

1 Q I want to ask you specifically though just to look at p.177, this is the joint  
2 experts' statement. A. Yes.

3  
4 Q Paragraph 22. A. I have it, yes.

5  
6 Q It says:

7  
8 "Dr. O'Callaghan is of the opinion that the fungal bracket is unlikely to  
9 have been detected even by a competent inspector as it was located  
10 underside of the stem that failed..."

11  
12 A. That is correct.

13  
14 Q "... and it was only visible to him", i.e. to you? A. Yes.

15  
16 Q "... because the stem had failed and been exposed"? A. That is correct.

17  
18 Q That was your judgment having been there while the bracket was still there but  
19 the stem was not, the failed stem was not. I want you just to, if it helps with  
20 the aid of either the sketch at p.161 -- I think the most useful photographs in  
21 your series are between 126 and 135. If it helps you to remove the sketch, you  
22 may do so. A. Yes.

23  
24 Q I just want you, in simple terms, to explain from your point of view, having  
25 been there and using your own assessment, why you say that it is unlikely to  
26 have been detected even by a competent person, i.e. a level 2 inspector.  
27 A. When I went on site, I had been provided in advance with these  
28 photographs which were more contemporaneous than mine. They were taken  
29 by somebody else.

30  
31 Q Can I just pause? I am sorry, I was going to let you go but just to make sure  
32 for the record we know which. This is at pp.126 and 127? A. Correct, yes.

33  
34 Q Appendix 3-1? A. Yes, appendix 3-1 photographs.

35  
36 Q Those three photographs? A. Yes. They were provided to me with my  
37 instructions. They were taken by another person. I then went to site and  
38 undertook my own assessment. I noted -- I would say that I had looked at  
39 these briefly. I had not looked at them in detail before I did my site survey.  
40 I went on site, made the examination of the tree and the failed stem, and  
41 I noticed the fungal bracket, which is shown at -- well, it is shown in a number  
42 of photographs, but I think the one where I point it out is the photograph at  
43 132, which is this one.

- 1  
2 Q Yes, there we have got one of the photographs that you took during your  
3 visit --- A. These are the ones that I took, yes.  
4  
5 Q -- in January 2003. A. I recognised this as a fungal fruiting body and I think  
6 -- I know I said in my report I confess that I did not recognise it as to what  
7 particular fungus it was.  
8  
9 Q I do not think that matters, does it? A. No.  
10  
11 Q Because if you find any fungus --- A. It is... I was about to say that point.  
12 So I sent it away to Forestry Research for identification, having first made an  
13 attempt using my own library to identify it, and I will pleased to say that I  
14 came to the same conclusion as Mr. Rose at Forest Research. I then went to  
15 look back at the photographs I had been supplied with, which are the  
16 photographs on p.127, and satisfied myself that the fungal bracket here, which  
17 is older and more weathered, was in fact the same fungal bracket as shown in  
18 the top photograph on p.127.  
19  
20 I then looked at the tree and the orientation of the tree. Two things stand out  
21 about the tree. First and foremost, it is a tree grown on the edge of a bank and  
22 in my opinion, and I think Mr. Barrell agrees with me, it had been previously  
23 coppiced or layered in the past and we have the resultant re-growth.  
24  
25 Ash, particularly grown on banks, do form a curved -- they sort of curve over  
26 the bank. It is not unusual. In fact they are grown commercially that way in  
27 Ireland for the production of ash to make hurling sticks because they grow in a  
28 particular way. Looking at the orientation of the failed stem and the size of the  
29 fungal bracket, I concluded that the only way the fungal bracket -- or the only  
30 position the fungal bracket would have been, would have been beneath the  
31 tree, and I attempted to represent that in the sketch at p.161. That was my best  
32 attempt at how the tree would have looked before the failure. Because the tree  
33 is on the edge of the bank and the failed branch curved down over it,  
34 I concluded, and I still hold to this view, that the fungal bracket would have  
35 been underneath the base of the stem that failed and the remaining stem as  
36 shown on the sketch. It would be in here. I believe from what I have seen and  
37 the scarring it was attached to the wood at that point and was starting to grow  
38 down and out, but the size of the fungus and the size of the branch led me to  
39 the conclusion that it would ---  
40  
41 Q I am going to stop a minute so that we can understand where you say it is  
42 attached. You are holding the sketch, I think, and neither I nor Mr. Stead  
43 could see, either with that or the photographs. Where do you say it is

1 attached? A. I think it is attached at the base of the -- jointly between the  
2 stem that has subsequently failed and the stem that failed and caused the  
3 accident. It was joined somewhere there, but the fruiting body itself would  
4 have spread out down and outwards but underneath the curvature of the stem  
5 that failed.

6  
7 Q Very well. If I have understood it correctly, no substantial difference between  
8 your assumptions and Mr. Barrell's. It is attached, as it were, at the back, at  
9 the bank end? A. Yes.

10  
11 Q As it were, nearer the bank, coming out away from the bank but coming out, as  
12 it were, flush with and just under the stem? A. Yes, just under the forward  
13 stem.

14  
15 JUDGE MACDUFF: And it has not shifted? If I look at p.132, that was the  
16 position it was in when you took this photograph? A. Yes.

17  
18 Q In July 2003, and that was the position it was in immediately after the fall?  
19 A. Yes.

20  
21 Q And it was the position it was in immediately before the fall? A. Well, it  
22 would have been -- again, going back to the last question you asked  
23 Mr. Barrell, if you could put the stems back on, it would have been attached,  
24 you know -- and I think when the stem came forward, it snapped the bracket  
25 off and it landed where it landed. That is my impression.

26  
27 MR. MOTT: As the stem falls, it pushes the fungus downwards --- A. It was  
28 separated and pulled the bracket.

29  
30 JUDGE MACDUFF: And you took it away --- A. Yes.

31  
32 Q -- after July, 11<sup>th</sup> July. A. Yes. No, I took it on the date of my survey,  
33 which was January 2003.

34  
35 MR. MOTT: 8<sup>th</sup> January 2003. A. 2003. I took it and sent it to Forest Research  
36 for identification.

37  
38 JUDGE MACDUFF: What date was 132 taken? Because you have put 11<sup>th</sup> July  
39 2003 as the accident, which is wrong. A. Sorry.

40  
41 MR. MOTT: The bottom right, it is 08/01/2003.

42  
43 JUDGE MACDUFF: Thank you. It is the accident ---

1  
2 MR. MOTT: The accident, it says 03, does it not?

3  
4 JUDGE MACDUFF: It says July 2003.

5  
6 MR. MOTT: In fact it was July 2001.

7  
8 JUDGE MACDUFF: That is what threw me, I am afraid.

9  
10 MR. MOTT: Yes. A. However, my Lord, to answer your question, I removed  
11 the fungus from site on 8<sup>th</sup> January 2003 and sent it to Mr. Rose at Forest  
12 Research, and his diagnostic report appears on p.137.

13  
14 JUDGE MACDUFF: Thank you.

15  
16 MR. MOTT: So that is your, as it were, reconstruction --- A. Yes.

17  
18 Q -- of what you saw. Why is it that you say the competent inspector would not  
19 have seen, probably not have seen that fruiting bracket? A. Well, if we take  
20 the process that Mr. Barrell has describing, one is doing a survey, one notices a  
21 multiple-stem tree and one goes to have a closer look at that tree, as one is  
22 bound to do. If the fungus is attached in the normal way, as Mr. Barrell has  
23 described, from the wound in the side of the tree, it will be growing out of the  
24 side of the tree. But it just so happens in this instance it was growing from a  
25 wound that was under the tree and there was space between the base of the tree  
26 and the base of the ditch, and it was growing at that point. It would in time,  
27 I suspect, have grown out from underneath there because it increases very  
28 rapidly in size, as Mr. Barrell explained.

29  
30 So having looked at it, the question then is: what assessment would one have  
31 come to apropos the included bark union on its own? And we are agreed that  
32 would have been a medium risk tree. Had the fungal bracket been seen -- and  
33 we worked out that the risk goes from low to high, and the answers to the  
34 question show that. But I feel that because of the size of the bracket and the  
35 location of the bracket and the fact that there were no visible symptoms of  
36 crown die back in the tree prior to the accident which would have made you  
37 look that much closer, if you look at the crown of the tree and there is die  
38 back, and then you look at the base of the tree and you cannot see anything  
39 appreciable, then you will dig around a lot more to try and find something.  
40 But taking it on the value that the photographs show, there is a photograph --  
41 on p.135 there are photographs that were taken in 2002. The crown of the tree,  
42 which is here, is typical, as I would expect an ash to be, so there is nothing  
43 untoward there that would have brought my attention closer down to cause me

1 to look around more carefully at the base. I would have made an assessment  
2 on the included union only or, shall we say, a competent inspector would have  
3 made a decision on the included union only. The second point is the bracket  
4 is, as decayed fungi go, a relatively small bracket. Thirdly, it is comparatively  
5 rare. But the key point here is that no symptoms in the crown to make me  
6 poke around in more detail at the base. I would suspect that I would have  
7 focused solely on the included union as the issue to address.

8  
9 Q I think it was my Lord who asked about getting down on hands and knees.  
10 Would you have expected a level 2 inspector, given what could be seen of the  
11 multi-stems and included bark union and the state of the ground, to have got  
12 down on hands and knees? A. If there had been symptoms in the crown,  
13 then I would have expected somebody to - pardon the expression - poke  
14 around a lot more, down on hands and knees to see what one could find. But  
15 in the absence of crown symptoms, the focus of attention would have been  
16 simply on the multiple-stem configuration of the tree and whether that in itself  
17 caused a hazard.

18  
19 Q So you have got a healthy crown, an included union, no sign of any fungus  
20 around that union and the fault line there - the wounding, I think Mr. Barrell  
21 called it. A. Well, to understand it, basically what happens is the stems  
22 grow together in such a way that there is bark inside the join and that will  
23 always be in motion because it is not what one would call a more solid union  
24 where the wood of both stems has anastomosed to the point where you have a  
25 strong union.

26  
27 Q And having heard what Mr. Barrell has said, have you changed your view at all  
28 about whether the competent inspector should have seen the fungus? A. No,  
29 I have not. I still hold to my view that, given the conditions prevailing, that  
30 there were no crown symptoms, the only focus would have been on the  
31 included union, and I also hold to my view that because of the size and  
32 location of the bracket it was very unlikely that it would have been seen.

33  
34 Q Very unlikely? A. Very unlikely.

35  
36 Q When you met Mr. Barrell to produce the joint statement on 16<sup>th</sup> March 2005,  
37 last year, you were dealing with the issues that are set out in writing in para.22  
38 on p.177. A. Yes.

39  
40 Q Did you make your view clear to him? A. I made my view clear to him and  
41 in fact at para.10 we agreed that "the sketch illustration of the subject tree prior  
42 to the failure at 7.1 of Appendix 7 of Dr. O'Callaghan's report is agreed". That



1 sketch is the sketch at p.16 -- I have a bad memory for numbers. The sketch  
2 I was just referring to. The sketch at p.161 --

3  
4 Q You will have to keep your voice up a little, I am afraid. A. I am sorry.  
5 Para.10 of the agreed statement refers to the sketch at 7.1, and that sketch is at  
6 p.161 of the bundle.

7  
8 Q But the conclusion as to whether the competent inspector, whether because of  
9 the layout or because of what he or she did, whether the competent inspector  
10 would have been expected to detect the bracket. What did you understand  
11 Mr. Barrell to be saying at that time?

12  
13 MR. STEAD: With respect to my learned friend, the content of the meeting is  
14 without prejudice between the experts. The product of the meeting we know  
15 about in the form of the statement and that, with respect, is as far as my  
16 learned friend really can take it.

17  
18 MR. MOTT: Well, it is interpreting words. Of course your Lordship can do it but  
19 this is not the discussions leading up to it but the conclusion that I am asking  
20 about.

21  
22 JUDGE MACDUFF: Well, ask about the conclusion.

23  
24 MR. MOTT: (To the witness): I do not want the details of your discussions, but  
25 the conclusion of it, the concluded positions and the differences between  
26 you --- A. Well, my position is set out clearly in the first part of para.22 of  
27 what I understood Mr. Barrell to say ---

28  
29 JUDGE MACDUFF: Well, it is there, it is in writing. You can make your  
30 submissions about it.

31  
32 MR. MOTT: All right.

33  
34 JUDGE MACDUFF: It is in English and I can ---

35  
36 MR. MOTT: All right. I will leave it, and my learned friend can investigate if he  
37 wants. Thank you very much.

38  
39 Cross-examined by Mr. STEAD

40  
41 Q Mr. O'Callaghan, my understanding of your position is you see the tree, you  
42 see it is multi-stemmed? A. Correct.

- 1 Q So you go through the undergrowth? A. Yes.
- 2
- 3 Q You find the included bark union? A. Yes.
- 4
- 5 Q That is what you would expect a level 2 inspector to do? A. Minimum, yes.
- 6
- 7 Q A minimum? A. Yes. You investigate a multi-stem tree and you see what it
- 8 tells you.
- 9
- 10 Q And an included bark union, you will agree with Mr. Barrell, is a common
- 11 problem on multi-stemmed trees? A. Yes, it is a very common, not
- 12 physiological, structural problem you find with trees.
- 13
- 14 Q And indeed, the nature of the structural problem means that inevitably that join
- 15 is going to fail at some point? A. At some stage they almost inevitably fail.
- 16
- 17 Q You go, you find the included bark union. We have looked at the crown of the
- 18 tree which is perfectly healthy for that type of tree? A. Yes.
- 19
- 20 Q And that concludes your inspection, does it? A. No. One looks at the
- 21 included union, one looks all round the base of the tree and obviously takes
- 22 into context the position of the tree in relation to prevailing winds and many
- 23 other factors, and then one makes a conclusion.
- 24
- 25 Q So one does look all around the base of the tree? A. Oh, absolutely.
- 26
- 27 Q The base of the tree being particularly important because that is very often
- 28 where fungal growths are to be found? A. Yes. Depending on the fungus
- 29 you will find them either growing on the root plate or growing on what we call
- 30 the root collar, which is a point where the stem emanates from -- where the
- 31 roots and the stem join.
- 32
- 33 Q So the point at where the tree comes out of the earth ---- A. Yes, that is the
- 34 root collar point.
- 35
- 36 Q -- is a point that is always going to be subject to inspection? A. Yes.
- 37
- 38 Q Indeed, if the surface of the earth disappears beneath an overhang of the tree --
- 39 you understand? A. What you are saying is if the tree overhangs ground?
- 40
- 41 Q Let me try and explain what I am suggesting to you. You have got the earth
- 42 goes under an overhang. So you have a void effectively between the earth and
- 43 the bottom of an overhanging stem of the tree? A. Yes.

- 1  
2 Q You follow? A. Yes. What you are saying is the tree is like this and the  
3 ground slopes below it.  
4  
5 Q And you will follow the earth into that void to try and see whether or not there  
6 is any fungal growth, will you not? A. Sometimes. It depends very much  
7 on whether there are signs there to make you look closer but generally you  
8 have a close inspection round the base of the tree.  
9  
10 Q Well, it is not dependent, I suggest to you, on whether or not there is any die  
11 back or any failure in the condition of the crown of the tree. You have  
12 accepted that you would look at the junction between the soil and the tree  
13 where the tree emanates from the soil and in checking that, I would suggest to  
14 you, inevitably you would follow the ground into that void beneath the  
15 overhang of the tree, would you not? A. Insofar as you can, yes.  
16  
17 Q And if that involved bending down or going on your hands and knees, you  
18 would do that? A. Like Mr. Barrell, I have done it many times, yes.  
19  
20 Q And if you had gone down on your hands and knees or indeed bent down in  
21 this particular location, you would have expected to find this fungal bracket,  
22 would you not? A. Sorry, I will answer that question as honestly as I can. If  
23 the fungal bracket was there, it would have been found. But I am just being  
24 sure that I am not saying every time I look under a tree I expect to find a  
25 fungal bracket.  
26  
27 Q This fungal bracket that you have drawn in your sketch at 161, if you had got  
28 down on your hands and knees or bent down to have a look into that void, you  
29 would have found this fungal bracket, would you not? A. An inspector  
30 could have found the fungal bracket. It depends on the size and where it was  
31 in relation to the base of the tree and how closely he looked.  
32  
33 Q Page 161, have a look at it if you like. A. Yes.  
34  
35 Q You have drawn what your understanding of the pre-accident state of the tree  
36 was? A. Yes. Insofar as I could, yes.  
37  
38 Q Sorry? A. That was my best ----  
39  
40 Q That is your best attempt. I understand that fully and I know you do not  
41 suggest this is precisely how it was, it is your best estimate of it. If that was  
42 the overhang that you were down on your hands and knees or bending down in  
43 front of, you would have seen that fungal bracket, would you not? A. Well,



1 yes, one would have detected something and possibly, as Mr. Barrell indicated,  
2 we always carry tools with us, whether it is a trowel or something to poke  
3 around - sorry for the expression - just to poke around and see if anything  
4 comes out.  
5  
6 Q Yes, and you would have cleared ivy or anything that might have been in front  
7 of it? A. Yes.  
8  
9 Q And either with a tool or indeed your bare hands you would pull something  
10 out? A. If there was something there to be pulled out, yes.  
11  
12 Q And if there is a fungal bracket there, you would have pulled part of the fungal  
13 bracket out? A. Yes.  
14  
15 Q And you would have seen it was fungus and then you would have made an  
16 even closer inspection ---- A. Oh, absolutely.  
17  
18 Q -- of that bracket? A. At that point I would have probably used an increment  
19 bore to bore into the tree and take a core from that point to see the extent of  
20 decay.  
21  
22 Q In fact given the drawing you have given us, and given the fact -- well, tell me  
23 whether you agree with this or not, but in fact one's feet in this ditch are  
24 somewhat lower than the overhang of the stem? A. Yes.  
25  
26 Q In fact the overhang of the stem is at about knee height, is it not? A. Well,  
27 my best estimate was about a foot but I do not think there is a great deal of  
28 difference ----  
29  
30 Q No, as long as we are in the same vicinity. A. Same vicinity, yes.  
31  
32 Q So the reality is, if you bend down or if you get on your hands and knees, you  
33 would in fact see this fungal bracket, would you not? A. Well, I am not sure  
34 that you would see it. I mean, I am not trying to be obstructive here but I am  
35 just trying to be as honest as I can. What I would have done in that situation  
36 had my attention been drawn to it and had I gone down on my hands and  
37 knees, I would have either put my gloved hand in or a trowel to scrape and to  
38 see what would come out. Because, quite honestly, down in a ditch  
39 underneath it is quite dark so I would be using an implement of some sort to  
40 see if there was anything there. Because one would have to, sort of, like, do  
41 this to look up ----  
42

- 1 Q Mr. O'Callaghan, can I just take issue with one point there? We can see on  
2 p.129, one of your photographs, the extent of the overhang. We can see what  
3 the extent of the overhang is on the left hand side. A. Yes.
- 4 Q And we have got a similar overhang on the stem that has fallen? A. Yes,  
5 which would have been up against it, yes.
- 6 Q Which is up against it. A similar kind of overhang, similar kind of hurling  
7 stick curve? A. Yes.
- 8 Q There is plenty of light if you go in daylight hours to be able to see a fungal  
9 bracket beneath that overhang, is there not? A. I can answer the question in  
10 certain light conditions, yes, you could see. But I am saying that in practice it  
11 is more likely that one would have used an implement to scrape to see if there  
12 was anything in there.
- 13 Q But, one way or another, you would have found this fungal bracket? A. The  
14 fungal bracket, yes.
- 15 Q Yes. There has been an issue in the past as to what is the meaning of medium  
16 risk and what might have followed on from it. A. Yes.
- 17 Q We have all seen the final answers that you and Mr. Barrell prepared.  
18 A. Yes.
- 19 Q Would you agree with him, however, that whilst these risk assessments are a  
20 very helpful tool --- A. Yes.
- 21 Q -- they are in fact no substitute for your judgment on the ground? A. The  
22 judgment of an experienced and competent inspector carries a lot of weight.  
23 As Mr. Barrell pointed out, when one is surveying a population of trees, in  
24 other words, for example, along the side of this road, then one would rely on a  
25 risk assessment to point to the priorities, the priority in which you would  
26 undertake work if necessary.
- 27 Q Yes. If you have got something which, following the risk assessment, comes  
28 out at medium risk, you as the tree inspector would go and use your experience  
29 and judgment in deciding whether you are going to leave it there and monitor  
30 it or whether you actually need to do some work upon it? A. Well, I suggest  
31 that that decision would have been made at the time the risk calculation had  
32 been made because one does not make it in isolation. One is looking at the  
33 tree and ---

1 Q I understand that, but you do your risk assessment? A. Yes.

2  
3 Q You are standing there, you reach a figure? A. Yes.

4  
5 Q And then you think: "What should I be doing about this tree?" A. Yes.

6  
7 Q Right. If we go to p.102, please, your para.4.7, you say:

8  
9 "Thus, included bark unions are features that indicate probable failure  
10 and would normally be what an arboricultural or forestry inspector  
11 would look for when inspecting trees."

12  
13 A. Correct.

14  
15 Q So you are dealing here with the included bark union? A. Yes.

16  
17 Q Then you say:

18  
19 "Had the subject tree been inspected closely by an experienced person, it  
20 is likely that the included union would have been noted and remedial  
21 work scheduled to abate the hazard."

22  
23 A. Yes.

24  
25 Q That was your judgment when you made your report, having visited the scene?  
26 A. Yes.

27  
28 Q What remedial work did you have in mind? A. Well, the remedial -- well,  
29 remember I am looking post-failure, so putting my mind back, insofar as  
30 I could, to how the tree would have looked pre-failure, and as neither  
31 Mr. Barrell nor I did actually see this precise tree at that time, the decision  
32 could be made on an included bark union tree depending, as you say, on the  
33 judgment of the inspector at the time as to whether one could retain the tree  
34 and monitor it in subsequent surveys with a view to doing further work as  
35 necessary, or one could make a decision there and then that work needed to be  
36 done immediately. It would depend very much on when found as we looked at  
37 the tree. So what I am saying about -- sorry ---

38  
39 Q Remedial work schedule. A. Remedial work schedule - remedial work  
40 could include regular monitoring.

41  
42 Q So you are suggesting that this phrase does not mean that it was your view that  
43 some kind of physical remedial work should be done? A. Well, I think in

1 the fullness of time, as we have agreed between us, that included bark unions  
2 are at some stage going to fail.

3  
4 Q Yes. A. At some stage in what we call intervention management, some  
5 work would have to be done either to reduce the height of the tree or fell the  
6 tree, or whatever is appropriate, would have to happen at some stage. But  
7 having not had the benefit of seeing this particular tree pre-failure, I do not  
8 know whether it would have been my decision or the decision of any  
9 competent inspector to fell it immediately based simply on the included union,  
10 or to say: "Oh, that tree is all right. I will look at it again next year".

11  
12 Q One of the difficulties with included bark unions is that you do not actually  
13 know when this is going to fail, do you? A. No, but this is where your risk  
14 assessment comes in because the quantified tree risk assessment asks you to  
15 look at, from your experience and your knowledge, how many similar trees in  
16 similar conditions per 100 are likely to fail in the year, in the year post-  
17 inspection.

18  
19 Q But it was certainly your view that remedial work should be scheduled to abate  
20 this hazard ---- A. But I am looking at ----

21  
22 Q -- at the time of your report? A. Yes, but I am looking at the tree post-  
23 failure.

24  
25 JUDGE MACDUFF: I am sorry, in fact it was post-failure but you are saying:

26  
27 "[Pre-failure] Had the subject tree been inspected... it is likely that the  
28 included union would have been noted and [pre-failure] remedial work  
29 scheduled to abate the hazard."

30  
31 A. Yes, but I did also qualify, your Honour, that the phrase "remedial work"  
32 could include monitoring.

33  
34 Q Yes. I have made a note of that.

35  
36 MR. STEAD: You go on in this paragraph:

37  
38 "However, the subject Ash is deep within a dense hedgerow, which  
39 forms the boundary between the estate and the ditch between it and the  
40 road. This is illustrated in Photograph 1... Unless the inspector had  
41 looked very closely from the road side, which would have entailed  
42 access through dense undergrowth, I doubt that the union would have  
43 been recorded in a routine visual inspection. Mr. Rowe's inspections

1           were limited to fairly rapid visual inspections from the road and field  
2           sides."

3  
4           At the time you did this report, Mr. O'Callaghan, it was your view that to  
5           remain in the road and not go into the hedgerow through the undergrowth was  
6           entirely reasonable?   A. No, what I am trying to say here, perhaps I have not  
7           articulated it correctly is that -- and I think Mr. Barrell said the same, but I will  
8           not put words in his mouth. My view is this. That if a level 1 inspector is  
9           doing a fairly quick walk or drive-by survey and does not get out of the car and  
10          go to the undergrowth, he is not going to see the union. However, if he stops  
11          his car and goes out and looks, he will see the included union.

12  
13       Q   And that is what he should have done?   A. I believe that is what he should  
14          have done, yes.

15  
16       Q   You do not say that anywhere in this report though, do you?   A. Well,  
17          perhaps I have not articulated correctly, but the point I was making here is that  
18          if you are just driving by and you do not stop and go through the undergrowth,  
19          you will not see the included union. If you do stop, you will.

20  
21       Q   Go to p.108, please, going straight to your conclusions, because I do not want  
22          to spend long on this.   A. Yes.

23  
24       Q   At 5.3 you say:

25  
26                "Unless a detailed and close inspection of the tree had been undertaken,  
27                the presence of the included union would not have been detected as it is  
28                at the very base of the tree and obscured from view by dense  
29                undergrowth on the road side. Additionally, it would not have been  
30                seen from the field side as it was positioned over the bank of a ditch  
31                away from the field."

32  
33       Then go down to 5.7, if you would:

34  
35                "Although the structural weakness and the decay fungus had been  
36                present in the tree for some years, neither would have been likely to  
37                have been recorded in anything other than a full and detailed assessment  
38                of the tree."

39  
40       Over the page:

41  
42                "5.8 The failure of the subject tree was not reasonably foreseeable as  
43                both the structural weakness and the decay fungus would only have been



1 detected by a full and detailed structural assessment of the tree. Such  
2 inspections cannot reasonably be expected from either a contractor  
3 acting for the estate or an inspector from the County Council Highways  
4 Department.

5 5.9 In the absence of symptoms, the subject tree would have looked like  
6 the hundreds of other hedgerow trees, i.e. typical of what would  
7 normally be expected, with no signs that it warranted closer  
8 examination."  
9

10  
11 A. Yes.

12  
13 Q Your view now is that it did warrant closer inspection because it was a multi-  
14 stemmed tree? A. Multi-stemmed trees should be looked at more closely,  
15 yes.

16  
17 Q Well, your position now is that that multi-stemmed tree should have been  
18 observed to be a multi-stemmed tree? A. Yes.

19  
20 Q That the inspector should have gone to look at the tree through the  
21 undergrowth? A. Yes. If you are talking about a level 2 inspection, yes.

22  
23 Q Which it should have been? A. Which it should have been, yes.

24  
25 Q Would have found the included bark union? A. Yes.

26  
27 Q Hence would have known that it was structurally defective? A. Had a  
28 weakness, yes.

29  
30 Q And would have found the fungal bracket? A. A full detailed inspection as  
31 we discussed would have found the bracket, yes. Could have found the  
32 bracket, yes.

33  
34 Q Well, you accepted earlier you would have found it? A. Yes.

35  
36 Q Thank you very much.

37  
38 Re-examined by Mr. MOTT

39  
40 Q Picking up that last point, Dr. O'Callaghan, you were taken, first of all, in the  
41 series of questions to para.4.7 on p.102. A. Yes.

42  
43 Q And your opinion at the end of that:

1 "Unless the inspector had looked very closely from the road side, which  
2 would have entailed access through dense undergrowth, I doubt that the  
3 union would have been recorded in a routine visual inspection."  
4

5  
6 A. Correct.

7  
8 Q It is suggested that you never said in that report that anything more should be  
9 done. Right? A. Yes.

10  
11 Q May I take you to p.105, para.4.15. A. Yes.

12  
13 Q You say:

14 "It is my opinion that there was one external sign present that would  
15 normally have alerted a professional to the fact that the tree could fail,  
16 i.e. the included bark union. However, as stated at paragraph 4.7 above,  
17 this would not have been obvious as it is at the base of the tree on the  
18 ditch side of the field and obscured by dense undergrowth. Unless a  
19 programme of regular and systematic inspections [etc.] could easily be  
20 overlooked. However, I am of the opinion that a multi-stemmed Ash  
21 resulting from a previously cut stool is likely to have an included  
22 union(s) and that type of tree adjacent to the highway would normally  
23 be singled out for detailed investigation by an experienced inspector."  
24

25  
26 A. Correct.

27  
28 Q Now, it is suggested that you changed your view, in effect, to come to that  
29 point. A. I have not.

30  
31 Q Do you think that is a change? A. It is not a change. It is in my report.

32  
33 Q All right. Would you then look, please, at p.174, the joint statement where you  
34 have the definitions, agreed definitions, of the three levels, 1, 2 and 3.  
35 A. Yes.

36  
37 Q At what level would you personally put yourself? A. 3.

38  
39 Q You are a level 3. All right. You were asked a series of questions in relation  
40 to what you would have done if you had been carrying out an inspection.  
41 A. Yes.

42  
43 Q Culminating in your discovery of the fungal bracket. A. Correct.

- 1  
2 Q I want to ask you what you now say about what a competent level 2  
3 inspector ---- A. A competent level 2 inspector would -- I would expect a  
4 competent level 2 inspector to, in the first instance, note it was a multi-  
5 stemmed tree. Based upon that evidence, to look at the crown to assess  
6 whether there were any symptoms in the crown. Then to approach the tree, go  
7 through the undergrowth and from the field, look closely at the base of the  
8 tree, look closely at the unions and make ----  
9  
10 JUDGE MACDUFF: Wait a minute. Just pause there. First of all, a level 2  
11 inspector would note from the road that it was multi-stemmed? A. It was  
12 multi-stemmed.  
13  
14 Q He would note from the road that the crown was in good condition? A. Yes.  
15  
16 Q He would note from the road there was no sign of decay? A. Well, no ----  
17  
18 Q No, not from the road. He would then approach the tree? A. He would then  
19 approach the tree, go through the undergrowth and ----  
20  
21 Q He would discover -- sorry, you tell me if I get it wrong and if I have missed  
22 anything out. I am doing it in my order. He would note it was multi-stem. He  
23 would note the crown was in good condition. He would approach the tree and  
24 he would discover the included bark union. A. He would, yes.  
25  
26 Q He would say to himself, would he not, "That puts it at least at medium risk  
27 where this is"? A. Yes. And he would look closely at the architecture of the  
28 union.  
29  
30 Q So medium risk. He would then look closely at the base of the tree?  
31 A. Yes.  
32  
33 Q That is what you said? A. Yes.  
34  
35 Q He would look closely at the base of the tree. He would note that there was no  
36 defect other than the structural defect. No decay, visible decay? A. On the  
37 subject tree as I envisage it to have been before failure, he would not notice  
38 any decay because, as Mr. Barrell said in answer to a question from you, my  
39 Lord, decay was internal.  
40  
41 Q Surely. So what we have got now, he has gone to the tree. His cursory look to  
42 begin at the base of the tree shows nothing wrong at all except for the included  
43 bark union ---- A. Correct.

- 1  
2 Q -- which puts it in medium risk? A. Yes.  
3  
4 Q Now we come to the crucial bit. He is looking closely ---- A. Yes.  
5  
6 Q -- at the base of the tree. You as a level 3 inspector tell me you would have  
7 found the fungal bracket? A. Yes.  
8  
9 Q What should he do when he looks at the base of the tree, given all the other  
10 signs? A. Looking at the fact that there were no symptoms of die back in  
11 the crown and looking around the base of the tree as was obvious to him on the  
12 bank and so on, and there were no obvious fruiting bodies there, and no sign of  
13 decay in the crown, what I am saying is it is possible that he would have said  
14 to himself: "The union is the problem here".  
15  
16 Q Wait a minute. (After a pause): Why would he not say to himself: "Well,  
17 there is an included bark union, it is near a road, the stem is where the stem is,  
18 it is a multi-stemmed tree, I have got to schedule this for", using your  
19 words ---- A. Hazard abatement ----  
20  
21 Q -- "schedule some remedial work to abate the hazard", which may, as you say,  
22 include just monitoring. A. Um hum.  
23  
24 Q Why would not a level 2 worker at that stage, and I am looking at -- I just want  
25 to remind myself of a level 2 worker. A level 2 worker - competent person,  
26 sufficient training expertise and qualifications to identify tree hazards, assess  
27 the level of risk and make appropriate management recommendations.  
28 A. Yes.  
29  
30 Q Why would he not do what you would have done and put his hand or a tool  
31 into that void that we see on your drawing to see whether there was some  
32 fungus in there? A. Because his judgment would have been based on the  
33 two things - what the crown was showing him in terms of was there anything  
34 in the crown to indicate a problem that may be further down in the tree. In the  
35 absence of that and looking around the base of the tree and not seeing any  
36 obvious fungi growing out from the side of the tree, I would say the majority  
37 of level 2 inspectors would have concluded to themselves: "It is okay from the  
38 point of view of decay, as far as I can tell" ----  
39  
40 Q "I do not need to look for fungus"? A. "I do not need to look any closer but,  
41 however, my management recommendation will be based on the included  
42 union". Now, that management recommendation may be, for example, he may  
43 say to himself: "Well, the side of the road, let us get rid of the tree now, just to

1 be safe". He may say, dependent on the tree and the position -- if it was a very  
2 prominent tree, possibly covered by a preservation order, he might say: "I will  
3 monitor that more closely and notify the landowner and/or controlling  
4 agency". Or he may say to himself ---

5  
6 Q "Lop that stem"? A. Yes, or another point, he may say: "I may need to get  
7 another opinion on this. I shall bring in a level 3 inspector to give me another  
8 opinion".

9  
10 Q Well, if he is going to say that, if he is going to say: "I need another opinion  
11 on this, I need to bring in a level 3 inspector", he might as well have a look for  
12 the fungus himself, might he not? A. Well, he could do but normally in the  
13 level 2 inspections and the inspectors that I know and we have trained, that  
14 really look -- this is an unusual position where the tree was growing.  
15 Normally a tree comes straight out of the ground and if there is going to be a  
16 problem, it is going to be around the collar area. This is an unusual situation.  
17 I would not have expected your average level 2 surveyor to do that. But I am  
18 saying it is possible that a level 2 inspector may say to himself: "I need  
19 another opinion".

20  
21 Q There we are. Thank you. Well, I have got a straight divergence of opinion  
22 between the two experts on that, Mr. Mott, it seems.

23  
24 MR. MOTT: Yes, absolutely right.

25  
26 JUDGE MACDUFF: I am going to have to make up my mind about it, am I not?

27  
28 MR. MOTT: Yes. I have nothing else. Thank you, Dr. O'Callaghan.

29  
30 JUDGE MACDUFF: Thank you, Dr. O'Callaghan.

31  
32 (The witness withdrew)

33  
34 MR. STEAD: My Lord has observed the point made by Mr. O'Callaghan about the  
35 level 2 inspector being interested in whether there is die back or not and hence  
36 leading to a certain conclusion. That was not something that was put to  
37 Mr. Barrell. Now, unless your Lordship wishes it, I do not propose to ask to  
38 re-call him ---

39  
40 JUDGE MACDUFF: I think it was put, you know, more or less, because it was  
41 said that the only thing that was wrong with this tree to visual inspection was  
42 the included union, and the crown was all right.



1 MR. STEAD: Yes. He fully accepted that. What is being suggested by this last  
2 witness is that because you see die back, then you do not actually carry out any  
3 significant inspection at base level. But I do not think I need to re-call  
4 Mr. Barrell.

5  
6 JUDGE MACDUFF: No, neither do I.

7  
8 MR. MOTT: I have to say not only does he not need to call Mr. Barrell to deal with  
9 it, but it is not an issue because it is in para.4.17 of Dr. O'Callaghan's report on  
10 p.106, crown symptoms would not be expected, and that is one of the  
11 paragraphs which is agreed in the joint statement at 175. It says:

12  
13 "The discussions with respect to there being no crown symptoms  
14 evident before the failure as set out in paragraph 4.17 of  
15 Dr. O'Callaghan's report are agreed."

16  
17 I believe...

18  
19 JUDGE MACDUFF: I think his point was going a fracture further than that. But  
20 you can make submissions about that in the fullness of time.

21  
22 MR. MOTT: Yes. My Lord, that is the case for the defendants.

23  
24 JUDGE MACDUFF: That is the evidence?

25  
26 MR. MOTT: That is the evidence.

27  
28 JUDGE MACDUFF: Right. Well, I am not going to try and give an ex tempore  
29 judgment today, and you are not available on Monday?

30  
31 MR. MOTT: I am not available on Monday, no... judgment that could be dealt  
32 with. I do not know what your Lordship would like to do about submissions.

33  
34 JUDGE MACDUFF: Well, I think I would like to have submissions completed  
35 today.

36  
37 MR. MOTT: Yes.

38  
39 JUDGE MACDUFF: And then I will either give you a spoken judgment on  
40 Tuesday morning or provide you with a written judgment at some later time  
41 and spend some time next week actually writing a judgment which can be sent  
42 out to you as a provisional judgment in the post.

1 MR. MOTT: My learned junior can be here on Monday if your Lordship would  
2 like to do that.

3  
4 JUDGE MACDUFF: I shall probably spend some time on Monday preparing the  
5 judgment one way or another. Let us have submissions today and then we will  
6 discuss the logistics of handing down the judgment when we have finished  
7 those. Now, do you want to go straightaway?

8  
9 MR. MOTT: May I have a little time just to gather my thoughts?

10  
11 JUDGE MACDUFF: Yes. It is now five to twelve. I anticipate that if I give you  
12 15 minutes or so, or even a little longer, you will be able to complete by  
13 lunchtime.

14  
15 MR. MOTT: Certainly.

16  
17 JUDGE MACDUFF: Because it is a very short point now, is it not?

18  
19 MR. MOTT: Yes.

20  
21 JUDGE MACDUFF: Shall I say half past twelve? I will come back here at half  
22 past twelve.

23  
24 (Adjourned for a short time)

25  
26 JUDGE MACDUFF: I am sorry I kept you waiting.

27  
28 MR. MOTT: A single issue case - the issue which, after the preliminaries, we have  
29 set out in some detail in the case summary, paras.39 to the end of that opening  
30 note. I will not take your Lordship to it in detail now, but I invite your  
31 Lordship to look back at those when considering judgment.

32  
33 It is a dispute between experts. Our submission is that Mr. Barrell was an  
34 unsatisfactory witness in general. We cite the exchange at the opening of  
35 cross-examination and his extreme reluctance to admit the classification which  
36 had been so clearly admitted, medium risk, in the questions and answers, and  
37 the consequences of that which again had been so clearly admitted. That does  
38 not bode well for the independence and reliability of him as an expert.

39  
40 JUDGE MACDUFF: Yes.

41  
42 MR. MOTT: Specifically in relation to the fungus, he agreed, in his report and in  
43 the joint statement, paras.4.8 and 4.9 of Dr. O'Callaghan's report. The

1 reference to that is B103, the bundle at p.103. I simply give your Lordship the  
2 reference. It is the one where he ends up saying: "It is not surprising that the  
3 presence of the fungus would have been missed in any visual inspection" at the  
4 end of that paragraph. It is a small and easily missed bracket. Although there  
5 were other parts that stood against that, it is important that that was affirmed in  
6 the joint statement.

7  
8 When we came to investigate the difference yesterday, Mr. Barrell in chief and  
9 in cross-examination was saying in effect this bracket, he believes, was visible  
10 from either a standing position whilst moving round the tree and looking from  
11 the side or with only a little bending. Can I assist your Lordship with my note  
12 in relation to that in chief? Having been asked about the sketch of  
13 Dr. O'Callaghan, which is at p.161, he said:

14  
15 "It is diagrammatic. It does not give an idea of where things were. It is  
16 not a complete cross-section. In 3D one would only need to move round  
17 the side and would have been able to see it. As moved around tree  
18 almost certainly would have been visible".

19  
20 That is my note. So the dispute appeared to be as to the geography and  
21 positioning of the bracket in relation to the whole tree with the failed stem  
22 upright. That appearance in evidence yesterday is confirmed by the way in  
23 which the vital paragraph 22 in the joint statement appears, which ends:

24  
25 "However, it was not present when he made his inspections so that he is  
26 unable to be certain as to whether it could or could not have been seen."

27  
28 So it was a positioning problem he was talking about.

29  
30 That has now been completely abandoned and today he has accepted that it is  
31 only if the inspector got his eye level with the base of the failed stem, which is  
32 knee height or about a foot above the ditch, whichever measurement one takes,  
33 that it could be seen. That is to say, it is only if the level 2 inspector should  
34 have been on hands and knees and looking into that void that the fungus would  
35 have been seen. That is a sea change in what he is saying. It does not appear  
36 anywhere in that joint statement and it makes a nonsense of the wording of  
37 para.22 of the joint statement at p.177 because on that issue, as to the degree of  
38 inspection of that sort of tree that a level 2 inspector ought to carry out, it  
39 makes no difference at all whether the bracket was present or not when  
40 Mr. Barrell made his inspection. The "however, it was not present when  
41 he made his inspections" only makes sense on the theory that was being put  
42 yesterday, which was that it could have been seen as you moved round with a  
43 little bit of head movement and mild bending.

1 So, my Lord, our submission is that this is an expert witness whose account  
2 has changed, and has changed significantly so that it moves the case, and that  
3 is a ground alone on which your Lordship should reject his evidence.

4 There has not been movement as to the visibility of the bracket in relation to  
5 the kind of inspection to be required of a level 2 inspector in the case of  
6 Dr. O'Callaghan, and he gives cogent reasons, which your Lordship can accept  
7 because they are agreed, as to why such an inspector would not scramble  
8 around in the void under the overhanging stem.

9  
10 Firstly, there were no crown symptoms, it is a healthy crown. This is para.4.17  
11 of Dr. O'Callaghan's report on p.106, and that is a paragraph agreed in the joint  
12 statement. The agreement is at p.175 in the bundle.

13  
14 Secondly, there was no sign of fungus around the bark union. Again, I want to  
15 just take your Lordship in detail to the evidence that was given yesterday by  
16 Mr. Barrell in chief. He was talking about the difficulties of getting to the base  
17 of the suspect tree and explaining why one should want to do so. He said:

18  
19 "You would be looking for fungal brackets. It is most common cause of  
20 failure. It indicates internal decay. They tend to be close to the point of  
21 the wounding and an included bark union is continuously being  
22 wounded as it moves."

23  
24 So that is Mr. Barrell's evidence yesterday, and the significance which  
25 Dr. O'Callaghan pointed out this morning is that around that point of  
26 wounding, that included bark union, right now there is no sign of fungus and  
27 that would have been a comfort to the level 2 inspector and something which  
28 would have encouraged him to say: "It is an included bark union. It has not  
29 got worse than that. We can put it on the list for dealing with when convenient  
30 but not immediately". Now, at that point in the examination in chief,  
31 Mr. Barrell went further in a rather interesting way when your Lordship was  
32 asking the questions and, as I have noted both the questions and answers, they  
33 are these. Your Lordship asked:

34  
35 "If you had gone in as a level 3 inspector [making the distinction] just  
36 before the accident, you would have undoubtedly seen the included bark  
37 union? A. Yes.

38  
39 Q But you cannot say you would have seen the fungal bracket? [That is  
40 as a level 3.] A. Not with 100% certainty."  
41  
42

1 That is a huge change. So no crown symptoms, no sign of fungus around the  
2 bark union where there is the wound continuously being re-opened. No sign of  
3 decay is the third comforting feature. It is apparently complete and healthy  
4 bark. There is no sign of the white rot that becomes apparent when the stem  
5 comes away. So nothing to induce, Dr. O'Callaghan's says, the level 2  
6 inspector to go further.

7  
8 And in considering that against common sense as well as expert evidence, your  
9 Lordship has to come away from the concentration we have in court on a  
10 particular tree and consider this as just one of hundreds of roadside trees being  
11 inspected in the course of, albeit by a competent level 2 inspector, a day, a  
12 week, or however long it takes. And there are others with included bark to a  
13 greater or lesser extent with some other features that need some examination.  
14 So it is not just a single tree standing out like a sore thumb from the rest. This  
15 sort of pattern would be repeated all over the country with landowners here  
16 there and everywhere. So although it is very easy for a court, as we are used to  
17 concentrating in detail on... the logic of the reality supports Dr. O'Callaghan's  
18 evidence, that this goes beyond what should be expected of the competent and  
19 reasonably careful level 2 inspector carrying out a consistent roadside  
20 inspection of trees, however they have been identified.

21  
22 So for those reasons we submit that your Lordship should find that the  
23 probability is that the level 2 inspector would not have discovered the bracket  
24 and it follows from that, in our submission, that this claim fails.

25  
26 My learned friend wishes, I think, to re-open somehow medium risk. Whether  
27 your Lordship wishes to hear from me on that ---

28  
29 JUDGE MACDUFF: I will give you an opportunity if he wins me round on it.

30  
31 MR. MOTT: Yes.

32  
33 JUDGE MACDUFF: Or prima facie wins me round on it.

34  
35 MR. MOTT: It is difficult to see - some might - how it could be criticised for not  
36 taking place. My Lord, those are my submissions.

37  
38 JUDGE MACDUFF: Before you are sit down, just three things. First of all, you  
39 handed in some authorities. I do not need to read them, do I?

40  
41 MR. MOTT: No.



1 JUDGE MACDUFF: You handed in a second bundle with various -- I have  
2 glanced at them but no more.

3  
4 MR. MOTT: Mr. Rowe's invoices.

5  
6 JUDGE MACDUFF: And Mr. Rowe (whose evidence I glanced at), I just  
7 disregard?

8  
9 MR. MOTT: Yes.

10  
11 JUDGE MACDUFF: So I think probably, if you will forgive me, I can get rid of  
12 these from the desk and these can all go back to counsel. (Same handed).  
13 I will find my material then more manageable. Thank you. Yes, Mr. Stead?

14  
15 MR. STEAD: My Lord, so far as the position of Mr. Rowe is concerned, following  
16 on from your observations, it is obviously right that he has not given evidence.  
17 Having said that, the evidence of Mr. O'Callaghan in his report carries a  
18 number of observations on what was done or not done by Mr. Rowe.

19  
20 JUDGE MACDUFF: Well, I think one of the findings I have to make is that the  
21 defendants did not comply with what it is said their duty was.

22  
23 MR. STEAD: Yes.

24  
25 JUDGE MACDUFF: I do not think it is argued otherwise and that goes by default.

26  
27 MR. STEAD: There is a breach of duty ostensibly, and what the court is dealing  
28 with is: is that breach of duty causative of the accident by reason of failure to  
29 find the fungal bracket?

30  
31 With great respect to my learned friend, it appears as though we have been  
32 doing different cases because it really is our respectful contention that there is  
33 no issue between the experts on the evidence you have now heard.

34  
35 JUDGE MACDUFF: It was that part of the cross-examination of Dr. O'Callaghan  
36 that you ----

37  
38 MR. STEAD: Well, with respect, not just the final bit of cross-examination. The  
39 whole of the cross-examination was premised from the outset on the basis that  
40 one was talking about a level 2 inspector, and the cross-examination started,  
41 and I am looking at the note of those sitting behind me:  
42

1 "First, one sees a tree with a multiple-stem in the road. One goes in,  
2 finds the included bark union."

3  
4 He agrees with that. Then he agrees that the included bark union was a  
5 common structural defect in ash. It means it will fail at some stage. He agrees  
6 with that. He then says you find the included bark union and one sees a  
7 healthy crown. I cannot follow the next bit. Then it is put to him:

8  
9 "One then looks around the base of the tree. This is important for fungal  
10 growths are often found there."

11  
12 He agrees, yes, and it is put to him:

13  
14 "You look at the point where the tree comes out of the earth, which  
15 would always be subject to inspection."

16  
17 He agrees with that. And it progresses on that basis. It is somewhat  
18 opportunistic to suggest that all of that cross-examination was being put to  
19 Mr. O'Callaghan on the basis that it was considering what a level 3 inspector  
20 would do rather than a level 2 inspector. Indeed, the aim of the cross-  
21 examination made it quite plain that it was a level 2 inspection that was being  
22 considered. I put to him:

23  
24 "Your view now is that it warranted a closer inspection because it was a  
25 multiple-stem tree, that that inspector would have gone into the  
26 undergrowth, found the included bark union and would have found the  
27 fungal bracket? A. Yes."

28  
29 We respectfully suggest it is abundantly clear from the answers given in cross-  
30 examination that Mr. O'Callaghan accepted that a level 2 inspector would have  
31 found the fungal bracket. In those circumstances, there is no difference  
32 between the outcome of the evidence of Mr. O'Callaghan and Mr. Barrell.

33  
34 Should your Lordship not be persuaded by the evidence that you heard this  
35 morning and my observations upon it, can I take it at a little further length? If  
36 one starts by looking at p.174 and the different definitions provided for level 2  
37 and level 3 inspectors, level 2 is:

38  
39 "A competent person recommended... will have sufficient training,  
40 expertise and/or qualifications to identify tree hazards, assess the levels  
41 of risk and make appropriate management recommendations."  
42

1 It is our contention that that clearly includes fungal brackets. Level 3 then is a  
2 quantum leap above:

3 "A specialist or expert in tree biology, pathology, internal detection of  
4 decay in trees, failure and hazard evaluation, e.g. a tree pathologist [it  
5 goes on] an experienced arboricultural consultant who is qualified to a  
6 high level in their discipline and who has considerable experience..."  
7

8  
9 So quite clearly we say from those definitions the identification of fungal  
10 bracket is within the level 2 level of competence, and indeed Mr. O'Callaghan,  
11 we say, has accepted that.

12  
13 In any event, if one thinks about this inspection and stands back and looks at it,  
14 you see the multi-stem tree, you find the included bark union, you know it is  
15 weak by virtue of that. Inevitably a competent inspector would then look to  
16 see if there is anything that adds to that weakness, and by virtue of the  
17 acceptance by both experts that fungal brackets are to be found at earth level,  
18 the examination inevitably must take place at earth level. It may take place  
19 elsewhere as well but primarily at earth level to see whether there are any  
20 brackets, and the moment one does that examination, with respect, one finds  
21 this fungal bracket as Mr. O'Callaghan accepted.

22  
23 My Lord, I am not going to take you through various parts of  
24 Mr. O'Callaghan's report when he considers ---

25  
26 JUDGE MACDUFF: Well, it seems to me that, whatever points are made about  
27 Mr. Barrell and any inconsistencies there, you can point to similar ones with  
28 Mr. O'Callaghan -- Dr. O'Callaghan, forgive me.

29  
30 MR. STEAD: Indeed. Well, I apologise for making the same error. Yes, exactly  
31 so. So ultimately ---

32  
33 JUDGE MACDUFF: You know, sitting here on the Bench, it is inevitable. I want  
34 to give both Mr. Barrell and Dr. O'Callaghan an element of comfort. You  
35 make your report, it is a long and detailed report. The other side make their  
36 report, it is a long and detailed report. Then you get supplementals, then you  
37 get joints, then you get answers. It is very, very rare, except in the simplest of  
38 cases, that you cannot point somewhere in the first report to something which  
39 is inconsistent to some extent or another with something that has been agreed  
40 later on.

41  
42 MR. STEAD: Well, indeed.  
43

1 JUDGE MACDUFF: And they shift. One of the shifts sometimes happens in court  
2 as a result of cross-examination pointing things out. But there it is.

3  
4 MR. STEAD: My Lord, I take the point. We do respectfully submit that  
5 Mr. Barrell has been consistent in his view. My learned friend has pointed to  
6 the assertion that he has agreed to a paragraph in Dr. O'Callaghan's report, but  
7 the agreement was qualified to the nature of the fungal infection rather than  
8 anything else. So he has not deviated from that point.

9  
10 There is an issue about wording in the joint statement and your Lordship has  
11 the point that is made by my learned friend, and Mr. Barrell has dealt with it,  
12 that he meant nothing more in that than he said in his report at some length  
13 about detectability of the fungal bracket.

14  
15 So we say, respectfully, that the claimant has proved that on the balance of  
16 probability a reasonably competent inspector would indeed have found that  
17 bracket.

18  
19 My Lord, may I say this about the other approach - namely the fungal bracket  
20 is not found - that you do have the evidence from Mr. O'Callaghan's first report  
21 that remedial work would have been undertaken, or words to that effect. That  
22 is what I rely upon as a matter... I readily acknowledge the stance of  
23 Mr. Barrell does not assist me on that point. Having said that, it is a position  
24 he has adopted heavily qualified by the fact that he cannot say because he did  
25 not see it.

26  
27 JUDGE MACDUFF: Well, I am not with you on that. If it was the bark defect  
28 only ---

29  
30 MR. STEAD: Well, I understand that.

31  
32 JUDGE MACDUFF: -- I do not think I would find for you.

33  
34 MR. STEAD: I will not push it. Unless I can assist further on any aspects of the  
35 evidence, then I will not take it any further.

36  
37 JUDGE MACDUFF: No. Thank you very much. Thanks to both of you for  
38 helping me for this case to be heard in an economically short time. What  
39 I think I have decided to do is I will reserve judgment only for a short time and  
40 I will do a written judgment, and I will hand it down between now and Easter.  
41 I will hand it down in the morning. I will not send it out to you, but I will get  
42 the listing office to liaise with those who are instructing for a suitable date for  
43 me to hand it down. It may be towards the end of next week, it may be the

1 following week. But I will hand it down at ten o'clock one morning. If you  
2 two individually are not able to be here, I shall miss you of course but I will  
3 put up with it so long as there is somebody here to deal with any costs and  
4 consequential orders.

5  
6 MR. STEAD: My Lord, I have indicated already that there is an outstanding issue  
7 as to the effect of what you will find if you find in our favour.

8  
9 JUDGE MACDUFF: If I find in your favour, whoever is here, whether it be you or  
10 somebody else, should be able to deal with that point.

11  
12 MR. STEAD: Yes.

13  
14 JUDGE MACDUFF: But first of all we will try and do it on a date which is  
15 suitable to solicitors and counsel on both sides so that you can all be here if  
16 you want to be.

17  
18 (The court adjourned)

19