

The Court of Appeal and the House of Lords disagreed. The reasoning of their Lordships is contained in a single speech, that of Lord Cooke of Thorndon. In Lord Cooke's view, the question whether an owner should be able to recover remedial expenditure in respect of pre-transfer damage was to be answered by reference to the concepts of "reasonableness between neighbours (real or figurative)" and "reasonable foreseeability" which underpin so much of the modern law of torts. He emphasised the continuing nature of the nuisance, and focused on the damage that the roots were doing to the subsoil rather than the structural damage (which was merely consequential). Even though no cracking occurred during Flecksun's ownership, there was nevertheless a continuing nuisance and continuing damage, namely the dehydration of the soil and the impairment of its load-bearing qualities.

On the evidence, it is unclear whether the extent of this impairment became any worse after Flecksun acquired ownership, and it may be that Lord Cooke thought that there could be a continuing nuisance even though Flecksun could not point to any fresh impairment. Yet even if there was fresh damage, it is clear that the remedial expenditure was necessitated solely by damage which Flecksun had not suffered and which had already occurred when it became owner. Lord Cooke gave this objection short shrift: where there is a continuing nuisance, reasonable remedial expenditure may be recovered by the owner who has had to incur it, notwithstanding that there may be elements of hitherto unsatisfied pre-proprietorship damage or of protection for the future.

It is likely that (as Pill L.J. opined in the Court of Appeal) the facts of *Delaware* are unusual, since when the reversion was sold the purchase price was not reduced to reflect the continuing nuisance; and Lord Cooke was careful to emphasise that consequently there was no risk of double recovery. If the price had been reduced, then it seems that any remedial expenditure recovered would have had to be apportioned between vendor and purchaser. But if the previous owner had obtained judgment against the Council for the diminution in the value of its reversion, that damage would be *res judicata* and the principle of merger in judgment would presumably preclude the new owner (who, as successor in title, would be privy to the *res judicata*) from recovering remedial expenses, save insofar as they were necessitated by fresh damage.

Lord Cooke was anxious to avoid imposing an unreasonable burden on the defendant. Explaining that his concern was to work out "the fair and just content and incidents of a neighbour's duty", he held that no liability for remedial expenses could arise unless and until the claimant gave the defendant notice of the alleged nuisance and a reasonable opportunity of abatement. This novel proposition (for which Lord Cooke found slender support in Australasian and US jurisprudence) goes not to the claimant's duty to mitigate his loss, but to the prerequisites of liability for remedial expenditure. It is to be hoped that future cases will give greater guidance as to precisely what steps are required of a claimant.

In *Marcic* v. *Thames Water Utilities Ltd.* [2002] EWCA Civ 65, [2002] 2 W.L.R. 932, the defendant was responsible for providing sewers in the area in which the claimant's house was situated. When constructed, the sewers were sufficient to meet the foreseeable needs of the area; but owing to increased use they had become inadequate, and had on numerous occasions backed up and caused flooding in Mr. Marcic's garden and damage to the foundations of his house. Thames Water could have prevented the flooding by carrying out major surface drainage works, but it failed to do so. Mr. Marcic sought damages, both in the tort of nuisance and under the Human Rights Act 1998.

The trial judge dismissed Mr. Marcic's claim in nuisance, relying on *Glossop* v. *Heston and Isleworth Local Board* (1879) 12 Ch.D. 102 and subsequent authorities which suggested that a statutory sewerage undertaker could not be liable for failing to provide an effectual system of drainage. The Court of Appeal disagreed and could not accept that the defendant enjoyed non-feasance immunity. The *Glossop* line of authority had been overtaken by developments in the tort of nuisance, in particular by the recognition in *Goldman* v. *Hargrave* [1967] 1 A.C. 645 and *Leakey* v. *National Trust* [1980] Q.B. 485 that a landowner could be liable for continuing a nuisance which had arisen naturally on the land. The defendant owned and was in control of the sewers; it knew, or ought to have known, of the risks; accordingly, it was under a duty to take reasonable steps to prevent the flooding.

In concluding that Thames Water was in breach of this duty, the Court of Appeal (following the well-known approach of Lord Wilberforce in *Goldman* v. *Hargrave*) emphasised that the reasonableness of its conduct was to be judged not objectively, but in the light of its individual circumstances (in particular, it was a "massive corporation" and could exercise its statutory powers of compulsory purchase of land in order to carry out drainage projects). *Marcic* thus makes it clear that subjective factors can be

used not only to reduce, but also to extend, the standard of care that applies to a continuing nuisance. The Court of Appeal ultimately applied the maxim *res ipsa loquitur* and held that once a claimant proved that a nuisance had emanated from land in the defendant's possession or control, the onus shifted to the defendant to show that it had taken all reasonable steps to prevent the nuisance (*cp. Sedleigh-Denfield* v. *O'Callaghan* [1940] A.C. 880 at 887, 899, 908 and *Goldman* v. *Hargrave* at 663: the claimant must prove negligence). It may be doubted whether this was an appropriate case for the application of *res ipsa loquitur*: it is difficult to see why the fact that an emanation has occurred should without more raise an inference of negligence.

In the light of its conclusions on the tort of nuisance, it was unnecessary for the Court of Appeal to examine Mr. Marcic's alternative claim under the Human Rights Act for breach of his rights to respect for his home (ECHR, Art. 8(1)) and to peaceful enjoyment of his possessions (First Protocol, Art. 1). Nevertheless, the Court went out of its way to approve the reasoning of the trial judge. Mr. Marcic's rights had been infringed, and—even allowing a wide margin of appreciation—Thames Water had failed to prove that the interference was justified in the public interest.

Of particular note is the concluding section of the Court of Appeal's judgment, which suggests very strongly that (at least in relation to claims against public bodies that carry out undertakings in the interest of the whole community) fault-based liability for continuing a nuisance is inconsistent with the requirements of the ECHR. The Court was uneasy about the fact that Mr. Marcic would have had no claim if Thames Water had not been at fault, and suggested that in order to strike a fair balance between the individual and the general community there should be strict liability. Noting that this result could be achieved if the principle in *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330 were extended to sewage, but that as the law currently stands the requirement of non-natural user would preclude this, the Court of Appeal hinted that common law principles may be in need of modification.

Marcic is a salutary reminder that the impact of the ECHR on the tort of nuisance must not be underestimated. Further, it provides ammunition for lawyers seeking to argue that the rule in *Rylands* v. *Fletcher* should be released from the shackles of its past.

BENJAMIN PARKER