Decisions of the Lands Tribunal

Compensation Claims

Tree Preservation Orders

	Case	Reference	Page
1	Mooney v West Lindsey District Council	LCA/98/1999	1-9
2	Duncan & Prudential Assurance – v – Epping Forest District Council	LCA/62/2003	10 – 18
3	Woodhams -v – Chichester District Council	LCA/167/2006	19 – 39
4	Keates v Haringey London Borough Council	LCA/389/209	40 – 48
5	Wright & Aviva Insurance Limited – v – Horsham District Council	LCA/509/2010	49 – 71
6	Halifax General Insurance Services – v – Teignbridge District council	LCA/288/2010	72- 84
7	Grammar School of John Lyon – v – City of Westminster	LCA/41/2011	85-109
8	Burge – v – South Gloucestershire Council	LCA/105/2015	110-121
9	Chubb European – v – Enfield Council	LC/2004/52	122-142

LCA/98/1999

LANDS TRIBUNAL ACT 1949

COMPENSATION - Tree Preservation Order - refusal of consent to fell two trees - consent subsequently granted after Public Inquiry - claim for loss of earnings and other costs incurred in pursuing matter and damages for stress, inconvenience and anxiety – Town and Country Planning Act 1990 Section 203. Compensation awarded £5,739 and interest from 11 August 1994.

IN THE MATTER of a NOTICE OF REFERENCE

BETWEEN

JAMES MOONEY **Claimant**

and

WEST LINDSEY DISTRICT COUNCIL **Respondent**

Re: 17 Southlands Gardens, Morton, Gainsborough, Lincs

Tribunal Member: P.R.Francis FRICS

Sitting at: Newark County Court, Crown Building, 41 Lombard Street, Newark.
On
14 January 2000

The following cases are referred to in this decision:
Factorset Limited v Selby District Council [1995] 2 EGLR 190.
Buckle v Holderness District Council [1996] 2 EGLR 133.
Bollans v Surrey County Council (1968) 20 P&CR 745.
Fletcher v Chelmsford Borough Council [1991] 2 EGLR 133.

The Claimant in person.
Robert Ashworth, solicitor to West Lindsey District Council, for the respondent.

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DECISION

1. This is a reference to determine the compensation, if any, payable to Mr. James Mooney ("the claimant") by West Lindsey District Council ("the Council") under section 203 of the Town and Country Planning Act 1990 ("the 1990 Act") consequent upon the refusal of consent to fell two trees at 17 Southlands Gardens, Morton, Gainsborough, Lincs ("the subject property"), under the terms of a Tree Preservation Order.

2. The hearing was conducted under the Simplified Procedure (Rule 28, Lands Tribunal Rules 1996), and the claimant appeared in person. Mr. Robert Ashworth, Solicitor to West Lindsey District Council appeared for the respondent.

3. The claimant had produced, prior to the hearing, substantial and voluminous documentation relating to his ongoing dispute with the Council and its officers, much of it having little or any relevance to the issues which I am to consider. I therefore make only passing reference to it where appropriate. Due to the strained relationship between the parties, a statement of agreed facts had not been prepared, but from the documentation produced and the oral evidence given at the hearing, I find the following facts:

3.1 The County of Lincoln, Parts of Lindsey, Tree Preservation (Morton) Order 1969 ("the TPO") was made on 30 October 1969. It related to a large number of trees in the general area.

3.2 The claimant purchased the subject property, a detached house on a new estate, in 1979, and added a garage extension in 1983. The trees within the boundaries of the property covered by the TPO were specified as within groups G.1 and G.9 in the schedule to the Order.

3.3 In April 1987, whilst re-planning his garden, the claimant applied for consent to fell five trees, and carry out surgery on others. This followed a report from an arboricultural expert who had advised that two of the trees in particular – a sycamore (T4) and a lime (T5) were too close to the house. Consent to fell three trees was granted, together with some surgery works, but in respect of trees T4 and T5 it was refused. The claimant appealed against the refusal to fell the two remaining trees, the subject of his application. The appeal was dismissed in January 1988.

3.4 In June 1994 the claimant made a further application to the Council for consent to fell ten trees that were covered by the TPO, these forming a line along the rear, north-east boundary which separates the house from the adjacent Walkerith Road. Following a report by Arthur Arbon, of Tree Advisory Services, North Hykeham, Lincoln, commissioned by the Council, (which had recommended that trees T4 and T5 were reduced by 50 per cent) and advice from the District Planner, consent to fell was

refused on 11 August 1994, but permission was granted to install a cable brace in one of the trees, (T9). It is this refusal that forms the basis of Mr. Mooney's claim.

3.5 In October 1994 the claimant submitted an appeal to the Secretary of State for the Environment, with a further amended appeal in December 1994 to cover the application for the Article 5 Certificate to be lifted, thus allowing him to claim compensation. Following correspondence with the Government Office for the East Midlands, the claimant applied for the appeal (which was in respect of trees T4 and T5 only) to be heard by means of a Public Inquiry. A Public Local Inquiry was held in June 1996 and the decision of the Secretary of State was issued on 31 July 1996. This allowed the appeal and granted permission to fell the two trees, subject to a replanting scheme, and also cancelled the article 5 certificate insofar as it related to the appeal trees.

3.6 In September 1996 Mr. Mooney submitted a claim for compensation in the sum of £2,105,368. Subsequently, due to illness, and his understanding that an agreement had been reached with the Chief Executive of the Council to the effect that the matter would be dropped if no further correspondence was entered into, the claimant did not pursue the claim.

3.7 On 20 May 1999 the Council wrote to the claimant to make arrangements for the inspection of the replanting scheme. Following this, the claimant reactivated the claim at a revised figure of £700,000.

3.8 The Notice of Reference was dated 16 July 1999.

Issues.

4. The claimant had submitted his claim in two parts. Firstly, direct loss of earnings and free time in preparing the case for the felling of the two trees, preparing the appeal, and subsequent correspondence with the respondent following the Secretary of State's decision, together with costs of consultants and advisers and incidental expenses. This amounted to £200,000. The second part of the claim was stated to be for the loss and damage to the physical and mental wellbeing of the claimant and his family, caused by the Council's actions, and amounted to £500,000.

5. It was for me to consider the validity of the constituent parts to these heads of claim, and determine accordingly. At the end of the hearing, I determined which of the heads of claim were, in my judgment, valid and acceptable, the parties then agreed quantum in those respects, and I summarise those below. The only matter reserved for subsequent decision related to interest on allowable costs.

Claimant's case.

6. **Mr. Mooney** said that the whole matter, and dispute with the Council, had arisen as a result of its failure to act to ensure the safety of him and his family and its unreasonable attitude to his concerns. In his view, the trees for which permission to fell had been refused had constituted a clear and present danger due mainly to their size and close proximity to the house. Tree T4, a sycamore, was 16.4m. in height, and 6.5m from the house, and tree T5, a lime, was 15.9m. high and only 2.3m. from the rear wall. He referred to the report prepared upon his instructions in respect of the 1987 application, and to Mr. Arbon's report to the Council, which had recommended the trees be reduced in size by 50 per cent. This view had been supported by Mr. Northcote for the District Planner, but despite those recommendations the planning committee had refused permission to do anything to the those trees and had only allowed him to do some work on tree T9, which was not as near to the property.

7. Mr. Mooney said he made an application for a Public Inquiry, but following discussions with the Council regarding his, and other residents, requirements for a risk assessment on the TPO trees (which the Council had initially refused to do), withdrew that application when it eventually agreed. That assessment, he said, also concluded that the trees should be felled, but when the Council again refused to allow felling, despite its officer's recommendation, he applied for the inquiry to be re-instated. Prior to the Inquiry taking place, Mr. Mooney said that in January 1996, branches from one of the trees fell onto a patio in the garden where only minutes earlier his daughter had been playing, and caused damage to a pergola and ornamental wall. Again, despite his resulting approaches to the Council over his renewed concerns over safety, he said it was still not prepared to relent.

8. The claimant said that due to the stress caused by the Council's attitude, and its constant refusal to heed specialist's recommendations over the trees, he had had to take many months off work to concentrate solely, and full time, on fighting what he described as a blatant abuse of power. He asserted that the Council had a duty under Health and Safety legislation to ensure its constituents were not put at risk, and had any damage or injury occurred as a result of his not being allowed to fell the trees, then he would have held it responsible. Mr. Mooney said that the Council was putting its concerns over the potential loss of amenity which removal of the trees might create, over and above the value of human life.

9. In cross-examination, Mr. Mooney admitted that he had not removed the dead branch on tree T5, highlighted in Mr. Arbon's report, although he said he had not seen it. He also accepted that despite the close proximity of the two trees to the house, he had proceeded to build a substantial extension, in 1983, which resulted in tree T5 being only just over two metres from the rear wall, and the roof being overhung by branches. He said that no special foundations, to allow for possible tree root damage, had been incorporated. In response to a question from me, Mr. Mooney said that he had not made any claim on his household insurance policy regarding the damage caused by falling branches.

Respondent's case.

10. **Mr. Ashworth** said that the Council had not been unreasonable, but that there had been a fundamental disagreement with the claimant over the trees concerned, and that Mr. Mooney's attitude

throughout, evidenced by the protracted and at times bitter correspondence, had militated against any opportunity for the matter to be resolved by a common sense approach.

11. He said there was no suggestion that the Council regarded retention of the trees as more important than life and limb, and had Mr. Arbon's report recommended felling, or intimated there was any immediate danger, then no doubt the Council's decision would have been different. As to the Health and Safety and duty of care aspects to which the claimant had referred, Mr. Ashworth said there was no case law, of which he was aware, to support the contention that the Council's duties in that regard extended to TPO's, and said that Mr. Mooney had failed to point to any authorities to support his claims.

12. In respect of the risk assessment carried out on trees T4 and T5 by Mr. Elliott of the Council, Mr. Ashworth said the report had concluded that T4 had a low to medium risk assessment of failure under normal conditions, felling had not been recommended, and only normal maintenance and removal of deadwood was required. T5 had a medium risk assessment of failure under normal conditions, and due to the tree having been extensively worked upon, and some damage to its root structure having been caused by the building of the extension, consideration should be given to its removal in the long term. It was also stated in Mr. Elliott's report that some trauma could have been caused to both trees due to the construction by the claimant of the patio and timber and brick structures between them, and Mr. Ashworth therefore concluded that the claimant had materially contributed to any problems with the trees by his own actions. He said that none of the experts who had inspected the trees had concluded that there was any imminent danger therefrom, and refuted the claimant's suggestion that the reports had condemned the trees, saying that his comments had been selective, and taken out of context. What is more, he said, the inspector's decision at the enquiry, to allow the trees to be felled was finely balanced.

13. Mr. Ashworth said that the Council contends that the claimant is not entitled to compensation as claimed, and said it was for this Tribunal to establish whether any loss suffered was such as might "fairly and reasonably be considered as arising naturally from the refusal of consent under the Order" and that the case should be determined on "its facts and merits". These principles were, he said, established in *Factorset Limited v Selby District Council* [1995] 2 EGLR 190. He said that the decision in *Buckle v Holderness District Council* [1996] 2 EGLR 133, which related to compensation being awarded to a claimant for the cost of underpinning foundations damaged by roots of a tree the subject of a TPO, should not apply in this instance. In that case an application for consent to remove the tree had been refused both by the local authority, and by the Secretary of State on appeal. Compensation for the appeal costs was awarded as a consequence of a loss that flowed from the Council's refusal of consent, because, it was held, it was reasonable for the claimant to have pursued the appeal to mitigate his loss.

14. The majority of the items claimed, particularly in relation to the costs of Mr. Mooney's own time were, Mr. Ashworth said, artificial and inflated, and apart from some of the experts costs, were not substantiated by receipts or any other form of proof. The claim for the cost of repairs by Stevenson Building Services in the sum of £2,200 for works to the structures damaged by a falling branch were not a valid head of claim, in that not only had it not been included within the original claim, but also the structures had been built by the claimant in 1988 when he was already concerned about the trees, and had admitted he was aware of the dangers. Also, no insurance claim had been

made. All heads of claim in the second part of Mr. Mooney's claim were entirely refuted, and Mr. Ashworth submitted that the claim in its entirety was ill-founded, excessive and an abuse of the Tribunal's process.

Decision.

15. Firstly, there is no doubt in my mind that the claimant has become obsessed, over a period of many years, with the need to remove as many trees as possible from the rear garden of his property. Although this reference relates purely to the amount of compensation (if any) to be awarded in respect of the Council's refusal of consent in 1994 and the appeal to a Public Local Inquiry in 1996, there is much more to the matter. Not only was there the earlier application for consent to fell trees in 1987, and the appeal therefrom, but, as extensively documented within the claimants trial bundles, there were further applications in 1995 by the claimant's wife and daughter, and another appeal to the Secretary of State.

16. In addition to the evidence that relates directly to the issues upon which I am to decide, the claimant submitted documentation running to three ring binders containing over sixty appendices. Most of this related to his ongoing dispute with the Council, and much has had to be disregarded as irrelevant.

17. The first part of Mr. Mooney's claim can be summarised as:

1. Loss of Earnings (May 1994 to September 1995). £143,000

   Mr. Mooney said that he had re-commenced employment on a part time basis in February 1995, and full time in September 1995, and therefore was not claiming loss of wages after this time.

2. Loss of Free Time (Jun 1994 to June 1996) £ 42,000

   This claim relates to additional time beyond normal working hours as claimed in (1) above, dealing with correspondence with the Council prior to the appeal.

3. Loss of Free Time for Claimant's Wife (June 1994 to June 1995) £ 10,000

4. Loss of Free Time corresponding with third parties (June 1994 to June 1996) £ 36,000

5. Loss of Free Time in preparing appeal (March to June 1996) £ 14,700

6. Loss of Free Time corresponding with the Council following the appeal. (June 1996 to March 1997) £ 18,000

7.	Cost of Consultants	£ 5,000
8.	Incidental expenses	£ 1,000
9.	Cost of Repairs to Garden Structures	£ 2,200

Items 1 to 9 amount to £271,900, against which the claimant had made a reduction of £71,900 to allow for potential duplication and tax, resulting in a net claim rounded to £200,000.

18. No documentary evidence, receipts, dockets or other substantiation was produced in respect of claim items 1 to 6. I am assisted here by the case of *Bollans v Surrey County Council* (1968) 20 P&CR 745., a Lands Tribunal decision in which R.C.Walmsley FRICS in dealing with an unquantified claim for loss of profits, said at p756:

> " Whilst, therefore, I am in no doubt that Mr. Bollans has been deprived of much anticipated pleasure as a result of finding his woodland operations confined within the cleared one-third acre, and I can sympathise with his feelings of frustration, I am not satisfied that he has also been put to a financial loss. This is not a finding that that he has in fact suffered no damage under this head; it is a finding that I am unable to award any compensation for loss of profit, because the claimant has failed to establish the extent of his loss, if any".

In disallowing the costs claimed, he went on to say:

> " ….but I should add that the claimant failed to produce any details, or supporting evidence such as receipted accounts, to substantiate that the stated expenditure had in fact been incurred".

19. In Mr. Mooney's case, the amounts claimed are, in my judgment, wholly speculative and without foundation. He has claimed sums based upon what he says he would have earned had he been working full time. In other words, for the periods he was not gainfully employed, and for the periods he was working part time, he has sought to replace, in full, the income that he had previously enjoyed. In addition, he has claimed substantial sums for loss of free time, thus contending that the time needed to prepare for the appeal not only accounted for the whole of his normal working week, but also ate into his, and his wife's free time.

20. As I indicated at the conclusion of the hearing, I find there are no sustainable grounds for allowing any of the amounts claimed under these heads. Applying the principle in *Factorset*, I do not consider that any of the "losses" referred to could fairly and reasonably be considered as arising naturally from the refusal of consent under the TPO, and thus award nil in relation thereto.

21. As to the cost of consultants, the Council accepted that the principle that this was a valid head of claim was established in *Fletcher v Chelmsford Borough Council* [1991] 2 EGLR 133., and Mr. Mooney confirmed that all the costs were incurred post the date of refusal - 11 August 1994. The parties agreed that the report of Mr. Jorgensen at a cost of £1,350 was in respect of the appeal, and the Council accepted it subject to a receipted invoice being produced by the claimant. The

arboricultural report of Mr. Wynn at £1,250 and Mr. Mooney's solicitors costs at £2,139 were accepted and receipted invoices for those were produced. I confirm, therefore, that the compensation awarded under claim item 7 amounts to £4,739.

22. Mr. Mooney had claimed £1,000 for incidental expenses, including mileage, stationery, photocopying etc. Although again not fully substantiated by receipts, the Council accepted this head of claim as reasonable and I therefore award that amount.

23. Claim item 9 related to the invoice from Stevenson Builders for repairs to the claimant's garden structures. I accept the Council's submission that, by not making a claim under his insurance, the claimant had failed to take action to mitigate his loss. I award nil under this head.

24. The second part of the claim, amounting to £500,000, was for loss and damage of indirect costs resulting from the Council's actions, including loss of faith in the democratic system, and damage to the emotional state of the claimant and his family. Mr. Mooney accepted at the hearing that this element of the claim was "totally subjective", and could not be substantiated by evidence or in monetary terms. In my judgment, the *Factorset* principles apply equally to this part of the claim. As indicated orally, I determine compensation under this part of the claim at nil. In doing so, I fully accept and concur with the Council's conclusions that this element of the claim in particular was ill-founded, excessive and an abuse of the Tribunal's process.

25. The final issue for my determination relates to interest on the compensation that has been awarded. Mr. Ashworth submitted that the claimant had taken an excessive amount of time to bring the claim – some three years since the Inspector's decision, and thus the Council's liability should be limited. There was also a question as to the point from which interest should run, if indeed I should determine that it is payable. In that regard he referred to *Buckle* in which the Tribunal member had concluded the claimant was not entitled to interest under the relevant statutory provisions, and in any event it is the duty of the Tribunal to award compensation. Whether or not interest is payable on that compensation is clearly the subject of separate statutory provisions the interpretation of which, the member said, strictly lies elsewhere.

26. However, in that case, the operative date (upon which consent was refused) was in October 1990. That date is relevant here because interest runs on compensation from the date the consent required by the tree preservation order is refused or granted subject to conditions (Planning and Compensation Act 1991, s.80 (1) and Sched. 18, Pt1), **provided that it is after 25 September 1991** (S.I.1991 No 2067 art.4 and Sched. 2, para 6(29). (My emphasis).

27. It is clear therefore that the Act makes provision for the payment of interest from the date of refusal in cases where the operative date is after 25 September 1991 (as in the instant case), and there is no provision for the application of an arbitrary cut off point.

28. In summary, I determine that the Council shall pay to the claimant compensation of £5,739 to which interest shall be added at the statutory rate from 11 August 1994.

29. This decision determines the substantive issues in this reference, and the Tribunal's award is final. In view of the provisions of Rule 28(11) of the Lands Tribunal Rules 1996, I make no award as to costs. Rights of appeal under section 3(4) of the Lands Tribunal Act 1949 and order 61 rule 1(1) of the Civil Procedure Rules will come into operation from the date of this decision.

DATED

(Signed) P.R.Francis FRICS.

9

LCA/62/2003

LANDS TRIBUNAL ACT 1949

COMPENSATION – tree preservation order – preliminary issues – held deemed refusal of application to fell was refusal on which claim could be based – cost of reparing damage suffered before refusal not recoverable – reasonable costs of appealing against deemed refusal recoverable if reasonable to appeal

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN **(1) ROSEMARY DUNCAN**

(2) PRUDENTIAL ASSURANCE COMPANY LIMITED

Claimants

and

EPPING FOREST DISTRICT COUNCIL

Compensating Authority

Re: 46 Highfield Green
Epping
Essex

Before: The President

Sitting at 48/49 Chancery Lane, London WC2A 1JR
On 15 January 2004

Roger Lancaster instructed by Halliwell Landau of Manchester for the claimant.
Charles Mynors instructed by Colleen O'Boyle, Solicitor to Epping Forest District Council, for the compensating authority.

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The following cases are referred to in this decision:

Bell v Canterbury City Council (1988) 56 P & CR 211
Buckle v Holderness Borough Council [1996] 2 EGLR 133

DECISION ON PRELIMINARY ISSUES

1. The preliminary issues that I have to decide concern the claimants' entitlement to compensation in respect of a refusal of consent to cut down two trees protected by a tree preservation order adjacent to a dwelling house, 46 Highfield Green, Epping. The facts relevant to these preliminary issues are not in dispute. The two trees, a weeping ash and a field maple, were specified in the District of Epping Tree Preservation Order No 28/83, made by the compensating authority on 12 April 1984. The house, an end of terrace house built in the 1960s, was bought by the claimant Mrs Duncan in 1989. In 1997 she noticed that damage to her property had occurred to her front porch and rear conservatory and she reported it to her insurers, the Prudential Assurance Company Ltd. She also instructed a specialist firm, O'Callaghan Associates, who advised that the damage was due to subsidence caused by the roots of the two trees. In February 1998 cracks were reported in the bathroom wall. In December 1998, on Mrs Duncan's instructions, O'Callaghan Associates submitted to the authority an application for consent to fell the trees. The application was not determined within the period prescribed and in March 1999 and appeal against its deemed refusal was made to the Secretary of State for Transport, Local Government and the Regions. An inspector held an inquiry in February 2002, and he recommended that consent should be granted for the felling of the weeping ash but not the field maple. The Secretary of State, however, in a decision dated 20 June 2002 rejected the recommendation for consent, and dismissed the appeal.

2. During the long period that elapsed between the claimant's notice of appeal to the Secretary of State in March 1999 and its determination in June 2002 the claimant sold the house to Mr R M Brown and Mrs M Parker. The statement of agreed facts says that the sale was in or around April 2000. At that stage no remedial works had been carried out, and the price reflected the damaged condition of the house. The claimant made a claim under her insurance policy for the reduction in market value and was paid £50,000 in settlement.

3. In September/October 2000 the purchasers carried out the necessary works to underpin the flank wall of the house, and stabilising works were carried out to the front porch, the conservatory and the boundary wall. In his report to the Secretary of State the inspector concluded that the damage to the porch might have been caused by the roots of the weeping ash and that the tree might cause damage in the future to parts of the house that had not been underpinned. The Secretary of State took the view that the tree's roots were not necessarily the prime cause of subsidence in the porch and that, as underpinning had been carried out in 2000 and no level monitoring had been carried out after 1999, there was no evidence of continuing movement in the property, so that the felling of the tree was not justified. In relation to the field maple the inspector concluded that it might have caused damage in the past to the flank wall of the house and to the boundary wall and probably had done so to the conservatory, but that it would not cause damage in the future to those parts of the house that had been underpinned and that the likelihood of future damage to the remainder of the house had been substantially reduced by the underpinning. The Secretary of State expressed his conclusions on the effect of the field maple in substantially the same terms.

4. The TPO was made in pursuance of powers contained in section 60 of the Town and Country Planning Act 1971. It accords with the model order in the Schedule to the Town and Country Planning (Tree Preservation Order) Regulations 1969. It contains (in Article 2) a prohibition against the cutting down etc of the specified trees without consent, and it provide (at Article 3) for the making of application for consent. Under Article 4(1) where an application for consent is made, the authority may grant such consent either unconditionally or subject to conditions or may refuse consent. Article 8 applies the Third Schedule to the Order which contains certain sections of Part III of the 1971 Act adapted and modified for the purposes of the Order. Under section 36(1), as so set out, where an application for consent is refused or is granted subject to conditions, the applicant may appeal to the Secretary of State, who, under section 36(3), may allow or dismiss the appeal and may deal with the application as though it had been made to him in the first instance. Under section 37 if within two months from the date of receipt of the application the authority have not given notice of their decision or notice of it having been referred to the Secretary of State the provisions of section 36 apply in relation to the application as if consent had been refused.

5. Article 9 of the Order provides:

> "9. Subject to the provisions of this Order, any person who has suffered loss or damage in consequence of any refusal (including revocation or modification) of consent under this Order or of any grant of any such consent subject to conditions, shall, if he makes a claim on the authority within the time and in the matter prescribed by this Order, be entitled to recover from the Authority compensation in respect of such loss or damage …."

Article 11(1) makes provision for the making of a claim for compensation, and Article 11(2) provides:

> "(2) The time within which any such claim shall be made as aforesaid shall be a period of twelve months from the date of the decision of the authority or of the Secretary of State, as the case may be, or where an appeal has been made to the Secretary of State against the decision of the authority from the date of the decision of the Secretary of State on the appeal."

6. On the application of the council, I ordered that the following issues be determined as preliminary issues:

> "(a) Whether or not the First Claimant is entitled to be compensated in respect of the loss she suffered on her sale of the Property, given that she has already been compensated for that loss by the Second Claimant.
>
> (b) Whether or not the Second Claimant is entitled to be compensated in respect of any loss that relates to or arises out of
>
> (i) harm caused to the Property by the trees prior to the date of the deemed refusal of consent under the Order.
>
> (ii) The possibility of such harm being caused to the Property after the date on which the loss was suffered; and

(iii) The costs of mounting the appeal to the Secretary of State against the deemed refusal of consent."

7. Issue (a) no longer remains for determination as the council accept that the second claimant is entitled to seek compensation on behalf of the first claimant under the step-in rights in the insurance policy taken out by the first claimant. In the event the preliminary issues for determination resolved themselves into the following:

(1) What was the refusal (and what was the date of the refusal) in respect of which a claim for compensation may lie under Article 9? Was it the deemed refusal (February 1999) or the Secretary of State's decision, which was given on 20 June 2002?

(2) Are the claimants entitled to compensation to reflect the cost of remedying damage caused to the property by the trees prior to the date of refusal?

(3) Are the claimants entitled to compensation to reflect costs of the appeal to the Secretary of State?

8. Issue (1) arises because the council contended that the refusal for the purposes of Article 9 was the Secretary of State's decision given on 20 June 2002 and that that refusal could not have caused loss to the claimants since Mrs Duncan had sold the house before that date. The contention of Mr Charles Mynors for the council was this. Under section 2(4) of the Planning (Consequential Provisions) Act 1990, any reference in any enactment, instrument or document to the provisions of the repealed 1971 Act, must be construed, so far as may be required for continuing its effect, as including a reference to the corresponding provision in the consolidating Town and Country Planning Act 1990. Thus the reference in the Third Schedule to the Order to section 37 of the 1971 Act must be construed as a reference to the corresponding provision, section 78(2), in Part III of the 1990 consolidating Act. Section 11 of the Interpretation Act 1978 provides that, where an Act confers power to make subordinate legislation, expressions used in that legislation have, unless the contrary intention appears, the meaning they bear in the Act. Section 336(5)(c) of the 1990 consolidating Act provides that "in relation to a decision given on an appeal in the circumstances mentioned in section 78(2), references [in this Act to such a decision] shall be construed as references to the decision so given," and section 336(1) provides that "planning decision" means a decision made on an application under Part III of the Act. So, said Mr Mynors, the refusal of consent consisted in the decision of the Secretary of State.

9. Mr Roger Lancaster for the claimants submitted that section 336 had no application to the Order. In *Bell v Canterbury City Council* (1988) 56 P & CR 211 Russell LJ (at 216) had rejected the council's contention that the words in Article 9 "loss or damage in consequence of any refusal of consent" should be construed in the light of various provisions in the 1971 Act dealing with the measure of compensation consequent upon other refusals of consent by local planning authorities exercising planning functions. The lord justice said that the interpretation of Article 9 should be read without reference to other provisions in the Act and the words of Article 9 should be give their ordinary meaning.

10. Mr Lancaster said that under the Third Schedule to the Order the effect of the council's failure to give notice of a decision on the application for consent was that the council were deemed to have refused the application in February 1999. Under Article 9 the council was the compensating authority where a person suffers loss or damage as the result of any refusal of consent. Article 11 of the Order specifically contemplated the Secretary of State's involvement in the process and provided for the submission of a claim for compensation effectively to be delayed until the outcome of the appeal was known. The council could at any time have indicated that they would entertain a further application, which they could have granted. An inevitable consequence of the council's interpretation would be that no authority would determine an application since by leaving the matter effectively to the Secretary of State they would avoid any possibility of having to pay compensation.

11. Mr Mynors's contention about the effect of section 336, assuming that it applied to the construction of the Order seemed to me to be misplaced in view of the provisions of the paragraph in subsection (5) after the one (paragraph (c)) on which he placed reliance. Paragraph (d) provides:

> "the time of a planning decision, in a case where there is or was an appeal, shall be taken to be or have been the time of the decision as made by the local planning authority (whether or not that decision is or was altered on that appeal) or, in the case of a decision given on an appeal in the circumstances mentioned in section 78(2), the end of the period there mentioned."

12. The effect of paragraphs (c) and (d) taken together are thus that where a decision is given on an appeal against an authority's deemed refusal of an application, the decision for the purposes of the Act is the Secretary of State's decision but the time of that decision is taken to be the end of the period referred to in section 78(2), ie the period of two months from the date of the council's receipt of the application. Mr Mynors accepted that this was the effect of these provisions, so that reliance on section 336 would lead to the conclusion that the date of the decision in this case was 18 February 1999 (two months after the date on which the council had received the application, 18 December 1998).

13. However, I do not think that section 336 does govern the construction of the Order as to what constitutes the refusal for the purposes of Article 9 and the time of the decision. The reason for this is that section 336(1) provides that "planning decision" means a decision made on an application under Part III of the Act. The application for consent in this case was not made under Part III of the Act but under Article 3 of the Order. It is because of this that the Third Schedule to the Order modifies section 36(1) (which gives the right of appeal) so as to reflect the fact that the application is not made under the Act but under the Order. It provides: "Where an application is made to the authority for consent under the Order…"

14. Since, therefore, section 336 does not apply for the purpose of construing the Order, "refusal" in Article 9 falls to be construed without reference to the Act – in the same way as the words "compensation in respect of such loss or damage" in the same Article (see the *Bell* case above). It is, in my view, clear that where an authority refuse consent and an appeal against their decision is dismissed by the Secretary of State, the refusal for the purpose of Article 9 is the decision of the authority to refuse consent. The Secretary of State in such circumstances

does not refuse consent. He dismisses the appeal against the refusal under the power contained in section 36(3) as contained in the Third Schedule, which provides that he "may allow or dismiss the appeal". That it is the date of the refusal by the authority that is the material date for the purpose of Article 9 was accepted in *Bell* (see per Slade LJ (1988) 56 P & CR 211 at 219).

15. In the present case there was no decision by the council refusing consent. Nor was there any refusal of consent by the Secretary of State. In his decision he said simply: "…the Secretary of State hereby dismisses your appeal." The appeal had been made under section 36(1) by virtue of section 37, which provided that section 36 should apply in relation to the application as if the consent applied for had been refused by the authority. To hold that in these circumstances there has been no refusal of the application, so that the claimant cannot be entitled to compensation, would not be an acceptable construction of the provisions. It is inconceivable that no compensation could ever be payable where the authority does not make a decision on the application, and indeed it is no part of the council's case that that is the effect of the provisions. The provisions of section 37, now section 78(2) of the 1990 Act, are commonly referred to as establishing a "deemed refusal", and in my judgment the Order is to be applied on the basis that, where the authority fail to determine the application, there is a deemed refusal which constitutes a refusal for the purposes of Article 9. Similarly where Article 11 refers to an appeal that "has been made to the Secretary of State against the decision of the authority" the reference to the decision includes a deemed refusal.

16. On issue (1), therefore, I conclude that the refusal for the purposes of Article 9 was the deemed refusal of the application, and the time of it was the end of the period of two months from the receipt of the application, ie 18 February 1999.

17. Issues (2) and (3) can be dealt with more shortly. On issue (2), compensation is payable only in relation to loss or damage that has been suffered in consequence of any refusal. It follows that (subject to the qualification that I mention below) the cost of remedying damage that the property suffered before the date of the refusal will not be recoverable because the damage will not have been suffered in consequence of the refusal, and the loss – the cost of remedying the damage – similarly will not have been suffered in consequence of the refusal. The qualification to this is that, if as a result of the refusal of consent a more costly remedy is required than would have been necessary if consent had been granted, the extra cost will be recoverable because it will be a consequence of the refusal. Typically works to deal with subsidence damage caused by tree roots will be designed both to repair the damage that has been suffered and to provide protection against future possible damage from this source. More extensive and more costly works may be required if the tree that has caused the damage is to remain following the refusal of consent than if the tree is to be cut down: see for example *Buckle v Holderness Borough Council* [1996] 2 EGLR 133.

18. The fact that the tree roots have caused damage in the past is likely to inform the judgment that has to be made on what works are necessary to prevent such damage recurring in the future. It must also be said that compensation may be awarded to reflect the loss of market value arising from the refusal of consent (see *Bell*), and it is not necessarily the case that the measure of this loss of value will be the extra cost of the remedial and preventive works. It is possible that the knowledge of past damage, coupled with the inability to remove the tree that

has caused it and the consequent fear of future damage, may result in a loss of value that is greater than the extra cost of the works. Whether or not it does so, however, is a matter of valuation.

19. On issue (3) there is no doubt, in my judgment, that the reasonable costs of pursuing an appeal against the refusal of consent are recoverable as a loss suffered in consequence of the refusal provided that on the facts it was reasonable to pursue the appeal. In *Buckle* the Tribunal (Dr T Hoyes FRICS) accepted that it was reasonable on the part of the claimant to have pursued an appeal because, had it been successful, the claim would have been reduced, so that, to that extent, the appeal was an attempt to mitigate the claimant's loss. Whether the same would apply in the present case depends on the facts, and I am not concerned in determining these preliminary issues to come to any conclusion in this respect. On the face of it, however, the fact that the council had failed to determine the application and the inspector recommended that consent should be granted for the felling of one of the trees would, quite apart from other considerations, suggest that the appeal was reasonable.

20. I therefore determine as follows the preliminary issues:

(1) The refusal for the purposes of the application of Article 9 of the Order is the deemed refusal of the council, and the relevant date for that purpose is 18 February 1999.

(2) The cost of repairing damage suffered before the date of the refusal is not itself recoverable, but, if the effect of the refusal was to increase the cost of carrying out works to repair past damage and to prevent possible future damage, the extra cost may form the subject of compensation. Similarly the fact that damage had occurred in the past may be relevant to any question of the loss of market value arising from the refusal of consent.

(3) The reasonable costs of pursuing the appeal against the refusal of consent are recoverable as a loss suffered in consequence of the refusal provided that on the facts it was reasonable to pursue the appeal.

21. The parties are now invited to make submissions on costs, and a letter dealing with this accompanies this decision, which will not become final until the question of costs has been disposed of. Further directions as to the future conduct of the reference will be given in due course.

Dated 19 January 2004

George Bartlett QC, President

Addendum on costs

22. I have received the parties' written submissions on costs. The claimants ask for their costs of the preliminary hearing. They say that they were successful at the hearing. The compensating authority say that the consequences of the decision on the preliminary issues are that compensation is payable under three heads as follows:

(a) the extra costs (if any) of works necessary to prevent future damage likely to be caused by the tree, over and above the cost of works merely to rectify past damage;

(b) any additional diminution in market value due to the need to retain the tree, over and above the costs referred to in (a);

(c) the costs of pursuing the appeal to the Secretary of State, provided that it was reasonable to pursue the appeal.

They go on to argue that the compensation payable under (a) and (b) is either nil or, at the very most, only a small proportion of the diminution is market value that forms the basis of the claim; and that compensation is payable under (c) only in relation to the professional costs incurred up to the date of the sale of the property, and that these are likely to be only a very small proportion of those claimed. They say that they are entitled to be paid by the claimants a significant proportion if not all of their costs of the preliminary hearing.

23. Of the three issues I determined at para 20, (1) was determined in favour of the claimants, (2) was determined in favour of the council, but with qualifications, and (3) was determined in favour of the claimants, but with a qualification. Neither party has been wholly successful, therefore, and in my judgment the proper award of costs is therefore likely to depend on the amount of compensation that is ultimately awarded and any offers that have been made. I am in no position to determine the correctness of the council's contentions on quantum. This must await the substantive decision. The appropriate order is that the costs of the preliminary hearing be reserved, and I so order.

24. The claimants ask that two further orders be made. Firstly they seek an order that the compensating authority pay the claimants their reasonable costs of pursuing the appeal against the deemed refusal of consent to fell. These costs, however, form part of the substantive claim for compensation, and what costs were reasonably so incurred fall to be determined as part of the substantive decision. Secondly the claimants ask for a stay of 3 months to enable negotiations to take place. On this, rather than directing a stay, I will order that the substantive hearing be now fixed for the earliest available date after 1 June 2004.

Dated 27 February 2004

George Bartlett QC, President

LCA/167/2006

LANDS TRIBUNAL ACT 1949

COMPENSATION – tree preservation order – refusal of consent to fell oak tree – subsidence and heave insurance refused for nearby bungalow – bungalow unsaleable except at substantial discount – whether blight caused by refusal of consent for felling – claim dismissed – Town and Country Planning Act 1990, s.203

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN	**DAVID T WOODHAMS**	**Claimant**
	and	
	CHICHESTER DISTRICT COUNCIL	**Compensating Authority**

Re: "Camellia"
Chalk Road
Ifold
Nr Loxwood
West Sussex RH14 0UA

Before: N J Rose FRICS

Sitting at Procession House, 110 New Bridge Street, London, EC4V 6JL
on 24 January 2008

Claimant in person
Paul Stinchcombe, instructed by District Solicitor, Chichester District Council for the Compensating Authority

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The following case is referred to in this decision:

Perrin and another v Northampton Borough Council [2007] EWCA Civ 1353

DECISION

Introduction

1. This is a reference to determine the compensation payable to Mr David T Woodhams, pursuant to section 203 of the Town and Country Planning Act 1990, for loss resulting from the refusal of consent by the compensating authority, Chichester District Council (CDC), to fell an oak tree (T2). The tree is the subject of a tree preservation order (TPO) and is situated in the grounds of the claimant's freehold bungalow, "Camellia", Chalk Road, Ifold, near Loxwood, West Sussex, RH14 0UA. The claimant has been unable to obtain insurance cover for his bungalow in respect of subsidence and heave and, as a result, he has been advised that the property is unsaleable other than as a building plot. He claims compensation of £155,000, including costs of £5,000. The compensating authority's case is that no compensation is payable.

2. Mr Woodhams appeared in person and gave evidence. CDC was represented by Mr Paul Stinchcombe of counsel, who called no witnesses. In the light of Mr Woodhams's evidence and the submitted documents, I find the following facts.

Facts

3. "Camellia" comprises a four bedroom bungalow, built in the 1940s with some subsequent additions. It sits centrally on a plot on the north side of the junction between Plaistow Road and Chalk Road in the village of Ifold. In this area the properties are mainly large detached houses and bungalows with fairly substantial gardens containing numerous mature trees and site boundaries are marked mainly by hedges and rural style fencing. Adjacent to the north-east boundary of the site of Camellia, at approximately the mid-point, is a single storey brick-built garage with a pitched roof, facing south-west. The tree known as T2 is located some 9m south-east of the eastern corner of the bungalow, and 7m from the front of the garage.

4. The claimant purchased the property in 1971. In 1993 he decided to build an additional property on the site, which is one of the largest plots in the area. He submitted a planning application and shortly afterwards, on 3 August 1993, CDC as planning authority made a TPO under the Town and Country Planning Act 1990 in respect of five oaks (T1 to T5) and four other trees on the site.

5. Some six or seven years later Mr Woodhams submitted an insurance claim for subsidence damage to his garage. The insurance assessor considered that the garage was not worth repairing and the claim was settled in the sum of £11,000. The insurance company, Royal and Sun Alliance, then asked for a detailed report on all the trees protected by the TPO. On Mr Woodhams's instructions such a report was prepared in December 2001 by Mr Derek

Patch of the Arboricultural Advisory and Information Service. It included the following commentary and recommendations with regard to T2:

> "Standing 1m from the edge of the sunken drive. The main fork at approximately 15m is a potentially very weak structure with the trunk becoming two more or less upright stems. The crown is thinning at its apex and there is significant dead wood in the crown suggesting that this tree is lacking vigour and under stress.
>
> The trunk is clothed with many young shoots, which again suggests a stressed tree. At the base of the trunk there are two wounds which appear to have been caused by removal of two major branches. One of these wounds has soft decayed wood to a depth of about 50mm, but the other was sound and callus is developing around the edges of the wound. There was also a patch of dead bark at ground level on the east side of the trunk.
>
> The root area appeared free from fungal activity, but construction of the drive is likely to have severed roots and may be the cause of the stress symptoms visible in the crown.
>
> Consider as having a limited safe useful life. Inspect regularly."

6. In February 2002 the insurance company added an endorsement to the policy covering Camellia, requiring T2 and another protected oak, T5, to be removed within two months as a condition of continued insurance in respect of loss or damage caused by subsidence.

7. On 10 May 2002 Mr Woodhams submitted an application for permission to fell T2 and T5. CDC failed to determine this application within the eight week statutory period and, on 12 July 2002, Mr Woodhams appealed to the Government Office for the South East on the following grounds:

> "Failure to issue a decision. Householder not able to insure property. Condition of the trees."

8. CDC made written representations to the Government Office in respect of the appeal. They included the following observations:

> "In submitting the application, the appellant attached a brief report commenting on the condition of both trees. This report appears to be reasonably balanced in its findings and recommendations. In respect of T2, whilst noting that the tree lacks vigour and may be under stress, there is no conclusion that the tree, at this stage, requires or justifies felling. The report states that whilst the tree may have a limited safe useful life, there was no need, at this stage, to do anything more than inspect it regularly. Reference in the report to the possible impact of changes to the drive arrangements relate to a planning permission granted consent in 1999 under application ref PS/99/02259/DOM. This granted planning permission to construct an extension on the north western side of the existing garage building to provide for an additional car port and gymnasium. The construction of this extension would require minor changes

to the alignment of the driveway in order to gain access to the car port. These changes are not considered to be of any overriding significance in respect of the health and viability of the T2 tree... The site has been visited by the Arboricultural Officer at West Sussex County Council. His views are to be the subject of a separate report as part of this appeal. His verbal conclusions, following the site meeting, were that whilst the two oaks were not necessarily in the prime of health, they were nonetheless not in such a seriously poor condition as to warrant felling.

For the reasons outlined in the preceding statement, the Inspector is asked to uphold the District Planning Authority's decision to refuse consent by dismissing this appeal. However, notwithstanding the above, if the Inspector is minded to allow the appeal the District Planning Authority considers that the conditions set out in Appendix D should be imposed on any consent. Such conditions are presented on a 'without prejudice' basis."

9. These representations were submitted to the Government Office under cover of a letter dated 20 August 2002, which included the following paragraphs:

"Since the preparation of the Council's statement, late comments have been received from the Arboricultural Adviser to WSCC [West Sussex County Council] who acts also as adviser to the District Council. His comments are attached. The Council has not had the opportunity to formally consider these comments.

It is of course for the Inspector to determine the weight which he will give to this consultee's views and whether he wishes to either dismiss or allow the appeal or alternatively to make a split decision upon the proposal."

10. The comments of the arboricultural adviser, Mr Turner, were written in manuscript and bore the date 9 August 2002. They were sent to CDC from the offices of West Sussex County Council Planning Department by facsimile transmission, timed at 9.18 am on 20 August 2002 and read as follows:

"As a result of our site visit the tree on the boundary with Rosehill Cottage was looking very thin. I would not object to its removal subject to replacement planting.

The tree to the west of site closest to the house did not look too bad to me. It had some dead wood but not under major stress. I would be surprised if it were this tree that was causing settlement problems to garage. However the applicant did state that he was prepared to do some replacement planting particularly on the south of the site. Planting here would be important in the long term providing cover adjacent to the road. Subject to the detail of species and location, I would accept this application."

11. On 13 September 2002 Mr Patch, on behalf of the claimant, sent to the Government Office a written response to CDC's representations. The first two paragraphs read as follows:

"The statement from the Chichester District Council indicates that, had they been mindful to issue a decision on the application made by Mr Woodhams (owner of Camellia, Chalk Road, Ifold), it would have been a refusal.

Also submitted by the District Council with the statement is copy of a long-hand note submitted to the Council from the arboricultural adviser based in the West Sussex County Council, which indicates a recommendation for approval of the application subject to replanting elsewhere on the site."

12. The response concluded:

"The application for permission to fell two oak trees was made in order to safeguard the safety of people and property. The Council's failure to issue a decision, and therefore deemed refusal, which is confirmed in their statement, was without and contrary to the advice of their arboricultural adviser. The recommendation from the Council's arboricultural adviser is to permit the felling subject to replanting elsewhere on the site – a requirement the applicant had offered in the original application. We ask that the Inspector and the Department overrule the Council's decision by granting permission for the felling of two oak trees (T2 and T5) at Camellia, Chalk Road, Ifold."

13. Mr R D D Grainger, an arboriculturalist, was the Inspector who was asked to visit the site and advise the First Secretary of State on the merits of the appeal. He submitted his report on 13 December 2002. In paragraph 1, he said:

"This report contains a description of the appeal trees and their surroundings and my appraisal (on the basis of my observations and the written representations of the parties) of the likely impact to the proposal. It is illustrated by various photographs, which are appended."

14. Paragraphs 2 to 8 contained a description of the site and surroundings and of the trees in question. The report then continued:

"**APPRAISAL**

9. When travelling along Plaistow Road and approaching its junction with Chalk Road from either direction, at distance, the appeal trees are not visible (photos A and D). However, when close to the junction, tree T2 is clearly visible where it forms part of a group of scheduled oak trees in the eastern part of the garden (photo B). Appeal tree T5 also forms part of this group but is screened by other trees and is not significant from this viewpoint. From Chalk Road, when close to the access to Camellia both appeal trees are less prominent, being screened by the boundary hedge and other trees in this part of the garden (photo D). When approaching Camellia along Chalk Road from the east, at distance, neither of the appeal trees is visible (photo E) but when close to Rosehill Cottage tree T5 can be seen above the garage of this property (photo F). As such, both appeal trees make a positive contribution to visual amenity as part of the group of trees in the

eastern corner of Camellia but as individuals have limited public amenity value. If either appeal tree were to be removed this would reduce the size of the group but there are sufficient trees in the immediate area to mitigate this loss, which would not be significantly damaging to the character or landscape of the local area.

10. With regard to the appeal trees' condition, in the case of tree T2, its condition as described in Mr Patch's report does not justify felling on grounds of safety. However, oak tree T5 has extensive crown dieback from which, in my view, it is unlikely to recover and therefore felling would be appropriate.

11. The appellant has appended an extract from insurance policy RH-RTTO54473 and in response to my question indicated this forms part of other insurance documents dated 28 February 2002. This appears to be a policy operative endorsement relating to subsidence damage and the removal of both appeal trees as a condition of the insurance. Whereas tree roots can contribute to subsidence damage to buildings, where subsidence has occurred a detailed investigation is required to determine the level of involvement of trees and the appropriate remedial action. From my observations made on site, there is some step cracking in the brickwork of the garage at Camellia and a crack in the render of the garage at Rosehill Cottage but no information has been provided to conclude that the damage to either building has resulted from the appeal trees, or any other tree, in the vicinity. Without this information, it cannot be concluded that either tree is involved in any damage to nearby buildings that could be rectified by their removal, or that the appeal trees are likely to cause damage in the future.

12. The felling and pruning of scheduled trees should always be justified and the need for such works based on the specific requirements of the individual tree and its situation and not by the previous treatment of other trees in the area. Where an application is made for planning permission trees are a material consideration and the local planning authority will normally take into account the effect of any proposed development on existing trees when determining the application.

13. If this appeal is allowed it would be appropriate to impose a condition requiring replacement planting. As suggested by the appellant, new planting would be beneficial adjacent to the southwest boundary where in time the new trees would be clearly seen from Plaistow Road. Any replacement trees should be large growing trees of normal nursery stock size, the species and siting subject to the Council's agreement.

CONCLUSIONS

14. The appeal trees are not individually significant but have collective value as part of a group of trees in the eastern part of the garden of Camellia. The condition of oak tree T2 does not justify its removal but oak tree T5 is suffering extensive crown dieback and its removal would be justified. Although the appellant's insurance policy requires the removal of both appeal trees, no information has

been provided indicating any damage to buildings or implicating the involvement of the two appeal oak trees. The felling and pruning of trees should always be based on the requirements of the individual tree and not by precedent and the local authority would normally assess the implications of any development proposals on trees as part of their assessment of a planning application. If this appeal is allowed it would be appropriate to impose a condition requiring replacement planting."

15. The decision on the appeal was dated 4 March 2003. It said:

"1. I am directed by the First Secretary of State to refer to your client's appeal, made under the above mentioned Tree Preservation Order. You appealed against the refusal of Chichester District Council to grant consent for the removal of two oak trees on land at Camellia, Chalk Road, Ifold, Loxwood, West Sussex, identified as T2 and T5 in the above order.

2. The Secretary of State has taken into account your client's representations to the Council. He has considered the reasons given in support of the appeal proposal, and whether it is justified in the light of the trees' contribution to the amenity of the local area.

3. An Inspecting Officer visited the site on 6 November 2002. A copy of his report is appended to this letter. The Secretary of State considers that both appeal trees make a positive contribution to visual amenity as part of a group of trees, but as an individual T5 has limited public amenity value since it is screened by other trees. He agrees with the Inspecting Officer that no information has been provided to indicate whether either tree is the cause of subsidence damage to nearby garages as a result of root action. The Secretary of State accepts the judgment of the Inspecting Officer that T5 has extensive crown dieback from which it is unlikely to recover, and that the felling of this tree would be appropriate. He also accepts the Inspecting Officer's judgment that the condition of T2 does not justify its removal.

4. For the reasons given above, the Secretary of State hereby dismisses your client's appeal with regard to T2 and allows your client's appeal with regard to T5..."

16. On 7 April 2003 the Valuation Officer, Worthing District, altered the valuation list entry in respect of Camellia, reducing its value from band G to band E. On 16 July 2003 Mr Woodhams, accompanied by his then surveyor Mr Crawford Clarke, attended a meeting with Mr Whitby, the then arboricultural advisor to CDC. Mr Woodhams expressed concern that he had been unable to insure the proposed building to replace the existing garage. Mr Whitby said that, without new evidence, the authority could not change its view regarding the felling of T2, unless the tree became unhealthy or hazardous. He suggested that the claimant should pursue one of the following options. Either apply for consent for pruning work to the tree, or submit a new application to fell the tree accompanied by reports from an arboricultural consultant and a consulting engineer, a letter from the insurance company stating why they were refusing insurance and a proposed planting scheme.

17. Mr Woodhams submitted a further application for permission to fell T2 on 28 May 2004. The letter accompanying the application said:

> "With further reference to the above I hereby make application to have tree T2 to be felled, the reason being that I still cannot get insured on my property for subsidence.
>
> Since the refusal of this I have had the Valuation Officer from Worthing downgrade the property in value by two bands, this being solely on your decision.
>
> I have also been informed by estate agents that the property now would be very hard to sell as a potential buyer would find great difficulty in obtaining a mortgage where subsidence is removed from insuring the same property.
>
> They also informed me that you, the Council, have blighted this property and the value would be considerably reduced.
>
> I think you will appreciate that this is a ridiculous situation and I hope the Council will see their way clear to have this tree removed immediately."

18. On 8 July 2004 Mr Woodhams attended a further meeting with Mr Whitby to discuss the outstanding application. CDC's file note recorded Mr Whitby as saying:

> "the information provided is not really material facts that CDC can consider when processing this application. I asked Mr Woodhams for a structural engineer's report to state the stability of the house and if any damage or possible damage could occur due to subsidence. So depth foundations, soil type, any evidence of subsidence, roots within or adjacent to property. I said that the structural engineer's report would clarify the state of the building and if there is or potentially the possibility of the tree causing harm to the building. This information may take a while and I suggested that Mr Woodhams should withdraw and resubmit once he has a structural engineer's written report."

19. In a telephone conversation on 9 July 2004 Mr Woodhams informed Mr Whitby that he wanted CDC to determine his application on the grounds set out in the application letter of 28 May 2004. On 26 July 2004 the compensating authority refused consent for the felling of T2 for the following reasons:

> "The tree is a significant feature in the local landscape and appears to be in adequately sound and healthy condition. Its proposed felling would result in undue loss and detriment to the visual amenities of the locality. The reasons submitted by the applicant to support his case to fell the tree are not material justification why the tree should be felled. The Secretary of State within the appeal ref GOSE/107/1/CHIC/23 of a previous application PS/02/01272/TPO stated 'that no information has been provided to indicate whether either tree is the cause of subsidence damage to nearby garages as a result of root action.' The applicant has not provided any material evidence or information why the tree should be felled and for this reason the District Council refuses the felling of Oak tree T2."

20. Mr Woodhams applied once again for permission to fell T2 on 5 March 2005. He wrote:

> "With further reference to the two applications and the subsequent refusal thereof re the above I now enclose engineer's report which you have stated you require for the above.
>
> This clearly states that this tree reference T2 is a threat to my home and justifies the felling of same.
>
> To alleviate the phenomenon known as heave they suggest that this tree should be taken down over two/three years which I also had confirmed by my arboriculturalist, and this is what I would do.
>
> However, I have been instructed to inform you that whilst this tree is still standing and I have not been able to commence with the felling of this tree under the guidance of the consulting engineer and arboriculturist I will hold you, the Chichester District Council, fully responsible for any costs on this property due to subsidence as I cannot insure this property until felling proceedings have commenced."

21. The reference to an engineer's report related to one prepared by Mr Stephen Brewster of Rushby Brewster Associates dated 23 September 2004. It referred to the receipt of instructions to inspect Camellia with a view to appraising its structural condition with particular reference to the nearby trees. It contained the following conclusions:

> "3.0. Evident distress
>
> 3.1 Internal. Apart from minor defects to the ceiling in some rooms and an ill-fitting door to the lounge, no internal distress has been noted. All floors appear level and uniform and no doors appear out of square.
>
> 3.2 External. Some minor distress is evident to areas of brickwork but this would largely appear as a result of the alteration works and extensions. Some vertical cracking above window heads can be seen, but this defect is common, resulting from minor thermal movements of small areas of masonry, manifesting themselves at lintel bearings.
>
> 4.0. Tree influence
>
> In the absence of intrusive investigation, it is possible that the clay founding medium would be affected by tree growth to such an extent that movements within the property could manifest themselves in the form of cracks or floor settlements. The proximity of the tree denoted T2 in the arboriculturalist report would suggest, according to NHBC guidelines, that foundations up to 2.5m at the closest point would be required if the property were to be built now. It is unlikely that the existing footings are this deep.
>
> In order to mitigate the possibility of subsidence, removal of the most adjacent tree should be carried out. We understand that the health of this tree is in question and that its lifespan is anticipated to be short. In our view, as no

distress to the property is in evidence, tree removal would be an option to obviate potential future subsidence.

We would, however, emphasise that such tree removal may allow clay recovery (a phenomenon known as heave) and, as such, very adjacent walls (on shallow foundations) and floor slabs could be adversely affected. This could be somewhat mitigated by the removal of the tree in stages and, to a degree, could be offset by the adjoining oak trees that remain."

22. Mr Whitby then wrote to Mr Woodhams on 3 May 2005 as follows:

"I refer to your current application mentioned above. I have had your structural engineer's report reviewed by my colleague in Building Control. He has made a few comments which I hope can be clarified by your structural engineer.

These are:-

1. There is a naturally high water table where your property is within this part of Ifold meaning that the stability of the clay may not be in question.

2. The property and trees existed in 1976 without any adverse distress.

3. What are the foundations of the main building like/consist of?

4. If the tree was allowed to be felled it would be more normal to remove the tree over a 5-10 year period."

23. On 11 May 2005 Mr Brewster responded to Mr Whitby on behalf of Mr Woodhams. He said:

"1. It is unlikely that a high water table exists in view of the site topography and the consistently dry ditch at lower level.

2. We do not see the relevance of the reference to 1976 et al.

3. We have not undertaken intrusive investigations to ascertain the foundations. Your own archives should serve in this regard.

4. Extending the time for felling may help, but the adjoining trees should mitigate, in some way, any instantaneous soil recovery.

We remain firmly of the view that the tree in question represents a risk to the property. In view of the health of the tree, the remaining threat to the property and the remnant trees in the event of felling we can see no reason for the retention of this particular tree."

24. Consent for the proposed felling was again refused by CDC on 7 June 2005. The reasons given were as follows:

> "The tree is a significant feature in the local landscape contributing to the wooded character of Ifold and appears to be in adequately sound and healthy condition. Its proposed felling would result in undue loss and detriment to the visual amenities of the locality. The District Planning Authority have taken into account the applicant's additional evidence in reaching this decision but have not been satisfied that the tree poses an actual or immediate threat to the stability of the dwellinghouse that would justify the loss of this important tree."

25. On 16 October 2006 Mr Woodhams submitted a reference to this Tribunal to determine the amount of compensation. It is agreed that he is entitled to compensation in respect of loss or damage caused or incurred in consequence of the refusal of consent for the felling of T2.

Mr Woodhams's Case

26. Mr Woodhams relied upon four pieces of evidence to support his case. The first was the report from his structural engineer, Mr Brewster, dated 23 September 2004, from which I have quoted in paragraph 21 above. The second was the decision by the valuation officer, in April 2003 to change the valuation list entry of the bungalow from band G to band E. The third was a report from Mr A G Dawkins BSc, MBEng MRICS of Messrs Peter N Dickin & Co, chartered surveyors and valuers of Horsham. Mr Dawkins's report was dated May 2006. It valued Mr Woodhams's property, assuming subsidence and heave cover were available at a "normal" premium, at £500,000. Without such cover the value of the property was reduced to £350,000, indicating a diminution in value of £150,000. Finally, Mr Woodham relied upon a letter dated 3 November 2006 which he had received from Mapp & Co, estate agents of Horsham. This letter reported that they had been marketing the bungalow without success for approximately six months. Potential purchasers had all withdrawn their interest when they learned about the lack of insurance cover.

27. Mr Woodhams said that CDC's building regulations proved that T2 was a threat to the bungalow. The NHBC guidelines required foundations in a new property to be 2.5m deep, whereas the present foundations were only 30ins deep. He continued:

> "What more evidence do Chichester District Council want for a sub-standard tree with a limited lifespan which was in my arboriculturalist's report and which Chichester District Council first agreed with? All four arboriculturalists' reports are different on tree T2, so what is the point of getting professional opinions on anything? (That was a reference to the reports of Mr Patch, Mr Turner, Mr Grainger and Mr Whitby). The fact is we cannot get insurance at flat rates on our house with the tree T2 standing ... we cannot get fully insured and are unable to move as our house is now blighted and nobody wishes to buy as matters stand."

28. In the course of his oral evidence Mr Woodhams accepted that T2 was not currently causing damage to his bungalow. Nor did he suggest that the tree presented a risk of damage. The insurers considered that it was a risk and he wanted to obtain insurance.

29. Mr Woodhams said that he had retired in 2004. Neither he nor his wife had a pension. Their pension fund was their house. They had been looking forward to selling the house, moving to a smaller one and living off the surplus funds released. His inability to dispose of his house meant that he was now facing the possibility of bankruptcy.

The case for CDC

30. Mr Stinchcombe submitted that the question whether the retention of T2 had caused, was causing, or was in the future likely to cause any damage to Mr Woodhams's property was one of fact to be determined on the balance of the evidence, the burden of proof being upon the claimant. When Mr Woodhams had appealed against the deemed refusal of consent to fell T2, his appeal failed because he had not undertaken the underground investigations needed to demonstrate whether or not T2 was causing any damage to his property. Despite that finding, Mr Woodhams had still not instructed anyone to undertake any such underground investigations, and had still not adduced any expert evidence linking the retention of T2 to any damage to his property. CDC understood that this may have been due to a lack of resources. As a result, and as an act of generosity to Mr Woodhams, CDC had offered, in a letter dated 25 May 2007, to undertake the necessary underground investigations at the property at CDC's own expense. Mr Woodhams had refused to take up this offer. He had, accordingly, failed to adduce any evidence to prove that the damage to his property, if any, was attributable to the retention of T2. It followed that he had not proved any entitlement to compensation in respect of the refusal by CDC to permit T2 to be felled.

31. Furthermore, even if the retention of T2 had caused, was causing, or was likely in the future to cause any damage to Mr Woodhams's property, in the absence of the necessary investigations being undertaken it was impossible to attribute any value to the compensation which would be payable. In particular, Mr Woodhams was under a duty to mitigate his loss. This would include a consideration of whether works other than cutting down the tree might remedy any problem caused to the property by the tree, securing its insurability and value but at lower cost than the compensation claimed. In this connection, Mr Stinchcombe relied upon observations of Sir John Chadwick and Blackburne J in the Court of Appeal judgment in *Perrin and another v Northampton Borough Council* [2007] EWCA Civ 1353. Mr Stinchcombe said that Mr Woodhams had failed even to contemplate the possibility of alternatives to cutting down the tree in question, so the Tribunal could have no idea what might be their cost and effect. Moreover when, in a letter to Mr Woodhams dated 25 May 2007, CBC offered to undertake the necessary underground investigations at the property at their own expense, they also offered to reconsider any future application to fell T2 in the light of what such investigations might reveal. It was quite possible, therefore, that should such underground investigations be undertaken and proved the roots of T2 to be proximate to Mr Woodhams's property, then consent to fell T2 would be granted, so that there would be no claim for compensation at all. In refusing this offer, Mr Woodhams had therefore failed to take such reasonable steps as might mitigate his loss, potentially to nil. He had therefore not proved any entitlement to compensation in the sum claimed, or at all.

Conclusions

32. CDC have repeatedly refused consent to fell T2 because, they say, no proof has been provided that the tree has caused, or risks causing damage to the bungalow. Mr Woodhams disagrees, and points to the report of his structural engineer, Mr Brewster, dated 23 September 2004. The paragraph of Mr Brewster's report which seems to me to be crucial reads as follows:

> "In the absence of intrusive investigation, it is possible that the clay founding medium would be affected by tree growth to such an extent that movements within the property could manifest themselves in the form of cracks or floor settlements. The proximity of the tree denoted T2 in the arboriculturalist report would suggest, according to NHBC guidelines, that foundations up to 2.5m at the closest point would be required if the property were to be built now. It is unlikely that the existing footings are this deep."

33. It is to be noted that Mr Brewster did not say there was a real risk that tree growth would lead to cracks or settlement. He said that it was "possible" that it "could" do so. The reason for the lack of certainty was that Mr Brewster had not carried out intrusive investigations to ascertain what was happening to the tree roots and the building below ground level. In the absence of such investigations, I agree with CDC that Mr Brewster's report does not provide the required level of proof that the presence of T2 is causing, or risks causing damage to Mr Woodhams's property. Nor, without information as to the location of the roots of T2, does the fact that the existing foundations do not comply with current requirements for newly built properties mean that those roots necessarily pose a danger to the bungalow.

34. Mr Woodhams also places weight on the decision of the valuation officer, in April 2003, to reduce the valuation of the bungalow in the valuation list. The reasons for the valuation officer's decision were explained in a letter he wrote on 10 February 2006 to Messrs George Ide Phillips, the solicitors then acting for Mr Woodhams, as follows:

> "Thank you for your letter dated 13 January 2006 in which you request details regarding the Council Tax assessment for the above mentioned property. Following correspondence from the owner Mr Woodhams I visited the property to carry out an inspection on 25 March 2003. As stated in your letter the property was suffering from subsidence and damage due to the proximity of two trees within the curtilage of the dwelling. During my inspection I noted these trees together with the damage and I was advised that no buildings insurance would be granted to cover the property.
>
> After considering the situation and taking further advice the decision was taken to reduce the Council Tax banding from G to E to take into account the loss of value due to the planning restrictions that prevented the removal of the trees and non availability of buildings insurance. As you quite rightly state in your correspondence the reduction was due to the subsidence problems and not that the property was over valued from 1 April 1993 when Council Tax came into force. The reduction was effective from 1 April 2002 and a notice was served accordingly on Mr Woodhams and the Local Authority Chichester were informed at the same time.

> Valuation Office policy is to dispose of records for these types of cases after 18 months which unfortunately means that I no longer hold any paperwork connected with the case.
>
> I would hope that the above will be of assistance to you and that I have covered the relevant points."

35. Thus the re-banding of the bungalow was because of the planning restrictions and the lack of insurance. It is self-evident that the value of a property will be reduced if it is uninsurable. It is therefore entirely understandable that the valuation officer decided to reduce the banding. However, the unavailability of insurance was due to concern on the part of Royal and Sun Alliance – subsequently shared by other insurers following their lead – that the trees might place the bungalow at risk. If an intrusive ground investigation were carried out in the relevant area, it would become clear whether or not that concern was justified. Until then, I consider that CDC are right to describe the risk of damage to the bungalow as being merely speculative. Should the investigations show that there is no risk, insurance cover would presumably then be available at normal premium rates and the bungalow would become saleable at its full market value. At that time the valuation office would no doubt wish to consider whether the Council Tax assessment should again be reviewed.

36. I have not overlooked the fact that the valuation officer stated that the property was "suffering from subsidence and damage due to the proximity of two trees within the curtilage of the dwelling". The valuation officer is a valuer, not an engineer, however, and it is clear from Mr Brewster's report, prepared after the valuation officer's inspection, that no significant damage to the bungalow was evident.

37. The valuation officer's approach was referred to by Mr Dawkins in his valuation report submitted to Mr Woodhams in May 2006. Mr Dawkins said:

> "We are in receipt of documentation extending back over the previous planning applications for the felling of tree T2. In particular, we feel the letter from Mr Martin Simpson of the Valuation Office at Worthing is particularly poignant. In this letter he states that 'after considering the situation and taking further advice the decision was taken to reduce the Council Tax banding from G to E to take into account the loss of value due to the planning restrictions that prevented the removal of the trees and non-availability of buildings insurance. As you quite rightly state in your correspondence the reduction was due to the subsidence problems and not that the property was over-valued.' Taking into account the drop in the bands from G to E, this produces a de-valuation of the property of up to £200,000.
>
> We understand that your present insurance has had subsidence and heave excluded. We understand that you have attempted to gain insurance cover for these items but to no avail. We feel that it is likely that cover could be arranged but at a substantial premium and in our experience this would be well in excess of £2,000 per annum over a normal premium. The central problem is that it will be extremely difficult for someone to obtain a mortgage on the property and that anyone interested in this

property is unlikely to proceed because of the issues regarding tree T2. The property is therefore severely blighted.

In this situation we feel that the valuation of the property is reduced to that of a plot. As a plot value we would assess the value at £350,000.

The property in its present condition require some upgrading and we feel its present value by analysis of comparables is £500,000."

38. The fourth piece of evidence adduced by Mr Woodhams consisted of correspondence from Mr Skelton of Mapp and Co, estate agents, who were instructed to offer Camellia for sale. In a letter dated 29 April 2006 Mr Skelton said:

"Further to our recent meeting we write to thank you for your kind instructions for us to offer your above-mentioned property at the asking price of £595,000 freehold.

Due to the fact that neither you or any future owner is able to obtain acceptable insurance for subsidence/ground heave until T2 oak tree is removed, it is likely that developers are going to be the only viable buyer; demolition negates the need to remove the tree. Selling to a developer will be subject to planning consents being obtained and could involve some considerable time while the various buyers discuss their proposals with the planners. I would suggest that you should persist in your negotiations with the Council to remove the tree and thus obtain insurance, because a residential purchaser will be a great deal easier for yourself, your neighbours and ultimately the planning department."

39. Mr Skelton wrote to Mr Woodhams again on 3 November 2006, as follows:

"I write to summarise our progress in marketing your property to date. We began marketing your bungalow at the beginning of May this year. During that time the following has been achieved:-

- 7 viewings
- 4 advertisements in West Sussex County Times
- 10,900 views on Rightmove.

Several people have asked why the property has been on the market for a long time, others have asked about the workshop and others have asked if there are any problems which we are aware of. In these instances, we as agents are obliged under the Property Misdescriptions Act to mention subsidence to the garage/workshop which may have been caused by the trees nearby (one of which I believe has been removed), and having mentioned this we would fall foul of the law by not going on to mention the lack of buildings insurance due to the close proximity of the particular oak tree in the front garden. This has tended to put people off the property and in order to effect a sale we should either make a very substantial reduction or resolve the dispute finally with the council and remove the tree.

> It is my sincere hope that both you and the council can find a successful resolution to the dispute which is currently putting potential buyers off and will almost undoubtedly prevent any exchange of contracts with anyone other than a developer who demolishes the property and rebuilds, thus removing once and for all the problem of buildings insurance."

40. The views expressed by Mr Dawkins and Mr Skelton therefore were strongly influenced by the absence of adequate insurance cover. Mr Woodhams fairly summarised the position when he said:

> "I don't say there is a real risk of damage. The insurance company says so and I want to get insured."

In the absence of adequate evidence that the insurance company's decision was based on an informed consideration of the risk of damage to the buildings by T2, that decision is inadequate to establish Mr Woodhams's claim for compensation.

41. As I have said, if the excavation and soil analysis which CDC has requested is carried out and shows that the roots of T2 are not in close proximity to the bungalow, so that the tree does not pose a threat to the building, this should enable Mr Woodhams to obtain insurance at a reasonable rate. The difficulty which hindered Mapp and Co's attempts to sell Camellia would disappear. If, on the other hand, the investigations show that the roots pose a real threat to the property, either a further application to fell T2 would be considered favourably by CDC or, if it were again refused, Mr Woodhams's case for compensation – based on diminution in value or the cost of reasonable protective works – would seem to be unanswerable.

42. For these reasons, the claim for compensation fails. I would add that Mr Woodhams was extremely critical of CDC's approach to the future of T2 and, in particular, to his first application for permission to fell both T2 and T5, submitted in 2002. The relevant history is as follows. CDC informed Mr Woodhams that his application had been received on 14 May 2002 and that they would endeavour to reach a decision within the statutory period of 8 weeks. If at the end of that period he had not received a written decision and had not agreed to extend the period in which the decision must be given, he could appeal to the Secretary of State. Not having received a decision within the 8 weeks, Mr Patch submitted a formal appeal on Mr Woodhams's behalf on 12 July 2002. CDC asked Mr Turner to advise on the merits of the application. His manuscript observations on the proposal were dated 9 August 2002. They are reproduced in paragraph 10 above. Mr Turner expressed doubt as to whether T2 was causing settlement problems to the garage (he did not mention the bungalow), but indicated that he would support the application provided satisfactory replacement planting were provided. As for T5, Mr Turner advised that it was looking very thin and he would not object to its removal subject to replacement planting.

43. During the course of August 2002 CDC prepared their submissions on the appeal. They described Mr Turner's verbal conclusions as being simply that, while the trees were not necessarily in the prime of health, they were not in such a seriously poor condition as to warrant felling. The difference between Mr Turner's views as expressed in his written

memorandum and as described in CDC's submission is startling. Two explanations for this disparity are possible. The first is that Mr Turner changed his mind after expressing his initial views verbally to CDC but, having put his revised opinions in writing, he sat on them until 11 days later, only faxing CDC his notes on the day they finalised their written submissions. The second explanation, as it seems to me, is that CDC's written submissions misrepresented the views which had been previously expressed by Mr Turner. Neither explanation reflects credit on CDC.

44. The reason I consider this matter to be significant is this. Although the Inspector concluded that the condition of T2 did not justify its removal and that no information had been provided indicating any damage to buildings or implicating the involvement of the two oak trees, he did not make a firm recommendation on the application. His conclusion was:

> "The felling and pruning of trees should always be based on the requirements of the individual tree and not by precedent and the local authority would normally assess the implications of any development proposals on trees as part of their assessment of a planning application. If this appeal is allowed it would be appropriate to impose a condition requiring replacement planting."

45. If Mr Turner's recommendations dated 9 August 2002 had been communicated to CDC on the day they were written, and if CDC had considered those recommendations before completing their written submission, it is in my view likely that they would have accepted them and informed the Inspector accordingly. Had the Inspector been advised that CDC were in favour of the proposed felling subject to satisfactory replanting, there is every chance that the Secretary of State would have accepted the judgment of the local planning authority. In fact, at no time did CDC consider the final recommendations of their arboricultural adviser and, contrary to those recommendations, they asked the Inspector to uphold their decision to refuse consent.

46. I would make two further observations on Mr Turner's written memorandum. Firstly, Mr Woodhams suggested that its date had been changed and it had in fact been written in May 2002. There is no evidence to support that allegation, which I reject. Secondly, at the hearing CDC sought to minimise the significance of Mr Turner's recommendations, on the grounds that he was not an arboriculturalist but a landscape adviser. Again, I reject that suggestion. Whatever Mr Turner's precise professional qualifications, CDC relied on Mr Turner's opinion in their submissions to the Inspector and described him in the covering letter as the "Arboricultural Adviser to WSCC who acts also as adviser to the District Council.".

47. As I have mentioned, on 25 May 2007 CDC offered Mr Woodhams

> "to arrange and pay for an excavation by an independent firm to ascertain the conditions of the soil near to the bungalow. If this showed that the tree roots were close to the bungalow, CDC would consider what remedial work was needed in order to protect the foundations of the building. In addition, they would be prepared to reconsider a fresh application to fell T2."

48. That was a constructive suggestion by CDC with a view to resolving a problem which was by then 5 years old, was causing serious hardship to Mr and Mrs Woodhams and concerned a tree which in 2002 had been agreed to have a limited life expectancy. Mr Woodhams rejected the offer, partly because he was advised that the new investigations could take a long time and he was anxious to resolve the matter quickly. CDC, on the other hand, considered that the excavation and reports

> "can be commissioned and completed within a few weeks, not months."

49. In answer to a question from me, Mr Stinchcombe said that CDC would still be prepared to honour the offer they made on 25 May 2007 if Mr Woodhams's compensation claim failed. It is to be hoped that Mr Woodhams will now permit CDC to commission the necessary investigative works and that CDC will then cooperate fully with Mr Woodhams in his efforts to obtain either satisfactory insurance, permission to fell T2 or adequate compensation without further delay.

50. A letter on costs accompanies this decision, which will take effect when the question of costs is determined.

Dated 14 March 2008

N J Rose FRICS

Addendum on costs

51. I have received written submissions from both parties seeking their costs.

52. Mr Woodhams submits that, if CDC had dealt appropriately with the recommendations of their arboriculturalist, the problem could have been resolved six years ago and the Tribunal hearing would have been unnecessary.

53. CDC say that the application for compensation has failed and that, if Mr Woodhams had accepted their offer to carry out the excavations, the Tribunal hearing and the associated costs could have been avoided. On three occasions CDC asked Mr Woodhams to allow them at their own cost to undertake excavations to ascertain the position of the roots of tree T2 in order to clarify whether the tree was likely to cause damage to the bungalow. Local planning authorities do not normally bear the cost of excavations to deal with applications for consent for felling as this is the responsibility of the property owner. CDC advised Mr Woodhams that in their opinion he was unlikely to win his case for compensation on the evidence he had provided so far and that CDC would seek to recover their costs if he failed to cooperate on the excavation proposal.

54. In May 2007 CDC offered to arrange and pay for an excavation to ascertain the condition of the soil near Mr Woodhams's bungalow. CDC describe that offer – rightly in my view – as exceptional. It was made out of concern for Mr Woodhams's financial circumstances. I agree with CDC that, if the offer had been accepted, it is likely that the matter would have been resolved by agreement and further expenditure on the Tribunal reference would have been avoided. Mr Woodhams accepts that "with hindsight" he should have given favourable consideration to CDC's offer. He did not do so because he and his wife "felt justified in believing that the way we had been treated by Chichester District Council in the past was just another ploy to drag this problem out".

55. As I indicated in my interim decision, there are grounds for criticising the representations submitted by CDC to the Government Office in connection with the appeal in 2002. I am concerned, however, only with the costs of the reference to this Tribunal, which was not made until October 2006. In their letter of 25 May 2007 CDC warned Mr Woodmans that "if you do not accept the Council's offer this will be drawn to the attention of the Tribunal and it may affect the award of costs against you if the Council is successful in its defence of your claim for compensation." This warning was repeated by CDC in a letter dated 16 July 2007. Whatever may have happened previously, it was in my view unreasonable of Mr Woodhams to reject CDC's offer when it was made in May 2007.

56. The normal rule in civil litigation is that the successful party is entitled to its costs. CDC are the successful party and there is in my judgment no reason why the normal costs rule should not apply.

57. CDC claim legal costs totalling £14,375. They have provided a breakdown of their counsel's fees and the costs of the district solicitor. These seem to me to be reasonable. I am not satisfied, however, that CDC should receive their costs in full. They were given permission to call two expert witnesses. The only expert report to be dated was prepared in February 2007, but neither report was served until 7 December 2007, nine months after the dead-line imposed by the Tribunal. Mr Woodhams objected to the late introduction of this material and Mr Stinchcombe decided not to call either expert witness. It is clear that the legal costs which CDC are claiming include time spent considering and advising upon the expert reports, although not the fees of the experts themselves. I do not think it is reasonable that Mr Woodhams should have to pay for advice relating to the expert reports. The Tribunal is empowered to order payment of a lump sum in respect of costs and I consider such an approach to be appropriate in this case. I propose to adopt a robust approach and determine that Mr Woodhams must pay £10,500 towards CDC's costs. Mr Stinchcombe indicated at the hearing that, in view of Mr Woodhams's financial position, CDC would not seek to enforce any order for costs without a further order of the Tribunal and I will make an order in those terms.

58. I would add that CDC suggested that paragraphs 43 to 45 of my interim decision should be deleted from my final decision. I do not propose to repeat their submissions on this point, many of which were raised at the original hearing. I would merely say that I am not persuaded that there is any reason to change the conclusions I reached following the oral hearing.

Dated 9 May 2008

N J Rose FRICS

UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2010] UKUT 392 (LC)
LT Case Number: LCA/389/2009

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – tree preservation order – preliminary issue – whether claim time-barred – whether letter sent within limitation period constituted a claim – held that it did – claim and reference to Tribunal validly made

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN	**MRS M KEATES**	**Appellant**
	and	
	HARINGEY LONDON BOROUGH COUNCIL	**Compensating Authority**

Re: 28 Harold Road,
London, N8 7DE

Before: The President

Sitting at 43-45 Bedford Square, London WC1B 3AS
on 25 October 2010

Stuart Benzie instructed by Eversheds Solicitors of Cardiff for the claimant
Charles Mynors instructed by Head of Legal Services, Haringey London Borough Council, for the compensating authority

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The following cases are referred to in this decision:

Texas Homecare Ltd v Lewes District Council (1985) 51 P & CR 205
International Traders Ferry Ltd v Adur District Council [2004] RVR 65,
London & Clydeside Estates Ltd v City of Aberdeen [1980] 1 WLR 182
Secretary of State for Home Department v Ravichandran [1999] 3 All ER 231.

The following further case was referred to in argument:

National Westminster Bank plc v Somer International (UK) Ltd [2002] 2 WLR 64

DECISION ON A PRELIMINARY ISSUE

Introduction

1. The claimant in this reference seeks compensation for loss that she says that she suffered as a consequence of the compensating authority's refusal of consent to remove a tree protected by a tree preservation order. The preliminary issue to be determined is whether her claim is time-barred.

2. The claimant is the freehold owner of a terraced house, 28 Harold Road, London N8 7DE. At the far end of the rear garden of the property there is a London plane tree. The tree is protected under the London Borough of Haringey Tree Preservation Order No.2 of 1967. It is the claimant's case that damage to the superstructure of the property became apparent in March 2006, and she relies on expert evidence to link the damage, caused by subsidence, to the presence of the tree, the roots of which are said to extend under the property and to have withdrawn moisture from the shrinkable clay soil under the foundations. On 9 August 2007 she applied through her agent for consent to the removal of the tree. The application was refused on 20 November 2007.

3. The TPO contains the following provisions relating to compensation where loss is sustained as the result of the refusal of consent under the order:

> "8. Subject to the provisions of this Order, any person who has suffered loss or damage in consequence of any refusal of consent under this Order or of any grant of any such consent subject to conditions, shall, if he makes a claim on the authority within the time and in the manner prescribed by this Order, be entitled to recover from the authority compensation in respect of such loss or damage.
>
> …
>
> 10. (1) A claim for compensation under this Order shall be in writing and shall be made by serving it on the authority such service to be effected by delivering the claim at the offices of the authority addressed to the Town Clerk thereof or by sending it by prepaid post so addressed.
>
> (2) The time within which any such claim shall be made as aforesaid shall be a period of twelve months from the date of the decision of the authority, …"

A claim for compensation in relation to the refusal of consent thus had to be made not later than 19 November 2008.

4. Following the refusal of consent the claimant instructed her insurers, Lloyds TSB Insurance Ltd, who in turn instructed their solicitors, Eversheds LLP. Eversheds sent a letter dated 14 October 2008 to the Insurance Section, Haringey Council. The letter was headed "Notification of Application for Compensation", and it said this:

"Dear Sirs

Our Client:- Lloyds TSB Insurance Limited
Insured Property:- 28 Harold Road, London, N8 7DE
Tree Preservation Order – Plane tree to rear of 28 Harold Road, Application for compensation

We are solicitors instructed by Lloyds TSB Insurance Limited who are the insurers of 28 Harold Road, London, N8 7DE.

The property has suffered subsidence damage to the front and rear. The damage to the rear has been caused by the plane tree situated in the rear garden of the property.

When the subsidence damage to the property was noted a claim was made to Lloyds TSB and loss adjusters, Crawford and Company, were instructed to investigate. Following the site investigations it was concluded that the plane tree to the rear was the cause of the damage to the rear of the property. It was considered the plane tree needed to be removed in order to allow for the stability of the property. As such Crawford contacted the Council with a request for the Tree Preservation Order on the plane tree to be removed in order that the tree could be taken down and then the nuisance abated.

On 26 November 2007 the consent for removal of the Tree Preservation Order was refused by the Council. As a direct result of this refusal a decision was to underpin the property in order to effect is stability given the continued present of the plane tree.

It is our client's intension to seek the recovery of the underpinning costs from the Council upon conclusion of the work. This will be done by way of an Application for compensation following the refusal of the Council to remove the Tree Preservation Order. If a settlement cannot be reached in this respect then it is our intention to issue a Lands Tribunal Claim to recover this money.

This letter is to notify the Council of the intention for such an Application to be made. The Application for compensation will be made as soon as the works to the property are completed.

At this stage we would advise the Council that the reserve for works are £40,000.00.

We look forward to hearing from the Council to confirm who will be dealing with this Claim for compensation on their behalf.

Yours faithfully

Eversheds LLP"

On 16 October 2008 the council's Risk Insurance Section wrote to Eversheds as follows:

"**Your Client: Lloyds TSB Insurance**
Insured Property: 28 Harold Road London N8 7DE
Details of Claim: Alleged damage as a result of failure to lift a Tree Preservation Order.

Thank you for your letter of 14 October 2008.

> Alleged damage caused by the failure to lift a TPO is not an insurance matter as insurers tend to look on such damage as 'inevitable' and as such beyond the scope of their policy.
>
> In the circumstances we have passed your letter to Ms Gerzie Newell of our Planning Development Control Dept. 1st Floor, 639 High Road, Tottenham, London N17 8BD together with a request that she contacts you.
>
> There may be a slight delay as she will probably with to involve her Legal Dept.
>
> One question which may be raised is whether the refusal of the application was appealed against as we understand such appeals are very often successful."

5. On 28 November 2008 a Senior Legal Assistant wrote to Eversheds on behalf of the council's Head of Legal Services referring to the letter of 14 October 2008 and to the TPO. The letter said:

> "In terms of the order a written claim should have been served on the Council, on or before the 19th November 2008, or if we consider your date of 26 November 2007, then one or before the 25th November 2008. No claim was served on the Council in the prescribed way on or before either of these dates.
>
> The time period within which your client could submit a claim for compensation has therefore lapsed and a claim can no longer be submitted. I consider this to be the end of the matter."

The council have always maintained that the letter of 14 October 2008 did not constitute a claim for compensation that complied with paragraph 10 of the TPO and, as a result, that it is too late to make a claim. After the claimant had given notice of reference of her claim to this Tribunal the council sought to have the validity of the claim decided as a preliminary issue, and on 17 March 2010 I ordered that the issue whether the claimant had made a valid claim pursuant to the TPO should be determined as a preliminary issue.

6. For the claimant Mr Stuart Benzie advanced four arguments. Firstly he said that on a proper construction the letter of 14 October 2008 constituted a claim for the purposes of the TPO. He referred to *Texas Homecare Ltd v Lewes District Council* (1985) 51 P & CR 205 and *International Traders Ferry Ltd v Adur District Council* [2004] RVR 65, and said that the letter was unequivocal in making clear that the claimant was claiming compensation. The claim in *Texas Homecare* (to which I will refer later) was more equivocal, but the Lands Tribunal had there stated that a benevolent construction should be used.

7. Secondly, if the letter of 14 October 2008 was , as he put it, "not good notice", Mr Benzie relied on section 6 of the Human Rights Act 1998, which makes it unlawful for public authorities to act in a way that is incompatible with a convention right and Article 6 of the Convention entitling a person to a fair hearing in the determination of his civil rights. If it was possible to construe the letter as an actual claim, as Mr Benzie submitted that it was, then the council was not entitled to adopt any other construction and thereby to deprive the claimant of her right.

8. Thirdly, Mr Benzie said, even if the letter was not a claim, it was nevertheless substantially compliant with what a claim was required to be, and so should be treated as a claim. He relied on *London & Clydeside Estates Ltd v City of Aberdeen* [1980] 1 WLR 182 and *Secretary of State for Home Department v Ravichandran* [1999] 3 All ER 231.

9. Mr Benzie's fourth argument was that the council was estopped from asserting that the letter of 14 October 2008 did not constitute a claim since the letter of 16 October 2008 was an unequivocal representation on the part of the council that the council was treating it as a claim, and the claimant relied on this representation, and it would be inequitable to permit the council to assert that it was not a claim.

10. For the council Mr Charles Mynors said that the only express requirements imposed by the TPO were that the claim should be made in writing, should be addressed to the Town Clerk, and should be made within the prescribed period. Relying on *Texas Homecare* and *International Traders Ferry* he said that the last requirement was not met. (He took no point on the fact that the letter was not addressed to the Town Clerk since the council has not had someone called town clerk for many years.) *Texas Homecare* showed, he said, that a document that is alleged to be a notice of claim must be unequivocal: it must make clear to the authority that a claim is being made, not that a claim is to be made in the future. He pointed to the words used in the letter of 14 October 2008 – "It is our client's intention to seek the recovery of underpinning costs from the Council upon conclusion of the work. This will be done by way of an Application for compensation … This letter is to notify the Council of the intention for such an Application to be made. The application for compensation will be made as soon as the works to the property are completed." These words, Mr Mynors said, simply evinced an intention to make a claim in the future, so that the letter did not constitute a valid and present claim.

11. Mr Mynors says that *International Traders Ferry* showed that it was sufficient for a claimant to say "Full details of the claim will be served on you in due course" but that it was not sufficient to say "The claim will be served in due course." What the claimants said was therefore not sufficient. Mr Mynors added that *International Traders Ferry* also stated that an unequivocal assertion would be sufficient, whereas here, he said, the letter was equivocal since it merely referred to a claim which might be made in future.

12. Mr Mynors accepted that the second to fifth paragraphs of the letter amounted to an assertion on behalf of the claimant that she was entitled to compensation, but that, he said, did not make it a claim. To constitute a claim it was necessary for a claimant to say that he was claiming compensation, and the claimant in the letter did not say that.

13. *Texas Homecare* and *International Traders Ferry* both concerned claims for compensation in respect of stop notices. Under the relevant statutory provisions (section 177(4) of the Town and Country Planning Act 1971 and section 186(3) of the Town and Country Planning Act 1990 respectively) a "claim for compensation under this section shall be made to the local planning authority" within the prescribed time. In each case the question arose whether a letter sent to the local planning authority satisfied this requirement.

14. In *Texas Homecare* the claimant's solicitors wrote to the local planning authority on 28 January 1981, one day after a decision of the Secretary of State for the Environment quashing the enforcement notice on which the stop notice was founded. The letter included these sentences:

> "Arising out of the quashing of the enforcement, and therefore of the stop notices, it seems to us that our clients are entitled to compensation and costs in relation to the appeal against the enforcement and stop notices and would be pleased to hear from you that your council recognises its liability under these heads. In the meantime our clients will be formulating their various heads of claim with a view to a formal submission of the claim to your council in due course."

15. Later, but not within the prescribed time, the authority received a claim for compensation that quantified the claim. The claimant sought to rely on the letter of 28 January 1981 as constituting a valid claim for the purposes of section 177. The Lands Tribunal (V G Wellings QC) held that the letter did constitute a valid claim. He said ((1985) 51 P & CR 205 at 209-210):

> "In my opinion section 177 and Regulation 14 do not require that a claim for compensation in respect of a stop notice should be in any particular form or that it should state the sum claimed or that it should be a detailed claim. Of course a document which is alleged to constitute a claim must be unequivocal: it must make clear to the authority in question that a claim is being made; not that a claim is to be made in the future. I agree with Mr Seward that the question in the present case is one of construction of the relevant passage in the letter dated January 28, 1981. In my view, in construing that passage, it is right that a benevolent construction should be used. In my judgment the passage brought to the notice of the council that a claim was then being made against it and that the reference to a formal submission of the claim in due course was a reference to an intention to file particulars of it. If the intention in the passage were merely to give warning that in the future a claim was going to be made then the request that the council should recognise its liability for compensation would hardly be apt until the claim had been made. Accordingly, in my opinion, the relevant passage constituted a claim in itself and the later claims, so far from being claims, were further and better particulars of a claim already delivered. The consequence is that the claim for compensation was not out of time and that the Lands Tribunal has jurisdiction to entertain the reference herein. I accordingly answer the preliminary issue in favour of the claimant."

16. In *International Traders Ferry*, as in *Texas Homecare* the claimants' solicitors wrote to the local planning authority shortly after the Secretary of State had quashed the enforcement notice on which the stop notice was founded. The letter included the following (see [2004] RVR 65 at 70, para 31):

> "In the light of the decision of the Secretary of State dated 28th January 1998 we write to give you notice that it is the intention of our client company to claim compensation

from your authority under section 186 of the Town and Country Planning Act 1990. Full details of the claim will be served on you in due course.

We also give you notice that we would wish to be served with notice of appeal under section 289 of the Town and Country Planning Act 1990 which your authority has made or intends to make.

We must place on record that as a matter of law we do not agree with the Secretary of State's decision on the question of our client's locus standi."

17. The claimant contended in the Lands Tribunal that the first paragraph constituted a claim for compensation under section 186 of the 1990 Act. At 71, para 34, I said:

> "In my judgment the first paragraph of the letter of 25 February 1998 did constitute a claim for compensation. In saying that it was the intention of the company to claim compensation, the letter was, in my view, making the unequivocal assertion that the company was entitled to compensation. As the Member in *Texas Homecare* said, there was no requirement that the claim should state the sum claimed or that it should be a detailed claim. The letter went on to say: 'Full details of the claim will be served on you in due course.' It did not say : 'The claim will be served in due course.' What was to follow ere the details of the claim that was being advanced in the letter. Having received the letter the council could have been in no doubt that the company was saying that it was entitled to compensation, and that details of the claim were to follow. A claim had, in my judgment, effectively been made for the purpose of the statutory provisions."

18. On appeal the Court of Appeal upheld this decision. At 76, paras 38-39 Pill LJ, with whom Latham LJ and Eady J agreed, having set out the paragraphs of the letter that I have quoted above said:

> "38. …Mr Holgate makes two points about the letter. First, that the letter expresses not a claim for compensation, but an intention to make such a claim in the future; second, the statutory requirement is that the document should indicate the nature of the claim – that is, the main heads and quantum.
>
> 39. I reject both submissions. I accept Mr Alesbury's submission that a claim was made and that the distinction claimed by the Council is not a real one. The inference that a claim was not being made in the letter could not properly be drawn from the terms of the letter. The future aspect upon a reading of the first paragraph as a whole goes to the full details of the claim and not the existence of the claim. Nor is it correct that the regulations require that the main heads of claim should have been indicated within the 12 month period. However, having reached that conclusion, I add that in order to avoid points like this taken and in the interest of the administration of justice, claimants should make any claim they propose to make clearly and promptly, giving appropriate details as soon as they reasonably can."

19. It is clear from Pill LJ's judgment, firstly, that for a document to constitute a "claim" for compensation, where the statutory provisions do not prescribe what the claim should contain, it is not necessary that the document should set out the main heads of claim or that it should quantify the claim; and, secondly, that the fact that a claim is being made may be derived as a matter of inference from the document.

20. Mr Mynors was clearly right, in my judgment, to accept that the letter of 14 October 2008 was an assertion on the part of Eversheds of the claimant's entitlement to compensation. It referred to the subsidence damage which, the letter said, was caused by the plane tree. It stated the reason why consent was sought for removal of the tree. It asserted that as a direct result of refusal of consent it was decided to carry out works of underpinning. It stated the intention to seek recovery of the costs of the underpinning works, adding that if a settlement could not be reached, reference to the Lands Tribunal would be made. There could clearly be no doubt in the council's mind, having received this letter, that the claimant's solicitors were asserting that she was entitled to compensation. It must also have been clear to them that no quantified claim was at that stage being made for the reason that the works to the property, for which the reserve was said to be £40,000, were not yet completed. They could expect a quantified claim later. It was not necessary that the letter should say, "I hereby claim compensation". As Pill LJ's judgment makes clear, the fact that a claim is being made may be a matter of inference, and in my judgment the inference here is inescapable. It would have avoided all argument if the letter had referred to articles 8 and 10 of the TPO and if it had stated explicitly that compensation was being claimed. But these omissions did not in my judgment vitiate its effect.

21. The result is, therefore, that the preliminary issue is decided in the claimant's favour. A valid claim for compensation pursuant to articles 8 and 10 and the TPO was made, and this Tribunal accordingly has jurisdiction to determine the reference. It is unnecessary, therefore, for me to consider the other three arguments advanced by Mr Benzie, all of which were predicated on a conclusion that the letter did not constitute a claim.

22. I said at the hearing that this was my decision, and I invited submissions as to costs. Mr Benzie asked for the claimant's costs of the preliminary issue, and Mr Mynors did not resist this. Accordingly the compensating authority must pay the claimant's costs of the preliminary issue, such costs if not agreed to be subject to detailed assessment by a Registrar on the standard basis.

Dated 27 October 2010

George Bartlett QC, President

UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2011] UKUT 319 (LC)
Case Number: LCA/509/2010

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – tree preservation order – cracks appearing in house - refusal of consent to fell three oak trees – claim for cost of underpinning works, distress and inconvenience – whether damage caused by tree roots – whether evidence produced after refusal of consent admissible in determining causation – whether underpinning the natural and probable consequence of refusal of consent – whether underpinning required in any event - whether compensation payable for distress and inconvenience - compensation awarded £24,001.25 – Town and Country Planning Act 1990, s.203(1)(a).

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN **(1) DERYCK EDWARD WRIGHT**
(2) IRIS DOROTHY WRIGHT
(3) AVIVA INSURANCE UK LIMITED **Claimants**

and

HORSHAM DISTRICT COUNCIL **Compensating Authority**

Re: 25 The Fieldings
Southwater
Horsham
West Sussex
RH13 9LY

Before: N J Rose FRICS

Sitting at: 43-45 Bedford Square, London, WC1B 3AS

on 18-20 July 2011

Robin Green, instructed by Plexus Law of Colchester for the Claimants
Celina Colquhoun, instructed by Solicitor, Horsham District Council for the Compensating Authority.

The following case is referred to in the decision:
Bell v Canterbury City Council (1988) 56 P & CR 211

The following cases were also cited:
Bollans v Surrey County Council (1969) 20P & CR 745
Fletcher v Chelmsford Borough Council (1992) 63 P & CR 312
Buckle v Holderness (1997) 71 P & CR 428
Halifax General Insurance Services v Teignbridge District Council [2011] UKUT 213(LC)
Factorset Ltd v Selby District Council [1995] 2 EGLR 190

DECISION

Introduction

1. This is a claim for compensation under section 203(1)(a) of the Town and Country Planning Act 1990 for losses alleged to have been incurred in consequence of the refusal of consent required under a tree preservation order. The compensating authority is Horsham District Council who, on 16 September 2005, refused consent to fell three oak trees, included within the Horsham District Council Mill Straight, Southwater 1975 Tree Preservation Order (the 1975 TPO) and described therein as T1, T2 and T3. The claimants are Mr Deryck Edward Wright and Mrs Iris Dorothy Wright, the owners of a two-storey detached house known as 25 The Fieldings, Southwater, Horsham (the subject property) constructed to the north of T1-T3, and their insurers, Aviva Insurance UK Limited (Aviva).

2. The claim is for the cost of underpinning works to the foundations of the subject property, which it is agreed totalled £23,251.25. Mr and Mrs Wright also seek the sum of £750 for distress and inconvenience. The compensating authority says that no compensation is payable.

3. Mr Robin Green of Counsel appeared for the claimants. He called two witnesses of fact, namely one of the claimants, Mr Wright, and Mr Patrick Isaacs, a loss adjuster employed by Cunningham Lindsey, who were instructed by Aviva to deal with Mr and Mrs Wright's insurance claim in October 2003. Mr Green also called expert evidence from Dr Martin Dobson BSc (Hons), DPhil, an arboricultural consultant based in Bordon, Hampshire, and Mr Bret Champion BEng (Hons), CEng, MIStructE, ACILA, the managing director of Pyle Consulting of Reigate.

4. Counsel for the compensating authority, Miss Celina Colquhoun, called expert evidence from two of the authority's employees. They were Mr William Jones, the arboricultural officer in development management, who holds the Royal Forestry Society's certificate in arboriculture, and Mr David Starr BSc, MRICS, MBEng, the authority's principal building control officer.

Facts

5. In the light of two statements of agreed facts and the evidence I find the following facts. The subject property was erected in 1976 and was purchased by Mr and Mrs Wright in the same year. To the east (the left hand side of the property as viewed from The Fieldings) was a garage. In about 1983 the garage was converted to a side extension comprising a dining room/study and two additional bedrooms above. A new tandem garage was added at the side.

6. The neighbouring property to the east, No. 24, suffered subsidence in 1996 . This was attributed by the consulting engineers appointed on behalf of the owners' insurers to a row of nearby oak and ash trees.

7. In 1998 Mr Wright noticed that the corner of the garage had subsided. Remedial works, including partial underpinning of the garage at the rear, were carried out in around October 1999. Following an application by Mr Wright dated 28 August 2001, consent was granted on 23 October 2011 to fell a small oak tree and to reduce the crowns of T2 and T3 by 20%.

8. In September 2003 Mr Wright noticed that some previous hairline cracks in the property had become much worse. Externally there was a crack in the brickwork in the centre of the rear of the house. Internally there were cracks in the kitchen and dining room on the ground floor and in two bedrooms and an en suite above. Mr Wright notified the building insurer of the cracks and Cunningham Lindsey were instructed. Mr Isaacs, who is a Chartered Engineer, a Member of the Institute of Civil Engineers and a Chartered Loss Adjuster, visited the property on 1 November 2003. He wrote to Mr and Mrs Wright on 11 November 2003 and advised that:

> "I am of the opinion that damage to the rear elevation has probably been caused by shrinkage of the clay subsoil supporting the foundations of your house, exacerbated by moisture extraction by nearby vegetation, in particular the oak trees beyond the rear boundary. It is possible some of these trees may need to be removed to prevent further damage occurring."

9. Mr Isaacs instructed CET Group Ltd to carry out site investigations, namely 2 trial pits in the garden close to the rear elevation of the house and 2 boreholes, one in the rear garden and one in the front garden. In addition Cunningham Lindsey carried out a programme of crack monitoring at the house. Two cracks were monitored, crack 1 at damp proof course level and crack 2 above the patio doors. A firm of arboriculturists, OCA UK Ltd, were instructed to report on the effects of vegetation surrounding the property.

10. Following receipt of reports from CET and OCA, on 11 May 2004 Mr Isaacs prepared an engineering appraisal report on the claim. It included the following observations:

> "SITE INVESTIGATIONS
> The ground investigation was carried out by the CET Group under our supervision and for details, please refer to the attached factual data.
>
> Two trial pits were excavated at the rear of the property as shown on the attached sketch. The pit at the rear right corner was extended by hand auger. A further borehole was augered in the front garden, to act as a control.
>
> The investigations reveal that the property has been provided with traditional concrete strip foundations, 200mm thick, the under side located at a depth of 1.10m below ground level. The supporting subsoil was a stiff to very stiff clay material, classified as highly shrinkable. Numerous roots were recovered from beneath the foundations to the area, these emanating from the Oak trees beyond the rear boundaries.
>
> Laboratory analysis of the soil samples reveal that the clay in the area of damage was approaching desiccation. In addition, moisture content values from the control borehole, at the front of the property, were significantly higher than those obtained from the area of damage.

MONITORING
A regime of crack monitoring has been established.

CAUSE OF DAMAGE
The investigations have confirmed subsidence damage due to shrinkage of the underlying clay subsoil. The water demands of the Oak trees will be a major influence in this regard.

RECOMMENDATIONS
We appointed our arboriculturists, OCA UK Ltd, to report on the effect of vegetation in the vicinity of the property. A copy of their report is attached. They have recommended removal of several trees and they will now liaise with all parties to ensure these works are implemented as soon as possible.

Repairs to the superstructure, incorporating masonry reinforcement as appropriate, can proceed in the Summer of 2004 once the clay subsoil has rehydrated and stabilised and following tree removal."

11. On 28 April 2005 arboricultural consultants Marishal Thompson and Co submitted an application to the compensating authority, as local planning authority, on behalf of the owner of 29 The Fieldings, four doors west of the subject property. The application was for consent to fell an ash tree at the rear of No.29. Site investigation data was provided in support of the application. It included the results of soil suction tests, which revealed significant desiccation below the 1.2m deep foundations in BH1 and BH2 to a depth of 3m and particularly severe desiccation in BH4 to about 4m. Ash roots were found below foundation depth in BH3 to a depth of 1.2m. On 20 July 2005 consent to fell the ash tree was refused because:

"insufficient evidence has been submitted to satisfactorily demonstrate a causal link between possible root action of the ash tree in question and the alleged structural damage to the dwelling."

12. On 28 June 2005 OCA submitted an application for permission to fell T1, T2 and T3. Enclosed with the application were Mr Isaacs's engineering report dated 11 May 2004, CET Group's factual report of investigation including laboratory soil test results and root identification certificates, a site plan locating vegetation, the latest crack monitoring results and an evidential assessment summary.

13. In a letter accompanying the application, OCA submitted that they had demonstrated that tree roots had encroached the underside of the foundations and that damage to the subject property had resulted from that encroachment. The following reasons for the application were given:

"(i) The above tree works are proposed as a remedy to the differential foundation movement at the above address and to ensure the long-term stability of the building.

(ii) The above tree works are proposed to limit the extent and need for expensive and disruptive engineering repair works.

(iii) The above tree works are proposed to limit the duration of any claim period and therefore allow the landowner his right to the peaceful enjoyment of his property.

(iv) It is the case that an alternative to felling such as pruning or significant pollarding of the tree(s) would not provide a reliable or sustainable remedy in this case. We do not consider that any other potential means of mitigation, such as root barriers, would be effective or appropriate in the circumstances.

(v) Estimated repair costs will vary between £10,000 and £32,000, depending upon whether the trees can be removed or have to remain."

14. A Mr Handley, the owner of No.26, immediately to the west of the subject property, wrote to the local planning authority about the application to fell T1-T3 on 23 July 2005. The letter included the following:

> "As you may be aware, my own property … was underpinned in 1999. In the final report that I have in my possession, the cause of the 'movement in the property' was not attributed to the trees, but to erosion of soil by leakage from the defective drainage system. In the initial investigations a report was produced by Mr Timothy Laddiman of Chris Yarrow & Associates, which stated as follows:
>
> > '*In considering whether removal of the trees would provide the required recovery and stabilisation, there is still the problem of obtaining permission for felling TPO covered trees, one being a third party tree. There may also be the slight risk of heave movement occurring, given the relative ages of the tree to the buildings, though the risk is lower than if the trees were large mature specimens. There is insufficient data available to make a full assessment of the heave potential, and if this option were pursued, the insured and insurers would need to be aware of, and accept the risk of heave occurring.'''*

15. Mr Jones inspected the subject property on 1 September 2005. His assessment was dated 13 September 2005. It recommended that the application be refused for the following reasons:

> "1. Insufficient evidence of differential foundation movement at the site has been submitted. It is also not accepted that the felling of the trees would necessarily ensure the long-term stability of the building.
>
> 2. The Council does not accept that removal of the trees would necessarily limit the extent and need for expensive and disruptive engineering works which may require to be undertaken in any event, or that this is suitable or sufficient justification for the removal of protected trees of amenity value, this being contrary to policy EDC 28 of the Local Plan.
>
> 3. The Council does not accept that limiting the duration of any claim period is suitable or sufficient justification for the removal of protected trees of amenity value, this being contrary to policy EDC 28 of the Local Plan. The Council also does not accept, from the evidence submitted with the application, that the felling

of the trees would necessarily result in the landowner enjoying his right to the peaceful enjoyment of his property.

4. The Council is of the view that, as insufficient evidence to support the application has been submitted, felling the trees on the grounds that there is no other option is inappropriate.

5. It is not considered that the attested increase in estimated repair costs is sufficient justification for the removal of protected trees of amenity value, this being contrary to policy EDC 28 of the Local Plan."

16. On the same day, a member of the Colchester office of Cunningham Lindsey advised OCA that it was considered that their file "did not have enough strong evidence to win an appeal.'' Formal notice of refusal of consent to fell was dated 16 September 2005. The reasons for refusal were identical to those recommended in Mr Jones's assessment.

17. Mr Isaacs inspected the property again on 19 October 2005. He noted that further damage had occurred since his previous visit in November 2003. The crack monitoring showed ongoing movement. He concluded that, in order to stabilise the property it would be necessary to underpin the rear to a depth below the influence of the oak roots. He discussed with Mr Wright the possibility of appealing against the refusal. It was decided to press ahead with the repair works, bearing in mind that the claim had been made more than 2 years earlier, that it would take between 1½ and 2 years for an appeal to be determined and that the success rate in such appeals was not high.

18. A claim for compensation consequential on the refusal of consent was submitted by Cunningham Lindsey on 5 June 2006. Underpinning to the eastern and rear (southern) elevations was carried out between 5 and 16 June 2006.

19. On 28 December 2007 a CCTV survey of the drains at the subject property was carried out by 1st Clear Flow Limited of Worthing. The written report on this survey, and the accompanying DVD, were produced by Mr Wright shortly before commencement of proceedings on the first day of the hearing.

Expert evidence for the claimants

Dr Dobson

20. Dr Dobson was instructed by the claimants' solicitors in a letter dated 11 February 2011 to prepare an expert report setting out his opinion on arboricultural issues relating to alleged subsidence at the subject property. He said that in order to distinguish subsidence damage from other forms of structural damage it was usually necessary to demonstrate that the damage arose in late summer (when soil drying reaches its peak), that soil below foundations was shrinkable clay, that foundations were not sufficiently deep to withstand the foreseeable influence of nearby trees and that the building was within the "zone of influence" of one or more trees. Further, it was

important to demonstrate that roots of such trees were present below foundations and that the soil affected by such root intrusion was drier than would otherwise be the case if there were no roots. Finally, it was necessary to demonstrate that the pattern of building movement or crack damage was seasonal and cyclical, that is, cracks opened during the drier summer months and closed during the wetter winter months. Or, in the case of level monitoring, the building moved downwards in the summer and upwards in the winter.

21. The evidence in this particular case was that subsidence damage had previously occurred at 25 and 26 The Fieldings which had necessitated underpinning in 1999. It was therefore known that the site was vulnerable to subsidence damage. New damage to the main part of the house at the rear occurred following the exceptionally dry summer of 2003. This was recognised as being an "event" year, with the cost of subsidence insurance claims being double that in 2002. The damage became apparent as cracks, which appeared suddenly at the end of the summer of 2003, coinciding with peak soil drying associated with trees. The site investigations demonstrated that soil below foundations was high to very high shrinkage clay which was infiltrated by tree roots. Samples of these roots were identified as oak. Tests carried out on soils recovered from below foundation depth revealed that the clay was drier at the rear of the property, in the area affected by tree roots, than at the front. The soil was also stiffer and had a higher penetration resistance at the rear, near to the trees. Comparison of moisture content with 0.4 x liquid limit (a commonly adopted rule of thumb for determining the presence of significant desiccation) further confirmed that the soil at the rear had become desiccated.

22. The crack monitoring results confirmed a seasonal and cyclical pattern of movement. The subsidence damage that had occurred in 2003 recovered during the winter of 2003/4 resulting in crack closure. Since 2004 was not especially dry, crack 1 did not open significantly during summer 2004, although crack 2 did open during the summer by approximately 0.5mm.

23. In relation to "zone of influence" oak was a high water demand species according to the National House Building Council (NHBC) classification. Such trees had the greatest potential for causing subsidence damage over the greatest distance.

24. The foundational piece of work detailing cases where tree roots had been implicated in subsidence damage to buildings was known as the "Kew Root Survey". This was a standard reference to which arboriculturists and others referred when considering distances within which buildings on clay soils might be at risk from the influence of trees. Maximum distances from trees to buildings in which damage had been recorded were given. The maximum tree-to-damage distance for oak was 30m. By comparison, the distances from the subject property to the three trees in question were 12.5m (T1), 10.5m (T2) and 9m (T3). The subject property was therefore within the potential zone of influence of all three trees.

25. Guidelines produced by the NHBC gave recommendations on when foundation design for new buildings on shrinkable clay soil should be deepened to take account of nearby trees. The guidelines used several interacting factors including tree species, water demand, tree height and distance from a building, and the shrinkability of the soil, to predict risk to foundations. Whilst the

guidelines were properly intended for determining appropriate foundation depths for new houses, they could also be usefully applied to assess the adequacy of existing foundations near to trees.

26. Appropriate foundation depths were calculated on the basis of water demand, the height of the tree and the distance between the foundations and the tree. In calculating how deep the foundations would need to be (assuming the building were to be constructed today) the NHBC generally recommended that the mature height of a tree should be used in making this calculation, and for oak that was 20m. On the basis that foundations across the rear of the building were 1.1m, the zone of influence of the oaks would be equivalent to 1.2 x height, that is 24m. It was therefore apparent that the foundations were too shallow to withstand the foreseeable influence of the oak trees T1-3, which were located between 9 and 12.5m from the property.

27. In Dr Dobson's view there was other information within the contemplation of the compensating authority that should have been taken into account when making a decision whether or not to permit the felling of T1-T3. In particular the history of subsidence problems locally (Nos. 24, 25, 26 and 29) and the fact that the supporting evidence for the contemporaneous 2005 application at No.29 revealed clear evidence of severe desiccation below foundations at the rear.

28. In summary, he believed that the evidence in the contemplation of the compensating authority was more than adequate to demonstrate on the balance of probabilities that the subject property suffered from subsidence caused by one or more of T1–T3. He thought that the principal tree causing damage was likely to have been T2, since it was closest to the area of damage, but he considered that T1 and T3 were also likely to have been a material cause.

29. Dr Dobson referred to the guidance given in *Tree Preservation Orders: A Guide to the Law and Good Practice*. This stated at paragraph 14.7 that:

> "In dealing with an application for consent under a TPO the LPA are advised to consider whether any loss or damage is likely to arise in consequence of their decision during the following 12 months, having regard to the reasons given for the application and any reports or other documents submitted by the applicant in support of those reasons."

30. OCA clearly stated that the reason for the application to fell the three trees was "differential movement and subsequent damage consistent with tree-related clay shrinkage subsidence". The claim for compensation was therefore directly related to the application. Dr Dobson concluded that the evidence supplied with the application was sufficient to demonstrate on the balance of probabilities that the oaks were responsible for subsidence damage. Therefore, in the absence of removal of the cause of damage, it was likely that crack damage would continue, as indeed it had. It was well known to arboriculturists that if an arboricultural solution to a subsidence problem was not implemented, the next course of action to stabilise a building and nullify a nuisance was usually to underpin. It appeared from the last paragraph on the first page of the notes relating to the application prepared by Mr Jones that he was familiar with the use of underpinning to mitigate a nuisance to which neighbouring trees may have contributed. It was therefore clearly within the compensating authority's contemplation that underpinning could well be necessary.

31. The London Tree Officers Association had produced a "Risk Limitation Strategy for Tree Root Claims", 1994, which gave advice to tree officers as to how to reduce the costs of tree root claims. The guide made it clear that claims against councils for underpinning and superstructure repairs often arose because of a reluctance on the part of councils to permit pruning or felling of trees. It therefore advised that:

> "In all but a few cases tree pruning will mitigate the significant costs associated with tree root claims. Moreover, regular tree pruning and/or selective tree removal (and replacement) may prevent these claims arising in the first instance."

Dr Dobson had no doubt that Mr Jones would have been aware of this publication and it should have been a material consideration in his decision-making process.

32. Dr Dobson disagreed with Mr Jones's assumption that underpinning might be needed in any event even if the oak trees were removed. He explained that heave was the upward movement of a building that occurred when a desiccated soil rehydrated. Heave could be divided into two categories, heave and recovery. The proper use of the term heave was when a building had been constructed on a persistently desiccated site. When the tree which caused the desiccation was removed the building was lifted differentially beyond its construction levels, resulting in progressive crack damage that might take place over several years depending on how quickly the soil rehydrated. Underpinning was often necessary in these circumstances, but having said that the occurrence of heave damage was comparatively rare compared to subsidence damage.

33. Recovery, on the other hand, was when a building recovered from a tree-related soil moisture deficit which arose after the construction of a building. If the deficit was not particularly severe then the soil might recover fully, and usually did, during a single winter and no such substructure works would be necessary when a tree was removed. But if the soil moisture deficit became severe and persisted from one summer to the next then, once the cause of that soil drying was removed, it might take an unacceptably long term for the soil to recover and for the building to stop moving. In these circumstances underpinning might be appropriate.

34. Dr Dobson said that he had seen no evidence to suggest that the subject property was built on a desiccated site. If it was then it might be expected that some heave damage would have occurred immediately following the root severance that must have resulted from the 1999 underpinning, or alternatively immediately after the oaks were pruned in 2001. But no damage was recorded after 1999 until the hot dry summer of 2003.

35. During the summer of 2003 cracks 1 and 2 suddenly appeared and progressively opened in response to drying of the clay soil. The cracks had not been there before and consequently were solely caused by the influence of oaks in that summer. During the winter both cracks closed and crack 1 remained closed throughout the following summer and winter. That pattern was important to note, because if there had been persistent desiccation of the soil crack 1 would not have fully closed and it is likely that, in the absence of any summer opening in 2004, the crack would have closed further during the winter of 2004/5. The fact that the crack did not, and in all probability could not, close any further indicated that there was no persistent soil moisture deficit and therefore there was no chance of heave movements if the oaks were felled.

36. Dr Dobson said that the evidence gathered after the determination of the 2005 application in terms of crack monitoring indicated that the building was continuing to experience movement, with new cracks appearing and existing cracks opening up by up to 2mm during 2005. It was therefore appropriate to underpin the building to bring about stability.

Mr Champion

37. Mr Champion was instructed by the claimants' solicitors on 11 February 2011 to prepare an expert report, setting out his opinion whether any or all of the three oak trees had been a material cause of the damage to the subject property. He was also instructed to advise on the question of building costs, which are no longer in issue.

38. Mr Champion reproduced extracts from the documents entitled "Claim Details" and "Engineering Appraisal Report" which had been prepared by Cunningham Lindsey in November 2003 and May 2004 respectively. He considered that this evidence confirmed that cracking and distortions as a result of subsidence of the clay substrata beneath the rear elevation of the subject property had occurred during the summer of 2003.

39. The trial pit investigations undertaken by CET Group showed that the foundation to the rear elevation extended to a depth of 1.1m below ground level. Mr Champion quoted from Building Research Establishment Digest 240 entitled "Low Rise Buildings on Shrinkable Clay Soils". This indicated that the foundation to the rear elevation was founded at a depth at which ground movement would not occur as a result of seasonal wetting and drying and the influence of minor vegetation.

40. It was therefore necessary to identify another factor as being the effective cause of the differential foundation movement of the rear which first occurred during 2003 and continued thereafter as confirmed by the crack monitoring. In Mr Champion's opinion, the partial underpinning carried out in 1999 would not have caused the differential foundation movement. The foundation to the original house had provided adequate support since it was constructed in 1976. Apart from the influence of the oak trees there would have been no reason for differential movement to occur.

41. Mr Champion summarised the results of laboratory testing of soil samples recovered during the site investigations in December 2003. In his opinion the moisture content and shear strength profiles confirmed desiccation of the clay beneath the foundations to the rear for the depth of the roots as confirmed in the boreholes. This opinion was based on the following facts. Firstly, the moisture content at 1.5m below local ground level in borehole No.1 was significantly less than in borehole No. 2. Secondly, the shear strengths at 1.0m, 1.5m and 2.0m for borehole No.1 was significantly greater than in borehole No. 2.

42. Mr Champion drew attention to the evidence of Mr Isaacs to the effect that the depth of the underpinning had to be increased on site due to the level of root activity. It followed, he said, that

roots extended to depths greater than that noted in borehole No. 1 (1.8m). This would explain why moisture contents at 2.0m and 2.5m in borehole No.1 were significantly less than the moisture contents at these levels in borehole No.2. Moreover, the greater depth of roots would explain why the shear strength at 2.0m in borehole No.1 was higher than that at 2.0m in borehole No.2 . Thus, the moisture content profiles and the shear strength testing confirmed desiccation, not just for the depth of roots noted in the boreholes but also for the depth of roots confirmed during the underpinning. For completeness Mr Champion quoted the relationships for determining whether a soil was desiccated suggested in a paper entitled "The Influence of Vegetation on the Swelling and Shrinking of Clay Soils in Britain." He considered, however, that comparing moisture content profiles and shear vane profiles with a control borehole was a more reliable method of determining desiccation than applying such relationships.

43. Mr Champion disagreed with Mr Starr's suggestion that underpinning would have been required if the oak trees had been removed. He said that he had undertaken a heave analysis in accordance with the procedure described in BRE Digest 312 entitled "Desiccation of Soils". This analysis was for the full depth of desiccation as confirmed by the moisture content profiles (2.75m) and not the depth of the roots noted in the boreholes (1.8m maximum). It indicated that the maximum heave would have been 48mm. The crack width monitoring confirmed vertical closure of cracking up to 5.1mm. In addition to cracking, the 2003 event of subsidence would have caused distortions to the property which would also have been corrected as a result of rehydration during the winter of 2003/4. That is, heave recovery as a result of the 2003 subsidence would have been greater than 5.1mm. Taking into account the closure of cracking and the correction of distortions, Mr Champion considered that the permanent moisture deficit prior to the 2003 subsidence would have resulted in a theoretical potential heave less than 40mm. In his experience dealing with hundreds of subsidence damaged properties over many years, he did not consider an impartial expert with similar experience could conclude that potential heave of less than 40mm would warrant underpinning if the oak trees were removed.

44. In support of this conclusion, Mr Champion pointed to Mr Wright's evidence that the oak trees were much smaller when he purchased the property than they were now. It followed that any permanent moisture deficit caused by the trees prior to construction would have been minimal. Removal of the trees would only have addressed the moisture deficit since construction of the house and would not have caused a problem of long term heave damage.

45. Finally, Mr Champion commented on the relevance of the NHBC Standards Chapter 4.2 "Building near Trees." Based on these standards the theoretical zone of influence of T1 – T3 had extended under the foundations to the rear elevation at the time of OCA's survey in January 2004. The ground investigations at that time showed roots extending to a depth of 1.8m below local ground level at the rear elevation and roots were confirmed to extend deeper during the underpinning. The depth of the roots was therefore in line with the theoretical zone of influence of the oaks.

46. Mr Champion also prepared an addendum report dated 13 July 2011. This report took account of the fact that different heights of T1-T3 at various dates had now been agreed by the arboricultural experts from those detailed in OCA's report and that there had been considerable

discussion between the arboricultural experts regarding the monitoring. In the light of this additional information Mr Champion did not consider that there was a problem of permanent moisture deficit of the soil beneath the foundations in 1976. Therefore there would not have been heave of the supporting soil beneath the foundations as a direct result of the oak trees being older than the house. In view of this; the fact that there was no evidence that damage/distortions had occurred as a result of subsidence between construction in 1976 and the damage occurring in 2003; and the fact that the 2003 damage had closed up, Mr Champion remained firmly of the opinion that heave would not have caused damage to the subject property if the trees had been felled. He pointed out that there were alternative procedures for calculating the theoretical maximum potential heave. There was, however, no need to undertake further site investigations and/or analysis of testing. Sufficient evidence had been gathered to prove that heave would not be an issue.

47. Mr Champion also prepared a sketch which he said demonstrated that the underpinning would have severed any roots from the oak trees which extended under the building envelope. If heave had been a problem following installation of the underpinning and severance of the roots, it would have caused distortions to the property including upward movement of the concrete ground bearing slab and outward movement of the rear elevation. This would have happened because the rear elevation would have been "locked" vertically into position by the underpinning. Since underpinning was installed in 2005, if heave was likely to have been a problem it would have resulted in such damage being manifest by 11 July 2011, when he re-visited the property. He had specifically looked for evidence of such heave damage, but could find none. This reinforced his view that if the trees had been felled heave would not have caused damage.

48. Finally, Mr Champion produced details of the monthly rainfall between 2001 and 2009. He compared this information with the crack monitoring records for station 1. He said that there was exceptionally good correlation between the monitoring and the rainfall. This showed that the movement across the cracks was cyclical/seasonal, and such movement happened as a result of the influence of trees.

Expert evidence for the compensating authority

Mr Jones

49. Mr Jones was the officer who dealt with the claimants' application to fell T1-T3. He said that, in cases proposing the felling of a tree or trees, the Government guidance set out in "*Tree Preservation Orders – A Guide to the Law and Good Practice*" (DETR, March 2000) was to determine whether to grant consent to the felling based upon an assessment.

> "(i) of the tree or woodland and the likely impact of the proposal on the amenity of the area, and
>
> (ii) in the light of their assessment at (i) above, to consider whether or not the proposal is justified having regard to the reasons put forward in support of it."

The guidance stated that

> "in general terms, it follows that the higher the amenity value of the tree or woodland and the greater the impact of the application on the amenity of the area, the stronger the reasons needed before consent is granted."

The reader was also advised

> "to consider whether any loss or damage is likely to arise if consent is refused or granted subject to conditions."

50. Mr Jones said that, in clay soils, trees could be responsible for structural defects as a result of their roots abstracting moisture from the sub-strata, causing desiccation and resultant shrinkage. All trees were known to have a "zone of influence", within which their roots could be responsible for this. If a dwelling was within this zone, on clay soils, structural defect could occur. There were, however, other reasons for foundation movement, such as excessive load or defective material beneath the foundations; collapse of mine workings or other related works; slope instability; fluctuation in ground water levels; and leaking drains causing washing out of fine particles from the soil. In addition, in cases where it was suggested that trees were causing subsidence it was also appropriate to examine any previous subsidence events at the property which could be a causal factor.

51. The most common way of demonstrating that subsidence was being caused by a tree was by showing a clear cyclical pattern of foundation distortion. In such cases results of measurements would show a clear upward movement of the foundations during the winter months, when the soils were rehydrating and trees dormant, followed by a clear downward movement during the summer, when ground evaporation and the water demand of trees were at their highest and rainfall low. Such evidence, however had to be considered with care. The onus of proof was on the applicant. In assessing whether that onus had been discharged, it was also necessary to consider any other factors which might call into question an applicant's claim that damage had been caused by trees. In making such an assessment, Mr Jones said that he would refer to the NHBC document "Building near Trees" which provided guidance on the water demands of different tree species. It also explained the principle of the zone of influence, that is the radius of an imaginary circle around the tree within which it was known that roots might have an influence upon the surrounding soils.

52. Mr Jones would also take guidance from "Tree Root Damage to Buildings" (Biddle, 1998), the authoritative work on the subject. In assessing the likely involvement of trees in a case of differential foundation movement, Biddle placed principal emphasis on the need to make a careful analysis of the movements of any property which had suffered subsidence, as without this information the involvement of nearby trees could not be verified. Biddle advised that, although there were several ways of measuring structural defect in a building, the use of a level distortion survey was by far the most effective. He noted that "a level distortion survey provides a very effective method of determining the extent of differential movement which has occurred some time in the life of the building. It should be an essential preliminary part of any investigation". He added:

> "as the underlying causes of any damage are the changes in foundation levels which are occurring, level monitoring is by far the most valuable technique, and should be an essential part of almost all investigations."

53. As well as level monitoring, Biddle considered the use of crack monitoring, the ongoing measurement of the pattern of cracks in the superstructure of the building. However, he advised caution in relying on such measurements, noting that

> "many engineers rely on these patterns of crack damage as the sole means of diagnosing the building movements which have occurred. Although in some cases this may be sufficient, in many cases it is inadequate or even misleading".

He also noted that, in some cases, reliance on this information

> "had led to serious errors in remedial work."

In conclusion, Biddle advised that:

> "the reaction of cracks to foundation movement can be erratic, and excessive reliance on crack monitoring is often misleading. For this reason crack patterns should be studied and analysed, but reliance should not be placed on them as the sole method of diagnosis."

54. Mr Jones said, that following receipt of the claimants' application, he had inspected the site on 1 September 2005. He noted that the three oak trees were unusually compact as a result of previous reductive surgery. Otherwise they appeared to be in good health, showing no sign of serious structural defect. He noted that whilst the trees had moderate to high amenity value, they also "neatly delineate(d) the countryside to the south from the residential area", were "clearly visible" from The Fieldings, despite being sited to the rear of No.25 and other neighbouring dwellings, and provided "a much needed greening and softening of the estate." He concluded that they were well worthy of retention and, in accordance with the DETR Guidance, a relatively high level of justification for their removal was required.

55. Taking all the evidence together, Mr Jones noted that the following factors appeared to provide at least circumstantial evidence of the likely contribution of the trees as the material cause of the structural defect to the building: the building was sited on clay soils; the soils exhibited high plasticity levels; the building was sited within the zone of influence of the three trees the subject of the application; there was some evidence of a cyclical pattern of movement as indicated by the submitted crack monitoring data; roots from oak trees had been found close to, or beneath the building; and the comparison between the soil moisture levels and shear strength profiles of samples taken from the front of the house, out of range of the trees, and from the rear indicated a degree of soil desiccation in the area closer to the trees.

56. In Mr Jones' view, however, these points did not provide conclusive evidence to substantiate the claim that the trees were the cause of the recorded subsidence event. Nor did the monitoring results show a conclusive cyclical pattern which must have been caused by the obstruction of moisture by vegetation. Not only was there no levels distortion survey, but the far less reliable

crack monitoring results were themselves inconclusive. Moreover, he considered that insufficient evidence had been submitted to eliminate, on the balance of probabilities, other quite possible causes for the structural defects. These were: defective drainage; the possible effects of the recent pruning works to two of the trees and the removal of another; the likely high levels of rigidity in the building itself, given its age, and how natural variations in temperature and moisture underground might lead to variations in expansion and contraction; how this might have been amplified, or worsened, by the partial underpinning undertaken in 1999 and whether those works in themselves could have caused the problem.

57. Mr Jones therefore concluded that the pattern of cyclical movement noted in the crack monitoring results was inconclusive at best, and could be explained by other factors which the claimants had failed to take into account. Given the moderate to high amenity value of the trees, and paying due regard to the Governmental Guidance, he could not recommend the felling of the trees as it had not been shown on the balance of probabilities that the slight structural deficiencies noted had been caused by the trees. In addition, he questioned the suggestion that the felling of the trees would necessarily avoid the need for expensive and disruptive engineering works, if matters were indeed as bad as was being suggested by the claimants.

58. In the course of cross examination Mr Jones said that, if the 1st Clear Flow report had been available when he was considering the application in 2005, it would have been much easier for him to rule out leaking drains as the cause of the subsidence. In answer to a question from me he said that the results of further crack monitoring between 25 May 2005 and 25 November 2005 (which were not submitted by OCA with the application for permission to fell) showed that it was more likely than not that the oak trees had been responsible for the subsidence in 2003.

Mr Starr

59. Mr Starr was not involved in the compensating authority's decision to refuse consent to fell T1-T3. His knowledge of the subject property related to the Building Regulations application for partial underpinning works submitted on 27 May 1999 and the subsequent Building Regulations application dated 30 May 2006 for the further underpinning works which followed the refusal of consent.

60. Mr Starr said that, having checked the information provided with the 1999 application, he had written to the claimants' engineers, Dixon Hurst Kemp, on 28 May 1999. He pointed out that the proposed partial underpinning could cause structural problems to the property in the future. He suggested that consideration be given to full underpinning to avoid the possibility of such problems occurring. Dixon Hurst Kemp replied on 8 June 1999. They said that, following investigation of the existing garage and house foundations, they had concluded that only the back of the garage needed underpinning. Nevertheless, they had revised the proposals by reducing the underpinning progressively towards the depth of the existing foundations. Since there were no signs of damage to the house itself they considered that further underpinning was unnecessary.

61. Mr Starr said he had set out his concerns in his letter of 28 May 1999 in order to highlight the potential effect of the proposed works on the rest of the building. A completion certificate was

issued because the works were found to pass the minimum standard. Nevertheless, the creation of a more rigid area of support to part of the superstructure rendered the structure around the junction between the existing and underpinned foundations vulnerable to distortion and cracking.

62. Whilst Dixon Hurst Kemp's revised design included a reduction in underpinning depth between the new work and the existing foundation depths, it did not take into account any future movement in the foundations which might be caused by subsidence. The section of the building underpinned by the works in 1999 had foundations to a depth of 2,700mm, which meant that they would not be affected, or they would be affected differently from the rest of the foundations, by the influence of trees.

63. The amount of disruption to foundations by trees over a period of time depended on the type and proximity of the trees. The amount of water removed from the normal ground moisture content would depend, among other factors, on the age of the tree and its growth rate. Damage to the building could occur at the same rate as ground conditions changed. In other cases foundations or brickwork would resist for some time and then fail in a more dramatic manner. The ability of existing foundations to withstand damage in this type of situation was influenced by such matters as the type of concrete and size of section, as well as the possible propping action resulting from partial underpinning. Having reviewed the evidence submitted by the claimants which suggested that further subsidence had taken place after 1999, Mr Starr concluded that it was possible that the damage caused in 2003 was due in part to the building having been partly underpinned.

64. Assuming the partial underpinning had not contributed to the damage, and that the trees alone were responsible, Mr Starr was firmly of the opinion that underpinning would have been required in any event, even if permission had been granted to remove the trees. This was because, if the trees were affecting the foundations in 2003, then the effect of their removal on the soil would have had to be taken into account and would have required the foundations to be underpinned in a similar fashion to the works actually carried out in 2006.

65. Mr Starr produced a response to Mr Champion's addendum report. He pointed that, in applying the method set out in BRE Digest 412 to predict heave, Mr Champion had adopted the suggested average Water Shrinkage Factor (WSF) of 4. In Mr Starr's opinion it was not appropriate to use an average WSF when dealing with an area of Weald Clay, which was liable to large changes in volume due to small moisture changes. He considered that Mr Champion's assessment was at the bottom of the potential range of heave. The top end of such range would be at least four times Mr Champion's estimate, namely 144mm compared with 36mm. Even if that figure was an overestimate, there was nevertheless a significant amount of potential heave sufficient to warrant underpinning.

66. In the course of cross examination Mr Starr accepted that, in the light of the evidence which was by then available, he considered that it was the oak trees, and not leaking drains, which had caused the subsidence in 2003.

The entitlement to compensation

67. Section 203(1)(a) of the Town and Country Planning Act 1990 (as amended) provides as follows:

> "A tree preservation order may make provision for the payment by the Local Planning Authority, subject to such exceptions and conditions as may be specified in the order, of compensation in respect of loss or damage caused or incurred in consequence of the refusal of any consent required under the order."

68. The 1975 TPO was in the form of a "1969 Model Order", that is in the form prescribed by the Town and Country Planning (Tree Preservation Order) Regulations 1969. 1969 Model Orders provide (as does the 1975 TPO under Article 9) that:

> "any person who has suffered loss or damage in consequence of any refusal … of consent under this Order… shall, if he makes a claim on the authority within the time and in the manner prescribed by this Order, be entitled to recover from the authority compensation in respect of such loss… Provided that no compensation shall be payable in respect of loss or damage suffered by reason of such refusal… in the case of any trees the subject of a certificate in accordance with Article 5 of this Order." (Such a certificate may be issued by the relevant authority on the basis that it is in the interests of good forestry so to do or that the trees in question are of outstanding or special amenity value. It was not suggested that an Article 5 certificate had been issued in respect of T1-T3).

69. The measure of compensation payable under a 1969 Model Order was considered by the Court of Appeal in *Bell v Canterbury City Council* (1988) 56 P&CR 211. At 216 Russell LJ said:

> "In my view the diminution in the value of the land was a natural and probable consequence of the refusal of consent, within the contemplation of the local authority refusing consent. It was not too remote and was, therefore, recoverable."

70. At 219 Slade LJ observed:

> "The only question therefore is whether, on its true construction, Article 9 does render compensation payable in respect of such depreciation. The language of the Article is very broad and, subject to what is said below, I can see no sufficient grounds for restricting its meanings so as to exclude compensation in respect of this particular category of loss."

Issues

The issues between the parties are these:

(1) In deciding whether the cost incurred in underpinning the subject property was the natural and probable consequence of the compensating authority's refusal of consent, within the contemplation of the authority when refusing consent and not too remote, can the tribunal have regard to all the evidence before it, or is it restricted to

considering the evidence relied upon by the claimants at the time of the application, together with any other evidence available to the council at that time?

(2) In light of the answer to issue 1, is the admissible evidence sufficient to establish that the damage to the subject property was caused by one or more of the three oak trees, T1-T3?

(3) Was underpinning the natural and probable consequence of the refusal of consent?

(4) Was underpinning within the contemplation of the compensating authority when it refused consent?

(5) Would underpinning have been required in any event as a consequence of the trees being removed? (It is agreed that underpinning would have been necessary if the trees had remained in place and that, when considering this issue, the tribunal is entitled to have regard to all the relevant evidence before it).

(6) Is compensation payable in respect of distress and inconvenience and if so, how much?

Conclusions

Issue 1 – the extent of the evidence to be considered

71. Mr Green submitted that, as the purpose of the compensation provision in Article 9 was to compensate persons who suffered loss "in consequence" of the refusal of consent, it was difficult to understand why the tribunal should be limited to a consideration of the evidence before the compensating authority at the date of refusal. He accepted that, in looking at what was in the contemplation of the authority at the time consent was refused, the focus would inevitably be on the material before the authority, but in assessing whether in fact the trees were the likely cause of the damage, or whether the underpinning subsequently undertaken was a reasonable response to the refusal of consent, it would be nonsensical to ignore evidence arising after the decision to refuse consent.

72 Miss Colquhoun's submissions on this issue were these: In order for something to be in the contemplation of an authority it needs to have been raised by the applicant in his application for consent, together with proof that it was a natural and probable consequence. In order to meet the relevant test, therefore, the claimants needed to show the tribunal that the evidence provided to the council at the time of the application was sufficient to prove that the three trees were the cause of the damage to the claimants' property and therefore that works required to put that right in the event of a refusal were reasonably foreseeable.

73. I am inclined to accept the submissions of Mr Green on this issue, but it is not necessary for me to decide the point. That is because, for reasons which I shall explain under issues 2 and 3, I am satisfied that the information before the compensating authority when it refused consent was entirely sufficient to establish that the damage had been caused by trees and that underpinning would be necessary.

Issue 2 – Causation

74. It is common ground that, in deciding whether the trees were responsible for the subsidence in 2003, the test to be applied is the balance of probabilities. That is not the test used by Mr Jones when he recommended that permission to fell should be refused. In paragraph 2 of his assessment of the application Mr Jones said:

> "no evidence has been submitted to satisfactorily demonstrate, **beyond a reasonable probability**, a causal link between desiccation of clay soil as a result of water uptake by the trees in question and the attested property damaged… This [crack monitoring data] is not considered to be evidence **anywhere close to being conclusive** that the property is suffering from a cyclical pattern of movement consistent with vegetation." (Emphasis added).

75. In my judgment, if Mr Jones had applied the proper evidential test, he would inevitably have concluded that the claimed causation had been proven. The following evidence all pointed to tree root damage:

(i) In the Summer of 2003 the compensating authority received a noticeably increased number of applications to remove trees.

(ii) There was a particular volume of such applications in relation to trees in Southwater.

(iii) Southwater was noted for tree root related subsidence.

(iv) The damage was within the zone of influence of all three trees in question.

(v) Roots of oak trees, which have a high water demand, were found following ground investigations close to the rear of the property.

(vi) Soil taken from BH1 (close to the rear elevation) as compared with the samples from BH2 at the front of the house, showed desiccation. Desiccation in clay soils can result in subsidence of the ground and damage to buildings.

(vii) In cross examination Mr Jones accepted that he could not think of an explanation for the 5mm closure in winter of the vertical crack width at the rear right corner at damp proof course level (station 1) which was consistent with the remaining evidence, other than that the subsidence was tree related.

76. In his expert report Mr Jones placed particular emphasis on the advice from Biddle, to the effect that crack monitoring data should be treated with caution, and on the letter from Mr Handley, which suggested that the structural problems at No.26 had been caused by defective drainage. I do not attach any significant weight to either of these factors. Biddle warned against relying on crack monitoring as "the sole method of diagnosis" but, as is clear from paragraph 75 above, the crack monitoring was far from being the only evidence which pointed to the responsibility of tree roots for the damage. As for Mr Handley's letter, it contained inconsistent information. Although the final report apparently attributed the building movement to defective drainage, Mr Laddiman referred to the possibility of heave movement, which would not have arisen if there was a leaking drain. In response to a question from me Mr Jones said that he had

been aware of this inconsistency at the time, but he had not thought it necessary to ask Mr Handley to clarify the position. That answer did not suggest that an objective approach had been taken to the ascertainment of the cause of the subsidence.

77. In concluding that, on the balance of probabilities, the damage to the subject property was caused by tree roots, I have not overlooked the agreed fact that the previous partial underpinning could have caused a hard spot and as a consequence it could have exacerbated the damage. There was little evidence that this was in fact the case and it does not detract from the fact that, but for the trees, there would have been no damage at all.

Issue 3 – was underpinning the natural and probable consequence of refusal?

78. Miss Colquhoun submitted that the compensating authority was in any event not liable to pay compensation on two grounds, both of which question whether underpinning was the natural and probable consequence of the refusal of consent. Firstly, she submitted that, since none of the subject trees were within land owned by the claimants, obtaining consent to fell the trees would not have allowed the claimants to carry out that felling in the absence of consent from the relevant owners. I do not accept that submission. Although the ownership of the trees is unclear, various works have been carried out to the trees in the past 10 years, including felling a smaller tree between T2 and T3. Mr Wright said, and I accept, that there has never been an objection from anyone claiming ownership. I am satisfied that, had consent to fell been granted, there would have been no difficulty in implementing it.

79. Secondly, it was submitted that the claimants' failure to make a further application or to appeal to the Secretary of State against the refusal of consent amounted to a failure to mitigate the damage. This was because the refusal was not based on an acceptance that it had been shown that the trees were causing damage, but which was outweighed by amenity considerations and, secondly, the claimants had recognised that the existing evidence was too weak to justify an appeal. Again, I am unable to accept that submission. Assuming in the compensating authority's favour that the claimants were obliged to take reasonable steps to mitigate their losses, I consider that they acted reasonably in deciding to underpin rather than appeal. In reaching this conclusion I have borne in mind that the refusal was issued in September 2005, some two years after the Wrights first made their claim and that it might have taken up to 2 more years to obtain an appeal decision, whose outcome was uncertain, particularly since it would have been open to the decision-maker to conclude that the amenity value of the trees outweighed the cost of other remedial measures. OCA, the claimants' arboricultural advisers, did not consider that the evidence was sufficiently strong to justify an appeal and it was not unreasonable for the claimants to follow that advice. As for the suggestion that the claimants could have made a further application to the authority, I accept Mr Green's submission that that would have been an exercise in futility, given the approach taken by the authority in determining the original application.

Issue 4 – Was underpinning within the contemplation of the compensating authority when it refused consent?

80. Miss Colquhoun submitted that, based on the evidence that was before the compensating authority when it decided to refuse consent, the loss incurred by the underpinning works was not

reasonably foreseeable and did not flow reasonably and naturally from the refusal of consent. Mr Green submitted that, on the material before the authority, there can have been no doubt that underpinning was likely to be carried out if consent was refused. I accept Mr Green's submission on this issue, given that in the arboricultural experts' statement of agreed matters, Mr Jones accepted that he had assumed that the reference in the claimants' application to possible engineering repair works was probably a reference to underpinning.

Issue 5 – Would underpinning have been required even if the tree had been removed?

81. I can state my conclusions on this issue very briefly. I found Mr Champion's evidence, to the effect that the potential heave likely to result if the tree was felled would not warrant underpinning, to be compelling. Mr Starr felt able to maintain his disagreement with Mr Chapman on this issue, despite his recognition that Mr Champion's experience was very much greater than his own, and despite the fact that his only visit to the property had been four years before the damage occurred. He accepted that Mr Champion had calculated the likely amount of heave using recognised methods for doing so. The only area of disagreement concerned the use of an average water shrinkage factor of 4. Mr Starr asserted that it was not appropriate to use an average when dealing with a high volume change soil. But he did not say what other factor should be used, nor did he identify any other guidance or technical study that might assist. I find that underpinning would not have been required if permission had been granted to remove the oak trees.

Issue 6 – Is compensation payable for distress and inconvenience?

82. Mr Wright said that he and his wife had suffered inconvenience and stress from living in a damaged house, such damage arising whilst permission to remove the oak trees was sought. This evidence was not challenged. The compensating authority was aware that the application for consent was made to avoid "expensive and disruptive engineering works" and must have been aware of the potential for distress and inconvenience arising from the refusal of consent. Miss Colquhoun did not suggest that this head of claim was not allowable in principle. In the light of the observations of Russell and Slade LLJ in *Bell v Canterbury City Council* (paras. 69 and 70 above) I consider that she was right not to do so. In my judgment the sum claimed, £750, is not unreasonable and I find that it is payable in addition to the agreed cost of underpinning.

83. The compensation payable to the claimants by the compensating authority is £24,001.25. A letter concerning costs accompanies this decision, which will become final when the question of costs is determined.

Dated 22 August 2011

N J Rose FRICS

Addendum on costs

84. It has been agreed that the compensating authority will pay the claimants' costs, to be assessed in default of agreement by a Registrar of the Tribunal and that such assessment will be on the standard basis in respect of costs up to and including 8 May 2009 and on the indemnity basis in respect of costs incurred thereafter. I so order.

Dated: 25 October 2011

N J Rose FRICS

Further Addendum

85. At the request of the parties I record that it has been agreed that interest in the sum of £2,039.59 is payable to the claimants in addition to compensation of £24,001.25 and costs as ordered.

Dated 17 November 2011

N J Rose FRICS

UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2011] UKUT 213 (LC)
LC Case Number: LCA/288/2010

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – Tree Preservation Order – refusal of consent to crown reduce a mature oak tree alleged to have caused subsidence to residential dwelling – claim for cost of remedial works and preventative measures – compensation £7,602 - Town & Country Planning (Trees) Regulations 1999

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN **HALIFAX GENERAL INSURANCE SERVICES** **Claimant**

and

TEIGNBRIDGE DISTRICT COUNCIL **Compensating Authority**

Re: 15 Ashburton Road, Bovey Tracey,
Devon TQ13 9BZ

Before: P R Francis FRICS

Sitting at: Plymouth Magistrates Court, St Andrew Street,
Plymouth PL1 2DP
on
14 April 2011

Keiron Hart of Marishal Thompson Group for the claimant
Duncan Moors, solicitor with Teignbridge District Council, for the compensating authority

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DECISION

Introduction

1. This is a claim for compensation in the sum of £7,602 to compensate Halifax General Insurance Services, the buildings insurers of 15 Ashburton Road, Bovey Tracey (the subject property), for losses alleged to have occurred as a result of Teignbridge District Council's (the council) refusal of an application to reduce the crown of a mature oak tree which is subject to a Tree Preservation Order, and is located on land belonging to a third party. The claim is for the cost of works designed to repair and avoid future damage to the bungalow. The council say that no compensation is due as the claimant has failed to prove that the damage alleged to have occurred was caused by the take up of moisture by the tree roots, that the preventative works that were undertaken were inappropriate and, in any event, crown reduction would not have been an effective remedy.

2. Mr Kieron Hart, BSc (Hons) C Env F Arbor A MIC For, an arboricultural expert with Marishal Thompson Group, Alnwick, Northumberland, a nationally based environmental consultancy, appeared for the claimant and called Mr Ian Hanson B Eng (Hons) C Eng MICE Dip CII (Claims) BDMA Ins Tech, a claims consultant with Halifax GIS who adopted an expert report that had been prepared by A S Lycett BSc (Hons) MRICS Dip CII (Claims) Ins Tech BDMA, a chartered surveyor and loss adjuster with the claimant, who was unable to attend the hearing.

3. Mr Duncan Moors, a solicitor with the council, appeared for Teignbridge and called Mr Paul Clark, B Eng (Hons), a structural and geotechnical engineer and Mr Paul Durkan, HND Arb M Arbor A, an arboricultural officer, both of whom are employed by the council and who gave expert evidence.

Facts

4. The parties helpfully produced an agreed statement of common ground from which, together with the evidence and my inspection of the subject property and its immediate environs on 13 April 2011, I find the following facts. The subject property comprises a detached bungalow fronting Ashburton Road in Bovey Tracey. The tree, which was the subject of the claimant's application is a mature, approximately 100 year old, English oak (Quercus) which is protected under a Tree Preservation Order issued by the council on 22 March 1999 and confirmed unopposed on 28 June 1999. It is described as the District of Teignbridge (Brimley Halt, Ashburton Road, Bovey Tracey) Tree Preservation Order 1999 and is listed as T1 on the Schedule and plan appended to it. It is located within the front garden of the adjacent property, Ashlea, 13 Ashburton Road, and is 6.7 metres from the front left-hand corner of the insured's bungalow. It was agreed that that this was the only oak tree within potentially influencing distance of the affected area, and that oak trees have a high water demand.

5. In 2007 the owners of the subject property noticed cracking to the brickwork and mortar joints on the walls at the front left-hand corner of the property, and contacted their insurers (the claimant) who, following initial investigations (the obtaining of a report confirming oak tree root activity below the foundations), instructed Marishal Thompson on 8 January 2008 to carry out a vegetation survey and to advise on proposed mitigation works. Investigations were instigated including, in January 2008, excavating a trail pit immediately in front of the damaged front wall of the subject property, and a bore hole in the rear garden (outside the alleged zone of influence), and obtaining a soil test report, together with the commencement of crack monitoring which would continue until January 2009. An initial Arboricultural Consultancy Report was however submitted to Halifax GIS on 11 January 2008 which although stating that "no technical investigations are available at the time of reporting" provided a synopsis that stated:

> "5.1. This report is based upon our understanding at the time of visiting the property that Halifax General Insurance's engineers are satisfied that damage is due to clay shrinkage subsidence exacerbated by vegetation.
>
> 5.2 In our opinion T1 has the clear potential to be exerting influence in respect of the moisture status of soils beneath the insured dwelling. The removal of T1 subject to heave assessment offers a predictable and effective arboricultural solution. Pruning within acceptable limits will not promote recovery and long-term stability."

6. On 29 February 2008, the former owner of Ashlea, Mrs J Hannam, made an application to the council to fell the tree, that being accompanied by documentation that had been supplied by Marishal Thompson – the initial root report, the soil survey and the 11 January Arboricultural report.. The application (ref: 08/0102/TPO) was refused on 24 April 2008 for the following reasons:

> "1. The oak (T1) is of important amenity value to Ashburton Road and the wider area. The removal of the tree would result in a loss of amenity to the area.
>
> 2. The application does not identify any reasons of condition or health that would require the tree to be removed.
>
> 3. The application states that T1 is implicated in subsidence damage. However, the information submitted with the application does not establish the tree to be a significant contributor towards the unspecified damage of 15 Ashburton Road. In order to better identify the tree as a significant source of structural damage, any application for consent needs to include a structural engineer's interpretation of the mechanism and progression of the damage as well as level and crack monitoring over an appropriate length of time."

No appeal was lodged.

7. Following completion of the site investigations and crack monitoring, a meeting took place between representatives of the claimant, Marishal Thompson and Mr Paul Durkan of the council to obtain, in Mr Hart's words "a without prejudice steer … on any forthcoming application."

8. On 17 February 2009, an application was submitted to the council to reduce the crown of the tree by 25%. At this time it was agreed that it was approximately 17 metres in height. The application was accompanied by the same documentation that had been submitted with the application to fell, along with a copy of Mr Lycett's engineering report dated 8 April 2008 and some crack monitoring data. On 20 April 2009 the council issued a notice of refusal (ref: 09/00567/TPO/E2/08/36/A) stating the following reasons:

> "1. The proposal may have an adverse effect on the long term health and/or structural integrity of the tree.
>
> 2. The proposal will have an adverse impact on the amenity offered by the tree.
>
> 3. Engineering opinion from a council structural engineer states that the new data shows very slight movement, and does not indicate that the tree is contributing to damage at the adjacent property.
>
> 4. The requested engineering interpretation of the new data was not provided by the applicant.
>
> 5. Where a tree is influencing a structure (which does not appear to be happening here), crown reduction is a poor management technique to address the issue."

No appeal was lodged. It is as a result of this refusal that the claim has been made.

9. The works to underpin the foundations and repair the drive were then put in hand, and completed in June 2009. Compensation was then sought from the council, and following their refusal, a notice of reference was submitted to the Tribunal in January 2010. The claim for £7,602 was made up of underpinning costs (£6,302), repairs to the driveway due to those works (£800) and consultancy fees (£500). It was agreed that £2,500 expended on superstructure repairs was incurred prior to the refusal of the application, and cannot therefore be claimed.

Issues

10. The matters for determination are:

> 1. Whether the evidence establishes that, on the balance of probabilities, the property suffered subsidence caused by moisture take up by the roots of the oak tree, the subject of the Tree Preservation Order, and whether the damage might continue or re-occur.
>
> 2. Whether the claimant has demonstrated that crown reduction is an effective management tool to address tree related subsidence, and avoid future problems.
>
> 3. Whether the engineering works undertaken were necessary, appropriate or proportionate in all the circumstances, and whether the costs were reasonable.

Claimant's case

11. Mr Hart said that the root report that had been the first investigation revealed a total of 6 functionally active oak tree roots at a depth of 0.63 metres (the depth of the property's foundations) in the location of a trial hole that was dug immediately in front of the left hand corner of the building (referred to as TP1). No roots were found at a greater depth. The subsequent soil tests revealed it to be of brown/grey clay with gravel at all tested depths in TP1 (where the root investigation had also been carried out), and within a borehole excavated within the rear garden of the property (BH1). The tests also revealed significantly reduced moisture content in the vicinity of the structural damage. At 0.63 metres deep, the moisture at the front was 16%, and at the rear 27%. At 1.0 metres it was 11% and 25% respectively and at 1.5 metres it was 14% and 21%. At 0.63m in TP1 the soil was found to be of low plasticity, and at the greater depths of intermediate plasticity. In BH 1 it was low plasticity at all three monitoring depths. It was accepted that clay soils of low plasticity have less potential for volumetric change than intermediate plasticity soils.

12. As to the **crack monitoring** that had been undertaken over a period of a full year, Mr Hart, in respect of the council's argument that **level monitoring** (a different test) should have been carried out, said that it was his professional opinion that the crack monitoring produced irrefutable evidence that the damage had been caused by moisture take-up from the roots. Reference was made to a paper published in 2009 by Dr Giles Biddle OBE entitled *"Level monitoring for investigating tree root damage to buildings"*, in which he said:

> "Where vegetation is involved, it produces a characteristic seasonal pattern of foundation movement; subsidence in the summer reaching a maximum usually in September, followed by upward recovery in the winter. No other cause produces a similar pattern"

He continued:

> "If it [seasonal movement] is occurring, there is no need to try to demonstrate shrinkable clay or desiccation – soil drying by vegetation must be involved (unless foundations are less than 300mm). One does not need to demonstrate the full cycle; just sufficient to confirm movement is consistent with this pattern. Monitoring upward recovery in the winter is particularly valuable."

The foundations here were more than 300mm deep, Mr Hart said, and crack monitoring produces a similar pattern to level monitoring. Level monitoring was appropriate where damage might have come from several different sources, but here there was only one – the oak tree.

13. He also said that the council had accepted (at para 3.4 of their reply to the claimant's statement of case) that two of the 6 crack movement trends monitored "appear to correspond with classic clay shrinkage subsidence." Furthermore, a peer review entitled "*A risk limitation strategy for tree root claims"* published by the London Tree Officers Association in May 2008 said:

> "Crack monitoring can help to establish the direction, scale and rate of movement (measured in mm) that is occurring within a building that has already suffered movement. It usually takes place over a number of months and is most useful when undertaken over a seasonal period (ie summer to winter) so that it can demonstrate seasonal movement and recovery at particular times of the year."

This is precisely what had been done in this instance, and Mr Hart said that the results from the 4 monitoring stations (including one at the rear on the warmest, southern, elevation that had been installed at the request of the council) clearly showed that the movement on the front and side wall was due to soil shrinkage and that to the rear was caused by thermal movement. Figure 6 in the statement of case graphically demonstrated the seasonal movement, with the crack at that monitoring station opening during the drying season, and closing again in the winter months as the soil re-hydrated. In his view, the evidence points irrefutably to the oak tree being the causal factor of the damage.

14. Mr Hart accepted that changes to the TPO legislation meant that level monitoring is now a requirement, and was by the time the application for crown reduction was made to the council in February 2009. However, he said that it was not mandatory when the initial investigations and crack monitoring commenced. To provide level monitoring would, he said, have meant a delay of at least a further 12 months and, as it was, the matter had already been going on for a considerable period of time since the damage was first reported. He also said that the council could, when validating the application, have advised that that information was required. It had also not been sought during the inter-party meeting, as the minutes showed, and the claimant had been advised to make the application.

15. In Marishal Thompson's advice to the claimant, Mr Hart said that whilst complete removal of the tree would have been the preferred option, and the only way to ensure that the influence was completely removed, having regard to the TPO, the fact that the tree was on third party land, and the relatively low level of damage being occasioned to the property, it was agreed that, in the first instance, an application for crown reduction should be made. The plan was to effect the necessary repairs to the superstructure, and then to monitor whether the reduction in the tree's canopy resolved the problems. If it did, no underpinning would be necessary, but if it did not, the claimant would then have had to consider whether to make a further application to the council, or to carry out underpinning at a later stage.

16. Whilst the council argued that crown reduction was not effective in the long term, and would be of severe detriment to the amenity of the tree, Mr Hart said it was a fact that the tree had been heavily pollarded about 40 years ago, and that had had no long term impact. Oaks were tolerant to extensive pruning. He referred to British Standard BS3998:2010 "Tree work – Recommendations" which, although it post-dated the claim, had been around in draft form since 2007. It indicated that crown reduction/re-shaping/pollarding were often appropriate options "to protect people and property from subsidence of land." Mr Hart said that there was no research information showing where moisture levels were recorded following crown reduction especially on highly shrinkable soil.

17. As to the council's suggestion that a trench should have been dug, and a concrete root barrier installed rather than partial underpinning (which it was alleged could cause more problems than it resolved), Mr Hart said that that was a much more expensive option and would have meant much more extensive physical works. Whilst Marishal Thompson were the largest suppliers and installers of root barriers in the country, such an exercise would not have been appropriate here. The close proximity of the drain run, and the boundary to the adjoining property, together with the fact that the tree itself was on third party land, were all factors that weighed against this option. It would also have meant the need to sever roots of the tree with the potential of causing long term damage to its health and, furthermore, the council would be facing a much higher claim for compensation if that route had been followed.

18. Mr Hart reiterated that crown reduction was considered to have been a fair option in all the circumstances, and there was no question that the council had been provided with more than sufficient information to establish that the problems that had occurred with the subject property were caused by the tree roots. The claimant was contractually obliged under the insurance policy to remedy the damage, and to provide a long-term solution to prevent it happening again. The chosen remedy that resulted from the refusal of the application was the cheapest option, and Shirepiling was the one which would cause the least damage and was the most environmentally friendly.

19. Asked in cross-examination whether it was right for public money to be used to allow the claimant to fulfil its contractual obligation, Mr Hart said that, as had been explained, the only reason the works were done was because the council had refused the application, despite there being clear evidence that the tree had caused damage to the property. Under the Town and Country Planning Act, that party was entitled to compensation in such circumstances. It was, in his experience, unusual for a council to refuse crown reduction and more often than not, local authorities were much more co-operative than had been the case here.

20. Mr Hart accepted that the initial technical synopsis that his firm had provided to the insurer stated that "pruning within acceptable limits will not promote recovery and long term stability" but insisted that crown reduction at 25% (whereas the BS suggested 30%) was a "suck it and see" option in the light of the council's refusal of permission to fell.

21. Mr Hanson is a claims consultant with Halifax GIS and said in a letter to the Tribunal dated 12 April 2011 that he adopted the report of Mr Lycett in full. Mr Lycett is a chartered surveyor, and loss adjuster with the claimant, and having prepared the majority of the relevant technical data, plans, investigation reports and engineering opinion, had produced a statement in response to Mr Paul Clark's expert witness report. He set out details of the technical evidence that had been submitted to Teignbridge's tree officer, Mr D. Pratt, in March 2008 and subsequently, and vehemently refuted the council's suggestion that insufficient evidence had been provided. The evidence included the initial tree root identification results, the soil tests, a site plan, engineering report, Marishal Thompson's initial arboricultural assessment and ongoing crack monitoring results. Subsequent reports gave details of crack monitoring locations and initial results. Mr Lycett affirmed that the information given to the council was "standard documentation in support of subsidence movement and damage to a domestic

22. Mr Lycett said that Mr Clark had not taken into account the fact that the summer of 2008 was one of the wettest on record, and was the most likely reason why the movement that had occurred was fairly minimal. In drier summers it could be expected that opening up would be much more severe. It should be noted also that Mr Clark said in his report that a number of the crack reading measurements "appear to correspond with classic clay subsidence exacerbated by trees." It was thus strange that the council were still contending that the cause of the damage remained unproven. Mr Lycett said that he did not consider level monitoring to be appropriate on a property of this type and age, and with no history of previous subsidence movement and no historic distortions to distinguish from recent cyclical movement. Accordingly, crack monitoring has been sufficient to demonstrate the cause, nature and extent of the movement beyond reasonable doubt.

23. Whilst it was accepted that movement was slight, and damage relatively minor, it could be predicted that the situation would worsen over time. In the light of the fact that the council had refused the application to crown reduce the tree, it was necessary for steps to be taken to identify and adopt a suitable repair solution in order to indemnify the insured homeowner under the terms of the policy. The stabilisation works thus undertaken were considered to be sufficient and a much cheaper option than the root barrier that the council was suggesting. Mr Lycett included within his report a copy of the BRE Digest 251 (revised 1995) entitled "*Assessment of damage in low rise buildings."*

24. In cross-examination, Mr Hanson was asked to comment on the paper relating to level monitoring that had been prepared by Dr Biddle, and that was included as an appendix to Mr Lycett's report (bundle p121). In that, Dr Biddle had said:

> "It is now recognised that in most cases underpinning is unnecessary and that foundations can be stabilised by appropriate tree management, usually felling the offending tree or carrying out heavy crown reduction. Site investigations should reflect this change and be aimed at providing the information to allow appropriate decisions on tree management, in particular …."

It went on to list 7 categories of information and concluded

> "Level monitoring provides definitive information on all of the above, and in most situations is the only investigation which should be necessary. Trial pits, boreholes and root identification do not provide relevant information and are of very limited value."

Mr Hanson said that whilst he was familiar with Dr Biddle's work, he did not necessarily agree with it. He said that level monitoring is normally used where the source of the problem is not

known, or the whole building is affected. As to why level monitoring had not been provided despite two council requests to do so, he said it was not considered necessary in this case. It was much more expensive to undertake, and would have been overreacting to the problem.

Compensating authority's case.

25. Mr Clark is a structural and geotechnical engineer specialising in building structures and defects, renovation works and remediation approaches, and has been with Teignbridge for 5 years. He said that said that he had been asked to comment upon the claimant's case and the background to the claim, but had not been requested to inspect the building or carry out any investigations of his own. At the hearing, he confirmed that he had not inspected the property in detail, and had only seen it at a meeting with the claimant's representatives on 10 June 2008. In his initial report of June 2010 Mr Clark said that it was his opinion that no clear evidence had been received by the council detailing the location and pattern of cracking and that no survey data or comments in the form of an engineering report have been provided to clearly link the location and nature of cracks to active vertical foundation movement in the affected area. There was no compelling evidence sufficient to exclude all other factors, and to determine beyond doubt that the tree was the principal cause of damage, but he acknowledged that two of the crack monitoring points appeared to correspond to classic clay shrinkage. Nevertheless, he said the movement trends highlighted in the claimant's statement of case are indirect displacements measured locally to specific cracks, and that they were not evidence of vertical foundation displacement.

26. Reference was made to another statement in *Tree Root Damage to Buildings* by Dr Biddle where he said it was "far more relevant to measure .. changes in level rather than the indirect effects which may or may not become manifest as cracks in the superstructure." With no level monitoring having been undertaken, the crack monitoring was in his opinion inconclusive. Although it was accepted that the building was within the zone of influence of the tree, the lack of tangible damage report data meant that it was not possible to conclude that the minor movement that had taken place was linked to the tree in question. As the movement was minor, and not proven to be progressive, the decision to underpin was in his opinion incorrect and could lead to more significant damage in the future. In his opinion a "do nothing" approach should have been adopted, other than cosmetic repairs to the cracking and internal plasterwork if necessary.

27. In his supplementary report, produced in response to Mr Lycett's report, Mr Clark acknowledged that further and more detailed engineering reports were provided by the claimant, but he insisted that despite the request that had been made by the council on 10 June 2008, no level monitoring information was provided.

28. In cross-examination, Mr Clark accepted that he had said in his report that two of the results provided by the claimant appeared to correspond with clay shrinkage but nevertheless the solution undertaken was inappropriate and a "Helifix" programme would have been more than sufficient. He also acknowledged that 2008 was a particularly dry year, but reiterated

29. Mr Durkan has been employed as the council's arboricultural officer since November 2008. He set out the background to the claim in considerable detail and said that where a tree is believed to be influencing the structure of a nearby property, one would expect to find it to be built on shrinkable clay, to be of a species that uses significant volumes of water in the growing season, to have roots within proximity of the damage, a significant seasonal pattern of movement and a crack pattern that indicates differential settlement of the foundations. In order to be satisfied that a TPO protected tree is contributing to the problem, Regulation 9A(c)(iv) of the Town and Country Planning (Trees)(Amendment)(England) Regulations 2008 stipulates the need for "appropriate evidence describing any structural damage to the property." Appropriate evidence is, he said, clarified in the Tree Preservation Orders: a Guide to the Law and Good Practice – Addendum – September 2008 and includes a structural engineers report and a level monitoring regime.

30. Mr Durkan acknowledged that all the things he had said would be expected to be found were found at the subject property, but the cracks could not be described as significant. He said that 2 of the 6 movements that were monitored correspond to the classic seasonal opening and closing of cracks associated with clay shrinkage exacerbated by trees. Nevertheless, it was his view that much of the information required to assist the council in taking a view on the matter was not provided. No level monitoring was undertaken, and no reasons given for why it was not. The engineers report was vague as to the location and pattern of the cracking, and no evidence was produced to suggest that other possible causes had been considered. There were no details of the repointing that had been carried out, no geological strata, no description of the foundations and no estimated of costs of repair. Significantly, no details were provided as to what precisely was intended in respect of the "25% crown reduction." For instance it was not known if this related to the branch length or the volume of the canopy. In this regard, he said that 25% reduction in branch length could mean a 40% reduction in canopy volume. Mr Durkan said that he undertook a desktop study following the round-table meeting on 9 February 2009 at which Marishal Thompson had discussed the proposed reduction, and could find no evidence to suggest that the proposal would reduce the amount of water extracted.

31. Aside from the council's concerns that insufficient evidence had been provided regarding the cause of the damage, and the efficacy of the proposed solution, a major consideration was, Mr Durkan said, the loss of amenity that would be caused by the crown reduction. Hence the application was refused and, he said, although the claimant could have appealed at no cost, it had not done so.

32. In response to a question from me, Mr Durkan said that an alternative to the actions that the claimant had taken would be to carry out regular root pruning, which could be done on application to the council once it had been established beyond reasonable doubt that the roots had caused the damage. However, he was not advocating that course of action and accepted in cross-examination that some die back to the tree could occur over a number of years if the pruning was too harsh. Although the council was particularly concerned about the loss of

33. He also acknowledged that the soil test report (bundle p53) did confirm that desiccation was occurring within the vicinity of TP1, and that on the balance of probabilities, it could have been caused by the tree roots. The issue was not that the tree roots could have caused the problem, but that the evidence submitted by the claimant was insufficient to prove that conclusively.

34. It was submitted for the council that it would not be right for it to have to pay for the works that had been undertaken by the claimant where they were considered inappropriate. The damage to the property was minimal, and in their view underpinning works were not required. Mr Hart submitted that the claimant had sought to minimise costs, and the works that had been carried out were widely recognised as being an appropriate solution, and were the most cost effective approach.

Conclusions

35. The council's principal argument was that the claimant did not undertake and provide level monitoring results as part of its application to crown reduce the tree. Its experts seem to have accepted, from the evidence that was provided, that on the balance of probabilities at least some of the cracking that had been monitored was likely to have been caused by the tree roots.

36. The requirement for level monitoring came into force just before the claimant submitted its February 2009 application, and undoubtedly (from what Dr Biddle says) this would have been a useful exercise. Mr Hart's argument was that if they had virtually had to start again with the monitoring, there would have been considerable extra delay and costs would also have risen. However, I note that the refusal of the application to fell the tree which was refused in April 2008 said, at reason 3, that as well as an engineering report, level and crack monitoring over an appropriate length of time should have been provided. The claimant was thus on notice of those requirements from an early stage, and could therefore have carried out that additional test without much, if any, further delay.

37. Nevertheless, I accept the claimant's evidence that the crack monitoring that was undertaken, together with the other information that was supplied to the council, was sufficient to establish beyond reasonable doubt that the damage was caused by the roots of the oak tree, and thus whether or not level monitoring evidence was provided becomes irrelevant to the issues. It also seems to me that, from the strong arguments propounded by the council about the affect upon the amenity of the tree, even if level monitoring had been undertaken, and the results (assuming they were conclusive) submitted to the council, any application to crown reduce the tree would probably still have been refused.

38. Although the council has said that the works of underpinning that were carried out were inappropriate in the circumstances, it produced no evidence to support that conclusion. I am satisfied that, although perhaps it would have been helpful if the claimant had provided the full set of crack monitoring results with the application, the investigation works that were undertaken were appropriate, as was the partial underpinning. I accept Mr Hart's argument that the alternative of a root barrier, as suggested by the council, would not have been an appropriate solution for the reasons he gave and in my judgment the claimant has, as a result of the refusal, carried out a repair and prevention exercise that was a cost effective and proportionate option.

39. Issues 1 and 3 are therefore resolved in favour of the claimant. As to issue 2, whether crown reduction would be an effective management tool to address tree related subsidence, little if any conclusive evidence was produced by either party. There seemed to be a paucity of published research into the subject, and the parties were at odds as to whether, in the longer term, such action would be sufficient to prevent any further damage. Nevertheless, the BRE digest produced with Mr Lycett's report says at page 8 [Bundle p 120]:

> "*Buildings near existing trees (Digest 298)*
>
> Where the action of existing trees has been identified as the principal cause of foundation subsidence, care and experience are required in assessing the likelihood of progressive movement and hence in planning remedial action.
>
> The following factors should be noted:
>
> *Where the trees have reached or a re close to maturity,* although seasonal shrinkage and swelling movements can be anticipated, larger movements are likely to occur only in exceptional spells of dry weather. Felling of such trees can lead to worse damage due to swelling of the clay. **Tree pruning may offer an acceptable way of reducing the influence of the tree.**" [my emphasis]

In my judgment, based upon the limited evidence available, it was reasonable for the claimant to conclude that crown reduction may well have been sufficient to prevent any re-occurrence of the cracking which was acknowledged to have been slight. Mr Hart made it clear that it was their intention to then monitor the situation, and underpinning works would only be considered if the crown reduction failed to achieve the desired effect. Thus, it was clear that they were not sure, but the result of the council's refusal was that it became necessary for other options to be considered. The option they took was the cheapest and most cost effective, and I am satisfied that the costs incurred were reasonable.

40. As I have said, the alternative of a root barrier would have been inappropriate, expensive and indeed very difficult to achieve due to the proximity of the drain run, and the boundary onto a third party property.

41. I thus find that the claimant has made out its case in respect of all three issues, and within the provisions of section 9(1) of Regulation 2(1) of the Town and Country Planning (Trees)

42. The matter was heard under the simplified procedure which is, except in exceptional circumstances, a no-costs regime. I assume that by agreeing to it the parties intended that to be the case, and thus make no order as to costs.

DATED 7 June 2011

P R Francis FRICS

UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2012] UKUT 117 (LC)
UTLC Case Number: LCA/41/2011

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – tree preservation order – cracks appearing in house – refusal of consent to fell robinia in adjoining garden – claim for costs of underpinning works – the basis for determining causation and foreseeability – whether need for underpinning caused by robinia – whether loss or damage reasonably foreseeable when consent refused – whether reasonable steps taken to mitigate loss or damage – whether interest payable on compensation moneys and if so on what basis – Town and Country Planning Act 1990, s203

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN	**THE KEEPERS AND GOVERNORS OF THE POSSESSIONS REVENUES AND GOODS OF THE FREE GRAMMAR SCHOOL OF JOHN LYON (A CHARITY)**	**Claimant**
	and	
	THE LORD MAYOR AND CITIZENS OF THE CITY OF WESTMINSTER	**Compensating Authority**

Re: 147 Hamilton Terrace
London
NW8 9QS

Before: N J Rose FRICS

Sitting at 43-45 Bedford Square, London, WC1B 3AS
on 1 and 2 March 2012

Jason Evans-Tovey, instructed by DAC Beachcroft, solicitors, for the claimant.
Charles Mynors, instructed by Head of Legal and Democratic Services, City of Westminster, for the compensating authority.

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The following cases are referred to in this decision:

Wright v Horsham District Council [2011] UKUT 319 (LC)
Vacwell Engineering Co Ltd v BDH Chemicals Ltd [1971] 1QB 88
Sempra Metals v Inland Revenue Commissioners [2008] AC 561
Bell v Canterbury City Council (1988) 56 P&CR 211
Yuanda (UK) Co Ltd v WW Gear Construction Ltd [2010] BLR 435
Duncan v Epping Forest DC [2004] RVR 213

The following cases were also referred to:

Perrin v Northampton Borough Council [2008] 1 WLR 1308
Rhesa Shipping v Edmunds ("The Popi M") [1985] 1 WLR 948
Fosse Motor Engineers Limited v Conde Nast [2008] EWHC 2037 (TCC)
Loftus-Brigham v London Borough of Ealing [2003] EWHC Civ 1490; 103 Con LR 102
Wagon Mound (No2) [1967] 1 AC 617
The Heron II [1969] 1 AC 350
Siddiqui v Council of the London Borough of Hillingdon [2003] EWHC 726 (TCC)
Network Rail Infrastructure Ltd v C J Morris [2004] EWCA Civ 172
L E Jones (Insurance Brokers) Ltd v Portsmouth City Council [2002] EWCA Civ 1723
Delaware Mansions Ltd v Westminster City Council [2001] UKHL 55 [2002] 1 AC 321
Solloway v Hampshire County Council [1981] 79 LGR 449

DECISION

Introduction

1. This is a claim for compensation under section 203 of the Town and Country Planning Act 1990 (the 1990 Act) and article 9 of a Tree Preservation Order (No.530 (2004)) dated 12 November 2004 (the TPO) for losses alleged to have been incurred in consequence of a refusal of consent required under the TPO. The compensating authority is the City of Westminster Council who, on 8 February 2005, refused consent to fell a robinia tree (otherwise known as a False Acacia) situated in front of a dwellinghouse known as 145 Hamilton Terrace, St John's Wood, London (No.145). The claimant is a charity known as The Keepers and Governors of the Possessions Revenues and Goods of the Free Grammar School of John Lyon. The claimant is the freehold owner of 147 Hamilton Terrace (No.147), a dwellinghouse immediately adjoining No.145.

2. The claim is for £68,511.58, being the cost of underpinning works to the foundations of No.147, plus interest. The compensating authority says that no compensation is payable, alternatively that compensation should be limited to £7,500.00.

3. Mr Jason Evans-Tovey of counsel appeared for the claimant. He called two expert witnesses. They were Ms Margaret MacQueen BSc, C Biol MSB, MICFor, MAE, an arboricultural consultant practising through OCA UK Ltd (OCA) and Mr Brian Butcher, a chartered structural engineer and director of Richard Jackson Ltd, consulting engineers.

4. Counsel for the compensating authority, Dr Charles Mynors, called expert evidence from Ms Barbara Milne BSc, DipTP, Dip Arb RFS, Tech Cert Arbor A, MRTPI, senior arboricultural officer in the compensating authority's built environment department and Mr Bret Champion B.Eng (Hons), C.Eng, M I Struct E, ACILA, managing director of Pyle Consulting.

Facts

5. From a statement of matters agreed and disagreed and from the evidence I find the following facts. No.147 is a part two - and part four-storey link detached house, situated on the west side of Hamilton Terrace one door south of the junction with Carlton Hill. The four-storey section was constructed in about 1830 and the two-storey addition (on the left or southerly side) was built before 1880. The building has subsequently been converted to form six flats. The site slopes from the front towards the rear. The external walls are of solid brick construction. There is a lightwell/sunken courtyard to the front of the property approximately 2.6m deep.

6. Damage to No.147 was first discovered when new tenants occupied the property in about September 2003. The claimant's surveyors, Beecrofts, inspected the property on 31 October 2003

and reported on 27 January 2004. They noted cracking and separation on the front elevation at the junction of the two-storey and four-storey sections, the width of the cracking being directly proportional to height above ground level. The maximum crack width at high level appeared to be approximately 10mm. On the rear elevation separation and cracking were again noted between the main building and the two-storey addition, the damage mirroring that to the front of the property. The maximum crack width in this location was approximately 8mm. Cracking was also noted internally in the raised ground floor flat and in the garden flat.

7. Following a claim against the building's insurers, Norwich Union, and on the instructions of Cunningham Lindsey, loss adjusters, Mr Tim Moya of OCA carried out an arboricultural survey of vegetation close to No.147 on 6 March 2004.

8. On 9 March 2004 a representative of CET Group Ltd (CET), also instructed by Cunningham Lindsey, attempted to dig a trial pit at the front of No.147, but was unable to do so because he was moved on by a traffic warden. He returned to the property on 27 April 2004. He dug a trial pit and sank a borehole (TP/BH1) at the front of the property, to the left of the front door to the ground floor flat, and a control borehole (BH2) in the rear garden. In February 2005 two further trial pits were dug: TP/BH1 on a wall inside the store in the lower ground floor of the two-storey extension, and TP2 outside the rear wall.

9. On 18 June 2004 Mr G L Martin, a consultant geotechnical engineer, reported to CET based on the information obtained from the site investigation on 27 April 2004. Mr Martin concluded:

> "The natural soil was indicated to be a clay of very high or high/very high plasticity, with high shrinkage potential and high volume change potential. Evidence of root activity was recorded to a maximum depth of 1.40m. The data available at the time of the investigation indicated a zone of desiccation to a depth of at least 3.00mm in TP/BH1."

10. CET returned to No.147 on 5 August 2004. A further trial pit was dug at the front of the property in order to find more roots, since the previously identified roots had not been retained and classified. This exercise identified roots of live appearance to 2mm in diameter. On 11 August 2004 Tree Root Investigation Ltd certified that the root samples obtained from the trial pit had been alive in the recent past and originated from either a member of the Leguminosae family or Ulmus (elm). They added that members of the Leguminosae included Laburnum, robinia and the climber, wisteria. There was no elm tree in the vicinity of the trial pit.

11. On 11 August 2004 Mr Richard Hope, a senior chartered engineer with Cunningham Lindsey, prepared an engineering appraisal report on behalf of Norwich Union. The report included the following observations:

> **"**NATURE AND EXTENT OF DAMAGE"

Description and Mechanism

The principal damage takes the form of separation cracks between the two and four storey parts of the property with cracks up to 15mm in width at the time of our visit.

The indicated mechanism of movement is a drop in level of the two storey section of the property.

Significance

The damage would be placed in category 3 of the BRE Digest 251 classification i.e. moderate.

Onset and Progression

In our opinion the damage appears to be recent although there is evidence of substantial previous movement to the bin store area at the front of the property.

SITE INVESTIGATIONS

The ground investigation was carried out by CET Group Limited under the supervision of Beecroft Sons & Nicholson, Surveyors. For details please refer to the attached factual data.

The result of the ground investigation indicates that the damage to this property has been caused by clay shrinkage subsidence, resulting from moisture extraction by various vegetation.

An arboricultural report has recommended removal of three trees as follows:

1. London Plane within the control of the Local Authority.

2. Shrubs within the risk address.

3. A robinia within private third party ownership.

Unfortunately, the site investigation contractor initially failed to request root identification and hence we are currently awaiting those results.

MONITORING

Crack monitoring has shown a clear indication of the seasonal pattern of movement consistent with clay shrinkage.

CAUSE OF DAMAGE

As discussed above, it is our opinion that the damage results from clay shrinkage.

RECOMMENDATIONS

My recommendation is that the arboriculturalists continue their approach to the tree owners and, subject to a satisfactory outcome, repairs to the property should be able to proceed in the Spring of 2005."

12. On a date between 12 August and 9 September 2004 Mr Paul Allen, an arbotriculturist employed by OCA, prepared a desk-top study of the available evidence. He concluded that the probable cause of the damage was clay shrinkage subsidence caused by vegetation. He recommended the removal of a wisteria shrub growing along the rear elevation and the felling of the robinia within the curtilage of No.145 and two London plane trees on the highway footpath in front of 145 and 147, which were under the control of the compensating authority.

13. On 10 September 2004 OCA wrote to the insurance section of the compensating authority, formally requesting them to carry out works to the two plane trees in the highway. A copy of Mr Paul Allen's report was enclosed. On 14 October 2004 Mr Moya amended his desk-top study prepared on 6 March 2004, omitting the recommendation to fell the plane trees in the light of the root identification certificate.

14. On 25 October 2004 Ms Milne sought advice from Mr John Gardner, a district surveyor, following receipt of conservation area notification of the proposed felling of the robinia under section 211 of the 1990 Act. Two days later Mr Gardner reported as follows:

"Having studied the technical information submitted by OCA and looked at the external brickwork I do not agree that the settlement problems encountered on site are solely caused by the False Acacia tree.

The tree in a stage of early maturity is located within the adjoining property 145 Hamilton Terrace and is some 6 to 8m away from the closest part of the building and some 2m higher than the buildings foundations. Because of the distance from the building and its height above the building foundations, the influence of the tree roots on the surrounding ground would be limited.

The two-storey part of the building appears to have been built at a different time from the main building and at several different stages, as the brick courses do not match. It is at these points of junction that vertical cracks are appearing.

Crack monitoring reports have not been submitted and will be essential in indicating seasonal movement and therefore the tree's involvement in causing settlement. The report was not specific in the magnitude and location of the cracks, which were described as moderate and up to 15mm in width. Further monitoring reports would therefore be required.

No other external details of the building would give me concern or that might be contributing to the problem, however it should be noted that the natural ground level slopes away from the building to the rear."

15. A report recommending the approval of a tree preservation order in respect of the robinia by the Director of Planning and City Development under delegated powers was prepared by Ms Milne and dated 4 November 2004. The report included the following comments under "Background".

"1.3 The affected property lies over 2m below the level of the base of the tree, and some 7m distant from it. The District Surveyor points out that, in view of this, the effect of the tree on the ground surrounding the affected property would be limited.

1.4 In addition, no monitoring and no soil classification tests been submitted, nor have specific details of the magnitude and location of the cracks been presented. As such it is considered that insufficient evidence has been submitted to identify the tree as a cause of damage.

1.5 The tree is an attractive specimen in early maturity and appears to be in reasonable health. It is clearly visible at the front of the host property use, and for a considerable length of Hamilton Terrace. It provides useful visual amenity in the form of garden planting, complementing the nearby large London planes in the street, and is part of the characteristically verdant character and appearance of the gardens in this part of St Johns Wood conservation area. A TPO is considered expedient in view of detriment to amenity and the character and appearance of the conservation area.

1.6 In view of the above it is considered that the removal of the tree has not been justified and a TPO is considered expedient in the interests of the amenities of the area."

16. The report's recommendation was accepted and the TPO was made on 12 November 2004.

17. On 1 December 2004 OCA wrote to the compensating authority, formally objecting to the TPO. Under the reading "Amenity and Public Benefit" the letter said:

"Our reasons for wishing to apply to fell the False Acacia tree directly related to the consequences of the location of the trees to the damaged property. We will be making an application under the Order to fell the False Acacia as a remedy to the subsidence damage. A possible refusal of consent to fell will almost inevitably result in the need for underpinning the property. All costs incurred in consequence of any refusal of consent are therefore likely to form the basis of a compensation claim against the Council under Regulation 9 of the Order and s203 of the Town and Country Planning Act 1990. This would represent a poor use of public funds."

18. On 14 December 2004 OCA submitted a formal application under the TPO to fell the robinia. They said:

"We are arboriculturists appointed on behalf of building insurers of the above address.

It is the view of chartered engineers appointed to investigate damage that the above property has suffered differential movement and subsequent damage consistent with tree related clay shrinkage subsidence. We enclose copies of the relevant technical reports, as itemised below:

1. The engineer's report describing the nature and extent of damage.

2. The factual report of investigations, including laboratory soil test results and root identification certificates.

3. A site plan, which locates vegetation including the tree the subject of this application.

4. Monitoring

We believe, from the evidence supplied detailed above, we have demonstrated our two evidential tests, namely:

1. Tree roots have encroached onto the insured's land because:

Positive False Acacia root ID with depth of roots in TP/BH/1 to 1400 mm. Crack monitoring has shown a clear indication of the seasonal pattern of movement consistent with clay shrinkage.

2. Damage to the insured's property has resulted from that encroachment:

Pattern of damage relative to the tree indicates the mechanism of movement is a drop in level of the two storey section of the property.

We understand that the tree referenced below is covered by Tree Preservation Order number 530/2004.

Please accept this letter as our formal application to undertake the works detailed below:

Tree Number (as per OCA plan)	**Common name**	**Specification**
T2	False Acacia	Fell to ground level and treat stump

Reasons for this application

1. The above tree works are proposed as a remedy to the differential foundation movement at the above address, and to ensure the long-term stability of the building.

2. The above tree works are proposed to limit the extent and need for expensive and disruptive engineering repair works.

3. The above tree works are proposed to limit the duration of any claim period and therefore allow the landowner his right to the peaceful enjoyment of his property.

4. It is the case that an alternative to felling such as pruning or significant pollarding of the tree would not provide a reliable or sustainable remedy in this case. We do not consider that any other potential means of mitigation, such as root barriers, would be effective or appropriate in the circumstances.

5. Repair costs will vary between £31,000 and £71,000 depending on whether the tree can be removed or has to remain.

Please provide your formal acknowledgement of this application, indicating the date of its registration and the date that any decision would in your view be due.

Please quote our reference number CA073/1872996/John Lyons Charity.

Should you wish to visit the property, please contact us in order that we may arrange suitable access. We trust that the above information is of assistance but should you have any queries please do not hesitate to contact us."

19. The application was not followed by any discussions or correspondence between OCA and the compensating authority. It was refused on 8 February 2005 in a letter dictated by Ms Milne in the following terms:

"I refer to your application for tree works at the above location.

You are advised that after careful consideration the City Council has determined to refuse consent to remove the false acacia tree situated in the front garden of 145 Hamilton Terrace NW8.

Consent is refused for the following reasons:

1. The proposed tree removal would be detrimental to the visual amenities of the street scene, and have an adverse effect on the character and appearance of this part of St Johns Wood Conservation Area, thereby contrary to policies DES 7 & DES 12 of the City of Westminster Unitary Development Plan adopted in July 1997 and policies DES 9 & ENV14 of our replacement Unitary Development Plan (pre-Enquiry version, as subsequently modified).

2. Insufficient evidence has been submitted to justify the proposed removal of the false acacia tree.

Informative:

1. The Town and Country Planning Act 1990 allows that the City Council may be liable to pay compensation for costs incurred as a result of a refusal of consent, or consent with conditions, for tree works.

If you are aggrieved by this decision or the conditions imposed, you may appeal to the Office of the Deputy Prime Minister, Government Office for London …"

No such appeal was submitted.

20. On 23 January 2005 CET dug two more trial pits – TPBH1 in the store in the two-storey addition and TP2 outside the rear elevation. On 18 March 2005 Tree Root Investigation Limited certified that live roots of a member of the family Leguminosae had been found in the store with a diameter of 2.0mm. They reported that roots of 0.5mm diameter found in TP2 may have been a member of the same family, but they were too immature to identify with certainty.

21. On 1 March 2005 Cunningham Lindsey submitted a formal claim for compensation. On 21 April 2005 the Planning Committee of the compensating authority decided to confirm the TPO with immediate and permanent effect.

22. Works of repair, including underpinning, commenced in March 2005.

Expert evidence for the claimant

Ms MacQueen

23. In her expert report dated 25 May 2011 Ms MacQueen expressed the view that the robinia was the effective cause of damage to the property in the light of the following evidence. The property is built on a shrinkable clay soil which is susceptible to volume change due to variation in moisture content. Trees are the predominant cause of changes in moisture content of clay soils below foundation level. The area of diagnosed movement is to that part of the building closest to the robinia. Roots of the robinia were encountered in the clay soil below foundations. There was conclusive root identification from TP1 at depths of 1400mm in 2004 using light microscopy pointing to the robinia. The source of Leguminosae roots points specifically to the robinia because it is the closest source to the location of the August 2004 trial pit.

24. In a supplemental report dated 28 February 2012 Ms MacQueen explained why she did not consider that the claimant's wisteria was a significant contributory factor to the damage sustained by No.147. She noted that the OCA 2004 survey gave the following dimensions for the two members of the Leguminosae family in the vicinity of the damage: robinia 12m high, crown spread 7m. Wisteria stem closest to the two-storey addition 4m high, stem diameter 200mm, crown spread 7m.

25. Ms MacQueen said that the NHBC classification which was applicable at the time of the application to remove the robinia described that species as having a moderate water demand. A study by Cutler and Richardson in 1989, "Tree Roots and Buildings", was based on data from survey cards and 1979-86 records. It indicated that twenty cases were recorded as involving robinia and only one case involved wisteria. There was no body of developed research literature which highlighted wisteria as a cause of root related property subsidence. There was little available information relating to the water use of wisteria. The wisteria may reasonably be expected to have caused localised soil drying, but it had a low energy need, relative to the dynamic mass of a tree like the robinia at No.145, to explore subsoil areas to a breadth and depth to cause differential property movement.

26. Ms MacQueen considered there was insufficient information available to confirm that species alone made significant differences between the tree and the climber in this case. In her view the differences in water use were simply a function of size or mass of dynamic canopy material. There was more green leaf area involved in the processes of evapotranspiration in the canopy of the robinia than in the canopy of the wisteria. This was also a very important point when considering the relative locations of the two plants. The robinia canopy foliage, with a mass some 3.5 times

larger than the wisteria, was located to the east of No.147 in full morning sun. The far smaller mass of wisteria foliage was located in the rear garden facing west and only intercepted the sun in the afternoon.

27. Ms MacQueen also responded to the allegation that it would be highly unusual for a root of the robinia to be found at 3.25m depth. She quoted from Dr Martin Dobson's paper – "Tree root systems", 1995, which stated that "all trees can develop a deep root system (2-3m) if soil conditions allow." In answer to the suggestion that the garden boundary wall and its foundations, between No.145 and 147, were a considerable barrier to tree root growth, Ms McQueen referred to Dr Dobson's observation that "roots meeting such obstacles are typically deflected by them and once clear of the obstruction they often resume their original direction of growth." In Ms MacQueen's view the roots of the robinia had clear physiological ability to grow to seek sufficient subsoil moisture to satisfy the tree's growth requirements. This included the ability to grow beyond the foundations of the boundary wall. The compensating authority had now granted permission to remove the robinia because it had grown to apply sufficient direct force to the wall as to dislodge the brickwork. That lateral pressure was a result of the root plate exerting lateral forces by the circumferential growth of roots adjacent to and under the wall.

28. As for the suggestion that the distance of the robinia from the 2004 trial pit was on the outer limit of its potential zone of influence Ms MacQueen said that, at a lateral distance of 8.5m from the property, the location fell within the 90% of cases covered by the Cutler and Richardson (or Kew Root) survey which were located closer than 10.5m. In any event, literature published subsequent to the Cutler and Richardson survey warned against treating its maximum distances as the absolute maximum distances to which roots of trees could grow.

29. Finally, Ms MacQueen referred to an article published in the Arboricultural Journal in 2011 which considered 12,800 files relating to subsidence claims between 2002 and 2005. This study did not produce any cases of wisteria being involved in causing property damage.

Mr Butcher

30. In his expert report dated May 2011 Mr Butcher said he was in no doubt that the site investigations showed that the two-storey addition had moved as a result of the influence of vegetation. This conclusion was supported by the following factors: the crack width monitoring indicated a cyclical pattern of movement, the maximum width being reached in autumn after closing in the preceding spring; the presence of clay of undoubted high shrinkage potential beneath the foundations; the presence in the August 2004 trial pit of live roots from a member of the family Leguminosae; the occurrence of damage in late summer/early autumn, a time of year when damage associated with tree root subsidence typically becomes apparent; no evidence of leaking drains being the cause of movement to the property at any time.

31. Mr Butcher noted that the April 2004 investigation comprised the assessment of moisture contents for the full depth of BH1 and for the determination of Atterberg limits at the undersides of foundation at 1.5m and 2.5m. In situ vane testing was also undertaken, as was soil suction testing on samples between 1m and 3m. For comparison purposes identical tests were carried out on samples taken from BH2 to the rear. Based on the moisture content profiles the moisture content of the samples from BH1 were consistently less than of those in BH2. Soil suction pressures in BH2 were less than in BH1 and shear strengths measured in situ were notably less in BH2 than in BH1. He concluded that, relative to BH2, the site investigation indicated the presence of desiccation beneath the foundations to the front of the property.

32. In respect of the investigations undertaken in February 2005 the moisture content profile in the store was less than that in the rear. The soil suction profiles did not merge, the shear strength of the clay to the store being higher than that to the rear.

33. In Mr Butcher's opinion the results of the site investigations confirmed the presence of desiccation beneath the foundations of the property, more significantly to the front. Although the results might not be conclusive he had no doubt that the results of the monitoring in 2003 and 2004 were consistent in showing movement which was typical as the consequence of moisture extraction from clay subsoils by vegetation. The occurrence of subsidence in Hamilton Terrace was not uncommon. He had been involved since the mid 1990s with claims in respect of Nos. 142, 130, 86, 58 and 30 relating to the influence of Lime, Plane and robinia trees.

Expert evidence for the compensating authority

Ms Milne

34. Ms Milne's expert report was dated 17 June 2011. She said that, on receipt of the section 211 notification, she visited the site on 8 October 2004 and subsequently consulted the district surveyor. She assessed the amenity value of the robinia. She considered it to be an attractive specimen in early maturity in reasonable health. It was clearly visible at the front of No.145 and for a considerable length of Hamilton Terrace, providing useful visual amenity in the form of garden planting, complementing the nearby London Planes in the street, and forming part of the characteristically verdant character and appearance of the gardens in this part of the St John's Wood conservation area. She did not think that sufficient information had been submitted to implicate the robinia in the damage to No.147. Accordingly, she recommended that a TPO be made to protect it.

35. Ms Milne re-inspected the tree following receipt of the application to remove it under the terms of the TPO. On the basis that Cunningham Lindsey's report dated 11 August 2004 implicated other vegetation in the movement of the property, and that the movement described in the report did not suggest that movement was occurring towards the robinia, and taking into account the views of the district surveyor, Ms Milne considered that there was still insufficient information to implicate the robinia in the movement. As for the crack monitoring information Ms Milne said that, whilst this suggested that minor seasonal movement might be occurring, this was insufficient to enable her to conclude that the robinia was the cause of the cracking at No.147.

Similarly, the moisture content and suction profile information contained in the CET factual report of investigation did not implicate the robinia in the movement of the property. She therefore recommended that consent for its removal be refused.

36. Ms Milne referred to a number of documents which were not submitted with the application. In each case she observed that, if the document had been submitted as part of the application, "it would have allowed the Council to obtain a fuller picture of the [claimant's] views of the cause of damage." (In the case of the crack monitoring the words "cause of damage" were replaced with "mechanism of movement").

37. Ms Milne said that the root identification of 11 August 2004, which was submitted as part of the application for consent to fell the robinia, was not a positive identification of the roots of robinia. It was of one root of less than 0.5mm of either a "Member of the family Leguminosae or Ulmus (elm)." It was possible that the root identified from the trial pit at the front of the property belonged to the robinia, but if so it would be highly unusual, given the change in level and distance involved. She added:

> "I also consider it possible that the roots belong to the wisteria, and whilst I consider it to be unusual, I am not able to discount it.
>
> I consider that analysis of DNA of this root would have confirmed whether it belonged to either the wisteria or the robinia. The absence of a positive root identification represents insufficient evidence to conclude that the continued presence of the robinia would cause damage to 147 Hamilton Terrace."

38. Ms Milne commented on the root found below foundation depth in TP1 of CET's investigation on 25 February 2005. This did not demonstrate whether it originated from the robinia or the wisteria, but DNA analysis would have confirmed the position. However bearing in mind the location of the trial pits, and the relative distances of the wisteria and robinia from TP1, Ms Milne considered it likely that the root identified emanated from the wisteria at the rear of the property. She considered it highly unlikely that it belonged to the robinia.

Mr Champion

39. Mr Champion's expert report was dated 20 June 2011. He said that all the crack width monitoring locations indicated very minor seasonal movement. Nevertheless the monitoring did not demonstrate a specific mechanism of movement sufficient to confirm the potential influence of the robinia. Bearing in mind the significant distortions to the property, its complex structural layout and the numerous trees and other vegetation that surround it, accurate level monitoring was essential and should have been undertaken and submitted as part of the application. The root sample from a member of the Leguminosae family could have originated from the large wisteria to the near of No. 147. Moreover, the depth of the foundations was in the annual drying out zone as detailed in the Building Research Establishment Digest 240. Accordingly, seasonal wetting and drying and the influence of minor vegetation could have contributed to the seasonal movement, particularly to the rear bearing in mind the sloping ground.

40. Mr Champion accepted that, at first sight, the graphical plot for TP/BH1 following the site investigation on 27 April 2004 appeared to indicate desiccation of the soil samples recovered from BH1 compared to BH2. Within BH2, however, the soil suctions increased with depth and, at 3.0m, the soil suction result for BH2 was similar to that for TP/BH1. He pointed out that roots were noted in TP/BH1 to a depth of 1.4m and in BH2 to 0.6m. It was therefore unclear why there should be desiccation beneath those depths and, in particular, why there should be a significant increase in desiccation within BH2 below 2.0m.

41. Mr Champion said that, based on the NHBC guidelines for new housing construction, the theoretical zone of influence of the robinia did not extend under the foundations of No.147 even assuming a level site. Given that the foundations of the building in this case were 2.0m lower than the robinia, it was even more unlikely that the root recovered from the underside of the foundations on 5 August 2004 originated from the robinia.

42. Referring to the engineering appraisal report prepared by Cunningham Lindsey on 11 August 2004, Mr Champion said that it made no mention of the drop in level in the region of 150m of the two-storey section of No.147. He considered that the failure to take these distortions into account was very serious, as it affected the design of the site investigations and the whole approach adopted by Cunningham Lindsey and OCA thereafter. In his opinion any engineer reasonably experienced in subsidence investigation would have identified from the outset that the 150mm drop was very unlikely to be related to the action of trees, and that there must have been another cause.

43. Mr Champion suggested that it was possible that the deep-seated desiccation at levels well below the roots noted in the soil samples was responsible for the 150mm drop. He considered that a further engineering review of the results of the laboratory testing should have been undertaken before the application to fell the robinia was submitted.

44. The robinia was positioned 2.0m higher than the foundations. If the desiccation to a depth of at least 3.0m was caused by the robinia, its roots must have been extending to a depth in excess of 5.0m. The NHBC standards was perhaps the document most commonly referred to by engineers to assess the zone of influence of trees. Based on those standards it was difficult to envisage that the zone of influence of the robinia extended to such depth. This called into question the relevance of the desiccation indicated by the laboratory testing when assessing the alleged zone of influence of the robinia. In view of this and the presence of wisteria at the same level as the foundations, DNA testing of the roots should have been undertaken. The claimant's failure to do so was a serious omission.

45. Mr Champion referred to the damage recorded by Beecrofts during their survey on 27 January 2004. This showed cracking in the region of 8 to 10mm at the junction of the front and rear elevations to the two-storey section. Such cracking was indicative of *en masse* movement of the two-storey section relative to the four-storey section, in line with the 150mm distortions, and not rotation of the two-storey section towards the robinia. Mr Champion considered that Cunningham Lindsey should have designed the site investigation to ascertain why the 150mm distortions had occurred and to discover whether the cause was a continuation of the consolidation and compaction of weak or made up ground, and/or the influence of the wisteria to the rear.

46. Mr Champion summarised the position by saying that it would have been possible to identify the specific causes of the movement of the building if the claimant had undertaken further deep borehole investigations, trial pit investigations to the rear of the two-storey section, testing of undisturbed (rather than disturbed) soil samples, DNA testing of roots and accurate level monitoring. The identification of the specific causes of movement was not possible on the basis of the available information.

The Entitlement to Compensation

47. Section 203 of the 1990 Act provides that

> "A tree preservation order may make provision for the payment by the local planning authority, subject to such exceptions and conditions as may be specified in the order, of compensation in respect of loss or damage caused or incurred in consequence –
>
> (a) of the refusal of any consent required under the order, or
>
> (b) of the grant of any such consent subject to conditions."

48. The TPO in this case was made in accordance with the model order in the Schedule to the Town and Country Planning (Trees) Regulations 1999, in the form in which those Regulations were originally enacted. Article 6 of the TPO provides, so far as relevant:

> "An application for consent to the cutting down, topping, lopping or uprooting of any tree in respect of which this Order is for the time being in force shall be made in writing to the authority and shall …
>
> (c) contain a statement of the applicant's reasons for making the application."

Article 9 provides, so far as relevant:

> "(1) If, on a claim under this article, any person establishes that loss or damage has been caused or incurred in consequence of
>
> (a) the refusal of any consent required under this order … he shall, subject to paragraphs (3) and (4), be entitled to compensation from the authority…
>
> (4) In any [case other than the refusal of consent for felling in the course of forestry operations], no compensation shall be payable to a person …
>
> (b) for loss or damage which, having regard to the statement of reasons submitted in accordance with article 6(c) and any other documents or other evidence submitted in support of any such statement, was not reasonably foreseeable when consent was refused or was granted subject to conditions;
>
> (c) for loss or damage reasonably foreseeable by that person and attributable to his failure to take reasonable steps to avert the loss or damage or to mitigate its extent…"

Issues

49. The issues are these:

1. Was the need for underpinning caused or incurred in consequence of the refusal of consent to fell the robinia?

2. Is the compensating authority able to avoid paying compensation because the loss or damage was not reasonably foreseeable in February 2005?

3. Is the compensating authority able to avoid paying compensation because the loss or damage was attributable to the claimant's failure to take reasonable steps to avert it or mitigate its extent?

4. What is the amount of compensation, if any?

5. Is the claimant entitled to interest on any compensation that may be payable, and if so at what rate and for what period?

Conclusions

Issue 1 and 2 – Causation and foreseeability

50. It will be convenient to consider the first two issues together. Dr Mynors submitted that a claim for compensation following the refusal of consent to fell a TPO protected tree was different from the position which arises in a nuisance action for damages for harm to a building said to have been caused by a nearby tree. In such an action, typically property damage has in fact occurred, and must be repaired – and often the harm will continue to occur unless prevented. The dispute is therefore as to who has to pay for it. The issue is thus merely causation. In a TPO compensation case, by contrast, the question is not just causation – although that is of course important – but also whether it was foreseeable to the planning authority at the time that it made the decision that the continuing presence of the tree in question would be likely to cause damage in the future. The issue is thus foreseeability as well as causation, and the analysis of past damage is only relevant evidentally to establish the likelihood of continuing damage in future. Clearly, the need to carry out works for the rectification of past damage to a building cannot possibly be "in consequence of a decision by the authority to refuse consent" (see *Duncan v Epping Forest District Council* [2004] RVR 213 at [17]).

51. Dr Mynors submitted that, whilst it was necessary for the claimant to establish that continuing damage to No.147 in the future would occur in consequence of the retention of the robinia as a result of the refusal of consent, that causation could only be established on the basis of what was or should have been foreseeable to the compensating authority at the time it made its decision to refuse consent, since anything that was not foreseeable had to be excluded by virtue of article 9(4)(b).

52. Dr Mynors referred to *Wright v Horsham District Council* [2011] UKUT 319 (LC), in which

which I considered briefly whether, for a matter to be foreseeable by a compensating authority, it needed to have been raised in the initial application or whether, as argued by the claimant in that case, it would be nonsensical to ignore evidence arising after the decision to refuse consent. I said that I was inclined to accept the latter, but I explicitly declined to decide the point (paras 71 to 73).

53. In Dr Mynors's submission the dichotomy posed in that way was a false one. The question of what was or was not within the contemplation of the planning authority was to be determined "having regard" to "the information supplied with the application for consent", not solely "on the basis" of such information. Thus it was necessary to look principally at the information supplied with the application, but also at anything else that was or should have been available to the authority at the time of the decision. Relevant items in either case might include both case-specific information – such as level monitoring, crack monitoring, root identification, soil samples and visual inspection – and more general information, such as technical literature, British standards, professional guidance, and so on. But it was not appropriate to look at anything that was not available to the authority at the time.

54. In reply Mr Evans-Tovey said that both section 203 and article 9(1) were concerned with the *cause* of the loss and damage in respect of which compensation was being claimed, and in particular whether it was caused by or incurred in consequence of the refusal of any consent. They were not concerned with foreseeability, which was a different issue. Article 9(4), on the other hand, was distinct and different from article 9(1). It did not provide a ground or the basis for a claim for compensation. It provided certain limited defences. It was not concerned with causation of the loss or damage, which was the domain of article 9(1). It was concerned with the lower threshold of reasonable foreseeability and mitigation.

55. In Mr Evans-Tovey's submission the compensating authority had wrongly conflated article 9(1) matters and article 9(4)(b) matters into one question or one point. The two articles, although related, were distinct provisions, addressing different issues, with different requirements, tests and standards and different applicable dates.

56. In my judgment the correct analysis of the legal position is as follows. Compensation is payable for loss or damage caused or incurred in consequence of the refusal of consent to fell the tree (article 9(1)). It is for the claimant to establish that such loss or damage was caused or incurred and that it was caused or incurred in consequence of the refusal of consent.

57. It is not suggested that any physical damage occurred after the refusal of consent. In effect, the basis of the claim is that the continued presence of the tree roots created a risk of subsidence damage occurring in future, that in the light of such risk it was appropriate to carry out works of underpinning, and that the claimant had such works carried out in March 2005. The relevant loss or damage is the cost of the underpinning works (not, as Mr Evans-Tovey suggested in argument, the dehydration of the sub-soil and ongoing inhibition of rehydration). It is a claim for the cost of preventive works. Evidence of past damage to the building is relevant only to the question whether there was a risk of subsidence damage occurring in future.

58. The test of causation for the purposes of the present claim must be whether it was reasonable for the claimant to have had the works carried out when it did. If it was not reasonable to have had the works carried out the cost was not caused or incurred in consequence of the refusal of consent.

59. Whether it was reasonable to have had the works carried out must depend on (a) the degree of risk of future subsidence occurring and (b) the appropriateness of underpinning as a response to that risk. Both those matters fall to be considered as at the time the works were put in hand. Thus, for example, a relatively low risk of damage that would be hugely expensive to repair might make it reasonable to incur modest costs in carrying out preventive works. If it did, the loss suffered in incurring those costs would have been caused by the refusal of consent. While (a) above involves the consideration of foreseeability, the question is one of the degree of risk; and causation is only established on the basis of (a) and (b) together. In relation to the cost of the works the claimant needs to establish (c) that the works in their nature and extent were reasonable and (d) that the cost was reasonable. The above analysis applies where the claim is for the cost of preventive works. Where the claim is for the cost of works for remedying damage that has occurred (and of course such a claim can only be founded on damage that has occurred after the refusal of consent) the questions that arise are (i) was the damage caused by the tree and (ii) in the absence of the refusal would the tree have been felled before it caused the damage? In addition (c) and (d) need to be established. Article 9(4)(b) provides a defence for the compensating authority where the loss or damage was not reasonably foreseeable at the time when consent was refused. Where the claim is for the cost of remedial works the question will be whether the physical damage was reasonably foreseeable. Where the claim is for the cost of preventive works the question is whether it was reasonably foreseeable that (a) and (b) would be established. With these considerations in mind I turn to consider whether, when the works of underpinning were undertaken in March 2005, there was a risk of future subsidence if the robinia was not felled, and if so the extent of such risk. For that purpose it is necessary to establish the cause of the previous damage (I consider the appropriateness of underpinning below).

60. I deal firstly with the engineering evidence. Mr Evans-Tovey submitted in closing that Mr Champion's evidence had been less than satisfactory. I am afraid that I consider that submission was well-founded, for the following reasons.

61. In paragraph 4.3.4 of his report Mr Champion described the failure by the claimants to undertake DNA testing of the foundation roots as "a serious omission". In cross examination he admitted that he had no personal experience of DNA testing in 2004 and he had not investigated whether such testing was in use at that time. In paragraph 4.3.1 of his report Mr Champion criticised OCA's application for consent to fell the robinia on the grounds that it did not make it clear why removal of the robinia was necessary and that this was "unreasonable". Mr Champion has never submitted such an application himself – that is the arborculturist's province. OCA are arboriculturists. Mr Champion's willingness to express a firm critical view on an area not properly within his field of expertise was not suggestive of an objective approach. Mr Champion also referred, in the course of his oral evidence, to without prejudice discussions with Mr Butcher, even though he was aware of the without prejudice rule and the claimant's solicitors had previously objected to reference to those discussions being made.

62. I accept Mr Butcher's opinion that the following matters, considered together, suggest on the balance of probabilities that movement to the two storey section of the property has occurred as a result of the influence of vegetation:

(i) The presence of clay of high shrinkage potential beneath the foundations.

(ii) The occurrence of damage in late summer/early autumn, a time of year when damage associated with tree root subsistence typically becomes apparent. (Mr Butcher said, and I accept, that in a high value street such as Hamilton Terrace, the damage was likely to have been reported very soon after it appeared.)

(iii) The presence of desiccation beneath the foundations of the property, more significantly to the front. (I accept Mr Butcher's view that the absence of tree roots below 1400mm in TP/BH/1, dug on 27 April 2004, does not necessarily mean that such roots were not present at greater depth in the close vicinity. Mr Champion's opinion as to whether or not there was desiccation oscillated during the course of the proceedings and I attach no weight to his evidence on this issue).

(iv) Internal and external crack width monitoring indicates a seasonal pattern of movement, which suggests vegetative action. (I accept Mr Butcher's evidence that level monitoring was not common at the relevant time and note that the need for such monitoring was not suggested by the district surveyor in his report in October 2004).

(v) The presence of live roots from a member of the tree family Leguminosae.

63. Mr Butcher also considered that, on the balance of probabilities, the cause of the foundation movement, and the damage to No.147, was subsidence as a consequence of moisture extraction by the robinia. Ms Milne did not agree that the robinia was the effective cause of the damage. In the schedule of matters agreed and disagreed which was finalised shortly before the hearing she expressed the view that roots from the wisteria to the rear of the property could have extended to the front of the property. She thought it would be highly unusual if the Leguminosae roots found in the site investigation were from the robinia.

64. In the course of cross examination Ms Milne accepted that it would be unusual to find wisteria roots travelling all the way from the rear of the property to BH1 at the front. She added this:

> "Given that Leguminosae roots were found at the front of the property, and the evidence shows they must emanate from either the robinia or the wisteria, given the relative height of the robinia above the trial pit and the fact that the wisteria was growing at about the same level puts some doubt in my mind that the robinia is the cause. It must be one of them, but given the height that the robinia is growing above trial pit level and the fact that the wisteria is growing at the same foundation level makes me consider that, whilst both are improbable, it is difficult to make my mind up."

65. Ms McQueen's view was that roots in the trial pit at the front of the property were likely to have come from the robinia and that they extended under and beyond the foundations of the front wall. This was based upon the fact that the robinia is a tree capable of causing much greater movement than the wisteria, because it is a larger plant requiring more energy to support it and to

hold up its large canopy mass, and also requiring much more water than the wisteria. Ms McQueen's evidence was unshaken in cross examination and I accept it.

66. The above conclusions have been based on the evidence produced at the hearing before me. I refer below to a number of documents which were produced in evidence but had not been provided to the compensating authority at the time it refused consent. The absence of such provision is not relevant to article 9(1), because the additional information was in the hands of the claimant and/or its advisers at the date the underpinning works started, and the degree of risk of further subsidence and the appropriateness of underpinning are to be considered at that date. It is also necessary, when determining causation, to decide whether the extent and cost of the works carried out to No.147 were reasonable. I consider these matters under issue 4 below.

67. I now turn to the question of foreseeability which arises under article 9(4)(b), that is whether, on the basis of the information available to the compensating authority when it refused permission, there was a risk of future subsidence due to the retention of the robinia, and that underpinning would be appropriate as a response to that risk.

68. Of the material relied upon by the claimant at the hearing, three items were not available to the compensating authority in February 2005. First, the results of the further investigations carried out by CET in February 2005. These results did not significantly alter the information which was before the compensating authority in February 2005 so far as concerns the position at the front of the property. Rather, they corroborated in general terms CET's earlier investigations by confirming dehydration under the extension. The earlier investigations had identified soil type, plasticity, desiccation, and the presence of tree roots, and the subsequent investigations identified the family Leguminosae. The second item of unavailable evidence comprised the results of the crack monitoring after the summer of 2004. It was agreed by the arboricultural experts, however, that the monitoring results that the compensating authority had in February 2005 showed seasonal movement. Although the maximum extent of the movement of cracks to the end of 2004 was greater (5.28m) than that to July 2004 (3.14mm), both sets of readings showed that there had been seasonal movement, indicative of vegetative action. The third item of evidence not submitted at the date of the planning refusal was the survey by Drain Tech Ltd dated 4 January 2005. This report did not add materially to the information before the compensating authority because, as Ms Milne accepted, drain damage would be inconsistent with the seasonal movement identified by the crack monitoring.

69. In addition to these three documents Dr Mynors identified two others which the claimant did not submit to the compensating authority at all. The first was a report dated 30 July 2004 to Cunningham Lindsey by Beecrofts, commenting on CET's site investigation works on 27 April 2004. Dr Mynors emphasised that this report continued to refer to damage caused by "trees" in the plural but, as is clear from page 3, the report was prepared without the benefit of the root identification certificate, which effectively eliminated the two plane trees (the wisteria is a shrub, not a tree).

70. Finally, Dr Mynors pointed out that OCA's amended arboricultural summary report dated 14 October 2004, which omitted the previous recommendation to fell the plane trees, had not been

made available to the compensating authority at the time of its decision. I do not consider that this omission is significant. The compensating authority had received details of CET's investigations, as well as OCA's letters dated 1 and 14 December 2004. The amended summary report added nothing material to the information contained in those documents.

71. I therefore conclude that, considering the matter based on the information available to the compensating authority on 8 February 2005 (and I accept Dr Mynors's submission as to the extent of such information that is material), the damage to No.147 was caused by the robinia. It follows that the material available to the compensating authority when it decided to refuse permission to fell was sufficient to show, on the balance of probabilities, that there was a real risk of further subsidence in the future. In their letter of objection to the TPO dated 1 December 2004 OCA informed the compensating authority that refusal of consent would almost inevitably result in the need for underpinning. There was no cogent evidence to suggest that that warning was unreasonable. A reasonable compensating authority would therefore have foreseen the risk of future subsidence and the consequent need for underpinning.

Issue 3 - Mitigation

72. In para 30 of its reply the compensating authority asserted that, if any loss or damage was suffered as a result of its refusal of permission, it was in whole or part attributable to the claimant's failure to take reasonable steps to avert the loss or mitigate its extent, in particular by removing other vegetation or taking other steps to prevent or limit further damage. In evidence Ms Milne said that the claimant had failed to mitigate its loss by not providing the compensating authority with a fuller picture and Mr Champion said that a further application should have been made, showing that the damage had not been caused by seasonal wetting and drying or the influence of other vegetation.

73. I am not persuaded that the claimant has failed to mitigate its loss. There was no evidence to suggest that further subsidence would have been avoided if other vegetation had been removed. I am not satisfied that seasonal wetting and drying was a material cause of the damage to No.147. Moreover, Ms Milne accepted in cross examination that the further information which she said should have been provided would have made no difference to the compensating authority's decision. It follows that the claimant's failure to provide a fuller picture or make a further application did not cause its loss.

Issue 4 – Compensation

74. The amount of compensation suggested by Mr Butcher at the hearing was £68,511.58. That figure does not include any of the cost of repairs to the superstructure. The quantum of individual items making up this figure was not challenged in cross examination. The compensating authority, however, relies on the letter from OCA accompanying the application on 14 December 2004, which suggested that repair costs would vary between £31,000 and £71,000 depending on whether or not the robinia could be removed. Dr Mynors said that this made it plain that the additional repair costs would be no more than £40,000. It was clearly foreseeable that there would be some professional fees to add to that. But that was the amount that would have been foreseeable by the authority at

authority at the time it made the decision to refuse consent, assuming that any compensation was payable in principle.

75. The letter of 1 March 2005 (shortly after the decision) from Cunningham Lindsey indicated that the likely costs to be claimed would be £41,000 for underpinning, plus £5,000 for superstructure repairs, £5,500 for fees and £12,000 for rent. In Dr Mynors's submission that showed that the original figure for repair costs included an element of superstructure repairs, so that the underpinning cost would have been £35,000. Superstructure repairs would be to repair past damage, and so would not be allowable. The maximum amount of any claim foreseeable by the compensating authority at the time of the decision was therefore £40,500 (£35,000 plus £5,500. No element of loss of rent was included in the final figure claimed of £68,511.58).

76. Mr Champion emphasised that the underpinning which was carried out was to the whole of the two-storey section of the property whereas, if the robinia was a contributory factor, only underpinning to the front elevation to the two-storey section would have been justified. He estimated the cost of such work to be £6,000. To this he added fees of £1,500, making the maximum amount which could be legitimately claimed, if the claim was sound in principle, £7,500.

77. Mr Evans-Tovey forcefully resisted the suggestion that the quantum of compensation claimed was not recoverable because it was not reasonably foreseeable. He submitted that the article 9(4)(b) defence concerned reasonable foreseeability of "loss or damage", not damages. Accordingly, the article 9(4)(b) defence did not concern reasonable foreseeability of the quantum of damage or compensation, only the foreseeability of the type of damage. Moreover, the suggestion that the amount of compensation was restricted to the estimate contained in OCA's letter dated 14 December 2004 required the Tribunal to accept the "startling proposition" that no reasonable person would have foreseen a final cost in the construction industry exceeding an initial pre-tender estimate.

78. In support of his submission on this issue Mr Evans-Tovey referred to *Vacwell Engineering Co Ltd v BDH Chemicals Ltd* [1971] 1QB 88. There it was known that a particular chemical manufactured and supplied by the defendants was liable to react with water, but on this particular occasion there was a violent explosion which caused extensive damage to the premises. A minor explosion was foreseeable, but an explosion of the magnitude that did occur was not foreseeable. Nonetheless, the defendants were held liable for the full extent of the damage. At p110 Rees J said:

> "the explosion and the type of damage being foreseeable, it matters not in the law that the magnitude of the former and the extent of the latter were not."

79. I respectfully adopt that judgment as a correct statement of the law applying to the assessment of compensation in cases such as the present. In fact, in this case the extent of damage was clearly foreseeable in view of OCA's reference to underpinning in their letter dated 1 December 2004. I accept Mr Butcher's evidence that underpinning design is a matter of engineering judgment and that the works specified by Beecrofts were reasonable. I find that the costs incurred by the claimant were reasonable and that there is no reason to reduce them merely because they exceeded the estimate put forward by OCA when the application was submitted.

Issue 5 - Interest

80. The claimant also seeks interest. Mr Evans-Tovey said that *Sempra Metals v Inland Revenue Commissioners* [2008] AC 561 demonstrated that interest was recoverable on damages at common law. He also referred to *Bell v Canterbury City Council* (1988) 56 P&CR 211, in which the measure of compensation payable under a 1969 model order was considered by the Court of Appeal. At 216 Russell LJ said:

> "In my view the diminution in the value of the land was a natural and probable consequence of the refusal of consent, within the contemplation of the local authority refusing consent. It was not too remote and was, therefore, recoverable".

At 219 Slade LJ said:

> "The only question therefore is whether, on its true construction, article 9 does render compensation payable in respect of such depreciation. The language of the article is very broad and, subject to what is said below, I can see no sufficient grounds for restricting its meanings so as to exclude compensation in respect of this particular category of loss."

81. On the basis of *Bell* Mr Evans-Tovey submitted that "compensation" within both s203 and article 9 was wide enough to include interest. He said that lawyers used various rates for interest including the special account rate, the Judgment Act Rate and a variant of the base rate. The commercial court has historically awarded interest at between 1 and 3% over base rate (*Yuanda (UK) Co Ltd v WW Gear Construction Ltd* [2010] BLR 435 per Edwards-Stuart J at [87](4)). Interest may be simple or compound. The claimant seeks simple interest at 2% over the applicable base rate from time to time, which Mr Evans-Tovey submitted was reasonable. While some large expenditure was incurred before 14 July 2005 and some smaller expenditure was incurred thereafter, the claimant seeks interest on the compensation sum from 14 July 2005, being a reasonable, appropriate and practical single date from which to calculate interest. The claim for interest was not contested.

Result

82. The compensation payable to the claimant is £68,511.58 together with simple interest from 14 July 2005 at 2% per annum. A letter concerning costs accompanies this decision, which will become final when the question of costs is determined.

Dated 3 May 2012

N J Rose FRICS

Addendum

83. I have received written submissions on costs from the parties.

84. The claimant asks for its costs, which it itemises and which total £116,610.21.

85. The compensating authority does not challenge the claimant's entitlement to its costs. It considers, however, that the costs claimed are excessive. In the event that the Tribunal is minded to make an order that it do pay the claimant's costs, the acquiring authority suggests that those costs should be subject to detailed assessment if not agreed.

86. The claimant has been successful and there is in my view no reason why it should not be awarded its costs in full. The acquiring authority must pay the claimant's costs, such costs to be agreed or in default of agreement assessed by the Registrar of the Lands Chamber on the standard basis.

Dated 13 June 2012.

N J Rose FRICS

Member

UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2016] UKUT 0300 (LC)
UTLC: LCA/105/2015

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – Tree Preservation Order – cracks appearing in conservatory – refusal of consent to fell oak tree on adjoining land – claim for cost of rebuilding conservatory – whether loss or damage reasonably foreseeable when consent refused – whether loss or damage foreseeable by claimants when conservatory erected – compensation awarded at £25,000 - Town and Country Planning Act 1990, s203

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN:

(1) MR RICHARD GORDON BURGE **(2) MRS NICOLA ANNE BURGE**	**Claimants**
- and -	
SOUTH GLOUCESTERSHIRE COUNCIL	**Compensating Authority**

Re: 27 Saxon Way,
Bradley,
Stoke
Gloucestershire
BS32 9AR

Before: His Honour Judge Stuart Bridge and Peter D McCrea FRICS
on
23 June 2016

Royal Courts of Justice, London, WC2A 2LL

Jason Evans-Tovey, instructed by DAC Beachcroft Claims Ltd, solicitors, for the Claimants
Nina Pindham, instructed by Aaron & Partners LLP, solicitors, for the Compensating Authority

DECISION

Introduction

1. This is a claim for compensation under section 203 of the Town & Country Planning Act 1990 ("the 1990 Act") and article 9 of the South Gloucestershire District Council (Land to the rear of 25 Saxon Way) Tree Preservation Order, 2007 (SGTPO 15/07) dated 13 December 2007 and confirmed without modification on 4 June 2008 ("the TPO") for losses alleged to have been incurred in consequence of a refusal of consent required under the TPO. The compensating authority is South Gloucestershire Council ("the council") which on 28 May 2010 refused consent to fell an oak tree ("the Oak") situated to the rear of a property known as 27 Saxon Way, Bradley, Stoke, Gloucestershire, BS32 9AR ("the claim property"). The claimants, Mr and Mrs Richard and Nicola Burge, are the owners of 27 Saxon Way.

2. The overarching issue is whether because the council refused to consent to the removal of the Oak, which was protected by the TPO, the claimants are entitled to compensation for loss and damage to a conservatory attached to the rear of the claim property.

3. Prior to the hearing, the claim amounted to £31,776.34 including £1,000 of general damages, plus interest. During the hearing, it was agreed between the parties that the claim, if upheld, would be in the sum of £25,000 including interest. The council, however, contended that no compensation is payable.

4. The council contended that the case raised an important point, namely whether there is an obligation to pay compensation for damage to a building which was not constructed in accordance with relevant industry guidance concerning the potential for tree root subsidence in an area of plastic clay. In its skeleton argument, it summarised its position as follows:

> The Claimants contend that a right to compensation arose automatically upon the [council's] refusal to fell the protected tree and thus all loss or damage which it was reasonably foreseeable would be incurred as a consequence of the refusal are payable. The [council] in turn contends that the conservatory was so inadequately constructed that it would have failed anyway, regardless of the presence of trees, but if that is not accepted it was reasonably foreseeable to the Claimants that a conservatory which did not comply with the relevant industry guidance concerning construction in areas of plastic clay would in due course suffer damage, and thus no compensation is payable.

5. Mr Jason Evans-Tovey of counsel appeared for the claimants. He called Mr Robert Evans BSc(Hons) CEng, MICE, MIStructE, a director of Robert J Evans Limited, and Mr Andrew Wyse, a subsidence consultant with Crawford and Company Adjusters (UK) Ltd.

6. Ms Nina Pindham of counsel appeared for the compensating authority, and called Mr Kenneth Brown BSc(Eng) CEng MIStructE, a director of KB^2 Consulting Civil and Structural Engineers.

7. In the week before the hearing, the council served on the claimants a supplemental report by Mr Brown. The report purported to deal with the issue of heave, the council wishing to allege that the removal of the tree would have caused such damage to the conservatory by heave that its total replacement would have become necessary and that no loss would therefore have been occasioned by the council's refusal to fell the tree. The claimants had made some reference to heave in correspondence as long ago as May 2011, indicating that it was not believed to be an issue, and the council had not responded. Five years then elapsed before the supplemental report was served.

8. The service of the supplemental report was so late that the claimant's experts did not have sufficient time to address it and that an adjournment would have been necessary to enable them to do so. We considered the council's application and informed the parties that we would not allow the council to adduce this evidence at such a late stage.

Facts

9. From a draft statement of agreed matters and from the evidence we find the following facts.

10. The claim property was constructed in 1994 as part of a housing estate scheme on a reasonably level site with no unusual topographical features. When viewed from the front, to the left of the property is No.25 Saxon Way, and to the right is No.29.

11. The claim property was purchased by the claimants in May 1997. It is a two-storey three bedroomed detached house of brick construction under a pitched tiled roof with a garage attached to the front and left side of the house. In about May 2003, a conservatory was built and attached at the rear and right side of the house. The house has foundations totalling 1.2m in depth. The conservatory, when first built (it has since been replaced as we outline below), had foundations of 0.4m. The property is sited on clay soil, having plasticity indices of between 39% and 50% which means it has a high shrink/swell characteristic.

12. By 2006, a number of trees and shrubs were in the vicinity of the claim property. In the front garden was a false Acacia tree, approximately 5m high and about 5.5m away from the front of the house. In the rear garden there was a eucalyptus tree, 5m away and with an estimated height of about 10m, and a conifer, 2m away and about 6m in height. The Oak is situated on land beyond the rear boundary of the claim property, adjoining its rear garden. It is about 13m away and 8-11m high. It was assessed in September 2009 to be significantly older than the claim property. There are also hawthorn trees in this area. In the rear garden of No.29 Saxon Way there was a magnolia tree, about 2.5m away and about 4m high.

13. In early Summer 2006, the claimants noticed cracks in the rear wall of the house and between the house and the conservatory. They reported this to their insurers, Axa Insurance Plc, who appointed loss adjusters, Crawford & Co to investigate and deal with the claim. Mr Wyse of the company's National Subsidence Unit visited the property on 1 November 2006 and in a report dated

2 November 2006 recorded that there were two areas of damage, one to the conservatory and one to the left rear corner of the house and in both areas there was cracking of 5mm or more which Mr Wyse categorised as moderate. He also said that "there are several trees and shrubs nearby, some with roots that may extend beneath the house foundations". He noted that the eucalyptus and conifers were of particular interest and in relation to the damage to the house he expressed a view that the cause appeared to be clay shrinkage which was root-induced. In relation to the damage to the conservatory, Mr Wyse was more cautious and said that the cause was not clear to him from the information that he had. He thought it could be clay shrinkage due to shallow foundations or drainage problems and he recommended site investigations.

14. These investigations were carried out by a company called Mat Lab in December 2006 which included CCTV drain surveys and the digging of four exploratory trial pits.

15. It is common ground that the cracking to the house was caused by the eucalyptus tree which has since been felled and the claimants make no claim for this. The trial pits near to the conservatory revealed roots of an oak tree or sweet chestnut together with some unidentifiable roots together with small conifer roots. In the Summer of 2007, bore holes were drilled to a depth of 4m close to the conservatory. In respect of one bore hole, roots from oak, and to a lesser extent hawthorn and some surface grass were detected. In the other bore hole roots from magnolia and to a lesser extent oak and another species were detected. The moisture content of the soil from the bore holes was tested and ranged from 30%-35% with the soil type being confirmed as clay.

16. In or before September 2007 the property was inspected by the Marishal Thompson Group, which confirmed that the conservatory was rotating away from the junction with the house and stated:

> "In our opinion [the Oak] will be exerting a significant influence across the whole of the rear elevation including the conservatory. Removal of this tree subject to heave assessment will help promote the restoration of stability of the currently affected areas. The influence of [the magnolia] is very much secondary to that of [the Oak]."

17. The report went on to say that pruning alone should not be considered as an effective alternative arboricultural solution and that removal was the only effective form of mitigation. The report accordingly recommended the removal of the magnolia and the Oak.

18. In September 2007 Mr Wyse prepared an addendum technical report in which he said that the underlying soil was shrinkable clay, with a significant moisture content deficit and swelling potential below foundation depth, confirming the soil below the foundations to be desiccated. He said that "the damage to the conservatory has also been proved to have been caused by clay shrinkage subsidence as a result of moisture obstruction by nearby trees/vegetation". He recommended removal of trees and said that once they had been removed, the ground would rehydrate over the winter and closure of the cracks would occur. Once this process was complete Mr Wyse said that his firm would prepare a schedule of repairs for the two areas of the building that had been damaged.

19. In September 2007 the conifer in the garden of the property was removed and in or around April 2008 the magnolia in the garden of No.29 was removed.

20. The TPO was made on 13 December 2007 and confirmed on 4 June 2008.

21. Following the removal of the conifer and magnolia, movement to the conservatory continued, implicating the Oak as a continuing contributory cause of the movement. On 2 September 2008 the Marishal Thompson Group made an application on behalf of the claimants to the council to remove the Oak which was refused on 3 October 2008 on the basis that the council took the view that there was then insufficient evidence to implicate the Oak.

22. On 16 October 2008 level monitoring was commenced and on 30 September 2009 further soil samples were taken. Results from the monitoring showed that in the absence of the eucalyptus, conifer and magnolia, but in the continued presence of the Oak, ongoing movement to the conservatory was present but which was seasonal.

23. On 1 April 2010 the council received Marishal Thompson's application to remove the Oak, stating that this tree had been implicated as a contributory factor in subsidence damage relating to clay shrinkage. The application included an arboricultural report, an engineer's report, foundation details, soil analysis, root identification, a drainage report and level monitoring results.

24. On 28 May 2010 the council refused permission to remove the Oak as its removal would "have a detrimental impact on the existing and future visual amenity of the locality and would be detrimental to the character of the local landscape and wider contexts and would be contrary to National Policy, PPSI and Policy L1 of the South Gloucestershire Local Plan (Adopted) 2006."

25. On 5 July 2010 solicitors for the claimants served on the council a claim for compensation.

26. In August 2010 Mr Evans visited the property. In his view the cracking had widened significantly since Mr Wyse had taken photographs in 2006. Mr Evans was of the view that the pattern of cracks and distortions showed that the primary mechanism of movement was rotation of the conservatory away from the house caused by downward movement at its rear wall with maximum movement at the rear left corner closest to the Oak.

27. On 3 March 2011 the council advised, in an open letter, that it was prepared to compensate for additional costs incurred by the claimants as a result of their refusal of consent, limited to the cost of upgrading any foundation works beyond that necessary to repair the original damage and that necessary to protect against any future damage caused by heave. It said "the council's liability would be limited to the cost of any additional foundation works, if any, deemed necessary to protect against any future damage and that necessary to protect against any future damage as a result of the retention of the protected tree." The council requested a heave report and supporting engineer's recommendations for foundation works to address the results of the heave report. It went on to say that the heave report and recommendations would have been required if permission had been granted and as a consequence the council was not prepared to contribute to the cost of obtaining these reports, or the required foundation works.

28. On 11 May 2011 Mr Wyse prepared a response document, in which he said that heave was not an issue and that the only alternative to tree removal was to take down the conservatory and re-build it on newly piled raft foundations. This was served on the council on 12 July 2011.

29. The council instructed an independent structural engineer to examine the foundations, whose report was provided on 12 July 2011. On 19 July 2011 the compensating authority denied liability on the basis that the property was not designed or constructed to comply with NHBC guidance.

30. In February 2013 works to take down and reinstate the conservatory with piled foundations commenced and they were completed in about April or May 2013.

The Entitlement to Compensation

31. Section 203 of the 1990 Act provides that

> "A tree preservation order may make provision for the payment by the local planning authority, subject to such exceptions and conditions as may be specified in the order, of compensation in respect of loss or damage caused or incurred in consequence –
>
> a. of the refusal of any consent required under the order, or
>
> b. of the grant of any such consent subject to conditions."

32. Article 9 of the TPO provides, as far as relevant:

> "(1) If, on a claim under this article, any person establishes that loss or damage has been caused or incurred in consequence of-
>
> (a) the refusal of any consent required under this Order;
>
> …
>
> he shall, subject to paragraphs (3) and (4), be entitled to compensation from the authority.
>
> …
>
> (4) In any [case other than the refusal of consent for felling in the course of forestry operations], no compensation shall be payable to a person-
>
> ….
>
> (b) for loss or damage which, having regard to the statement of reasons submitted in accordance with article 6(c) and any other documents or other

evidence submitted in support of any such statement, was not reasonably foreseeable when consent was refused or was granted subject to conditions;

(c) for loss or damage reasonably foreseeable by that person and attributable to his failure to take reasonable steps to avert the loss or damage or to mitigate its extent;

…"

Issues

33. Following discussions between counsel immediately before the hearing, it is common ground that the damage to the conservatory at the claim property was caused by the roots from the Oak, rather than any other trees.

34. The council resists the claim on the basis that the foundations to the original conservatory were wholly inadequate, to the extent that they would have failed in any event. Further, or alternatively, that when the conservatory was constructed in 2003, it was in the full knowledge of a) the presence and distance of the Oak, and b) its status as a tree retained as part of the scheme for its substantial amenity value.

Discussion

35. Despite references in the council's skeleton argument to the Town and Country Planning (Tree Preservation) (England) Regulations 2012 ('the 2012 Regulations'), it is now accepted by the council that these Regulations do not apply to the circumstances of this case and that the claim is being made under the TPO itself as expressly provided for by section 203 of the Town and Country Planning Act 1990.

36. It is therefore for the Tribunal to apply the terms of the TPO.

37. It is for the claimants to establish that loss or damage has been caused or incurred as a consequence of the council's refusal to give consent to fell the Oak, a consent that was required as a result of the TPO. The burden of proof is on the claimants, and the standard of proof is the normal civil standard, that is the balance of probabilities.

38. We have no doubt that the claimants have satisfied us in this regard. The claimants' conservatory was damaged by the roots of the Oak, and in refusing consent to fell the Oak, further damage was caused. It seems to us that this is relatively uncontroversial, indeed common ground, and it follows that the claimants are *prima facie* entitled to compensation.

39. No compensation is however payable in two instances which the council contends are relevant to this case. In order to deny compensation that is otherwise payable, it is for the council to prove, on the balance of probabilities, that one or other of these instances applies.

40. The council contends that the claimants' loss or damage was not reasonably foreseeable when consent was refused: Article 9(4)(b) of the TPO. That is a difficult argument to sustain. Consent was refused in 2010, by which time it was apparent to all that the Oak was causing significant damage to the foundations of the conservatory. We do not consider that the council comes anywhere near satisfying us that further loss or damage to the claimants was not reasonably foreseeable at that date. On the contrary, we accept the claimant's contention that the Oak was a substantial and effective cause of the real risk of on-going and future movement of the conservatory.

41. The council contends, in the alternative, that the claimants' loss or damage was reasonably foreseeable by the claimants and attributable to their failure to take reasonable steps to avert the loss or damage or to mitigate its extent: see Article 9(4)(c) of the TPO. The basis of this contention is that the foundations of the conservatory were so inadequate, being of insufficient depth taking account of the relevant building standards, that they would have failed anyway. The council argues that, when the conservatory was built in 2003, it would have been reasonably foreseeable from the proximity of the Oak to the conservatory that loss or damage would ensue. No reasonable steps were taken to avert that loss or damage, for example by building deeper foundations.

42. The issue of the depth of foundations was investigated in the course of the hearing. The criticism made by the council, that the foundations of the conservatory were too shallow taking account of the ground conditions and the proximity of trees, is not contested by the claimants. Both experts (Mr Evans and Mr Brown) agreed (following a discussion held on 21 April 2016) that due to the depth of the foundations, some distortion or cracking of the conservatory might have occurred, the only difference being that Mr Evans believed that this 'might have occurred during prolonged periods of drought' whereas Mr Brown that this 'would be expected to occur through normal seasonal changes in moisture content of the clay even if no trees were present.' Both experts agreed that proper engineering advice would have been to construct the conservatory in accordance with the NHBC Guidelines, Mr Evans qualifying this by noting that this was 'not the industry standard for conservatories.'

43. There was as a result some exploration of the appropriate standard in the course of the hearing. Mr Brown had made reference in his Report to the NHBC Standards operative from October 1992, Chapter 4.2 of which deals with 'Building near trees'. It states (in bold) at D4 that 'The design shall make allowance for the effect of trees in shrinkable soils', indicating that the species and mature height of the tree was an item to be taken into account, Oak trees themselves having a high water demand. It states (again in bold) at D5 that 'Foundations shall be designed to transmit loads to the ground safely and without excessive movement', and continues:

> "Irrespective of any foundation depths derived from this Chapter, all foundations should be constructed on soils capable of supporting the imposed loads. For foundations near trees, the depth should be established in relation to:
>
> - water demand and mature height of trees
> - movement potential of soils

> Design of foundations to all permanent constructions, including those to dwellings, garages, porches, etc, should take account of the effects of soil desiccation caused by previous or existing trees and trees which are scheduled to be planted."

44. Mr Evans sought to argue that this did not apply to conservatories, and it is right that when the NHBC Standards were reviewed in 2003, conservatories were included for the first time in the list of 'permanent constructions'. He therefore contended that at the time that the claimants' conservatory was built, there were no requirements for conservatories to comply with Building Regulations unless they formed part of a habitable room (which the claimants' conservatory did not). It was not until 2007 that the Guide to Good Practice in the Specification and Installation of Conservatories within the UK published by the Glass and Glazing Federation recommended that conservatories should comply with Chapter 4.2 of the NHBC Standards.

45. We do not consider that this discussion advanced matters very far. We are prepared to accept that insofar as a particular conservatory was a permanent construction it would fall within the scope of the 1992 NHBC Standards and that the 2003 amendment merely clarified the existing position. We cannot see that there is a meaningful distinction to be drawn in this respect between, for example, porches and conservatories. But whether or not the claimants' conservatory complied with the requisite building standards is in our view immaterial. It is accepted, as we have noted, that its foundations were too shallow, and that the builders should have dug them deeper. We do not see how that reflects adversely upon the position of the claimants with regard to the case being advanced by the council. Applying Article 9(4)(c) of the TPO, it is necessary to consider the position in 2003 immediately before and at the time of the erection of the conservatory. The question is whether at that time loss or damage to the conservatory being erected was reasonably foreseeable to the claimants themselves. It is for the council to show that the claimants knew, or ought to have known, that there was a real risk of the Oak tree causing subsidence damage to the new conservatory.

46. In our judgment, the council has failed to show this. There is no evidence that the claimants knew the depth of the foundations, the proximity of the Oak, or for that matter its potential effect in terms of subsidence damage of its proximity to the conservatory being built. The claimants employed professional contractors to build the conservatory and as far as is known put their faith in those so employed as they were perfectly entitled to do.

Conclusions

47. The council has sought to contend that the case has major implications for compensating authorities, and that if claims such as this succeed, 'anybody would be entitled to erect an inadequate building near a protected tree contrary to all industry guidance and when damage is caused by that tree and the local authority refuses to grant consent to fell the tree they are liable to pay damages in any and all events.' In her closing submissions, counsel for the authority referred to the claimant's building as a 'candyfloss conservatory' and emphasised the danger of allowing such obviously defective buildings to be subsidised at public expense in this way.

48. This argument based on policy does not, however, sit at all comfortably with the facts of this case. The conservatory was built in 2003 at a time when there were no protected trees in the vicinity.

The TPO protecting the oak was made in 2007, confirmed the following year, and consent to fell was refused in 2010. We do not see how it can sensibly be argued that the claimants have sought from the outset to use the compensatory machinery available to those affected by TPOs to their personal advantage and to the disadvantage of taxpayers generally.

Result

49. The compensation payable to the claimants is £25,000, including interest. This decision is final on all matters except costs. A letter concerning costs accompanies this decision.

Dated: 27 July 2016

His Honour Judge Stuart Bridge

Peter D McCrea FRICS

Addendum on Costs

50. We have now received submissions on costs. It is not in dispute that the Tribunal has jurisdiction to award costs in this claim, which falls within "proceedings for injurious affection of land" at paragraph (6)(b) of Rule 10 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, as amended ("the Rules").

51. The claimants submit that costs should follow the event, and that, as they were successful in their claim before the Tribunal, the compensating authority should be responsible for their costs. The claimants submit further that, as a local authority, the compensating authority had substantial resources in respect of finance and manpower and should not have defended this claim on an

apparently misconceived basis despite having been warned that costs would increase substantially should the claim proceed to trial.

52. The compensating authority appear to accept that, in principle, it should be responsible for the claimants' costs. However, the authority submits that the legal issues were narrow, the facts were straightforward, and the number of documents disclosed were minimal. It contends that the claim being made (at over £100,000 the claim for costs is over three times the value of the damages award) is wholly disproportionate and excessive, and that in deciding upon costs the Tribunal, under Rule 10(8) of the Rules, should have regard to the size and nature of the matters in dispute.

53. There are two further connected matters. First, the authority submit that the claim, initially pleased on the basis of damage to both the house and the conservatory, was not discontinued in relation to the house until very shortly before the date of trial, and that accordingly the costs of the claim for damage to the house should be the authority's in any event. Secondly, when the parties agreed to a consent order on 19 January 2016 for an extension of time in relation to the filing of expert evidence, the claimants agreed to meet the costs of that application in any event.

Conclusions and disposal

54. We have considered these competing submissions and we deal with the issue of costs as follows.

55. The claimants having made out their claim for damage to their conservatory are in our judgment entitled to their costs. We reject the authority's submission in relation to the damage to the house. The issue of damage to the house was insufficiently distinct from the issue of damage to the conservatory to carry the costs implications for which the authority contends.

56. We direct that, in the absence of agreement between the parties, costs should be assessed by the Registrar on the standard basis, taking into account the size and nature of the claim, and giving effect to any agreement which the parties made by way of a consent order. There should be no payment of costs on account.

Dated: 12 October 2016

His Honour Judge Stuart Bridge

Peter D McCrea FRICS

Neutral Citation Number: [2025] UKUT 053 (LC)

Case No: LC-2024-52

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
IN THE MATTER OF A NOTICE OF REFERENCE

14 February 2025

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – TREE PRESERVATION ORDER – cracks to rear of property – refusal of consent to fell an oak tree in adjoining land – claim for costs of underpinning works – causation – claim dismissed - Town and Country Planning (Tree Preservation) (England) Regulations 2012

BETWEEN:

CHUBB EUROPEAN GROUP SE

Claimant

-and-

ENFIELD LONDON BOROUGH COUNCIL

Compensating Authority

98 Old Park Ridings,
Enfield,
London, N21 2EP

Mrs Diane Martin, TD, MRICS FAAV
6-7 November 2024

Mr Robin Green, instructed by Kennedys for the claimant
Mr James Neill, instructed by Legal Services, London Borough of Enfield

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No cases are referred to in this decision.

Introduction

1. This is a claim for compensation under regulation 24 of the Town and Country Planning (Tree Preservation) (England) Regulations 2012 ("the Regulations") for losses alleged to have been attributable to the refusal of consent to fell a protected tree. The claimant was the insurer of 98 Old Park Ridings, London N21 2EP ("the property") when cracking was first noticed to the property in January 2014. The local planning authority, responsible for compensation under the Regulations, is Enfield London Borough Council ("the authority").

2. The claim is for the cost of underpinning works carried out in late 2018 and early 2019 to the rear extension of the property and its garage, following the authority's third refusal of consent to fell an oak tree, dated 2 February 2018. The claimant's assessment of the cost of relevant works, including VAT and professional fees, was £143,480.75. The authority's assessment was £99,212.98, without prejudice to their position that the cause of damage had not been established and also that the remedial works carried out were not appropriate.

3. The claimant was represented by Mr Robin Green, who called Mr Daniel Kennedy, to give evidence of fact for the claimant, Dr Martin Dobson BSc(Hons), D Phil, FArborA, MEWI to give expert arboriculture evidence and Mr Stuart Allen BSc, CEng, FIStructE, MICE to give expert engineering evidence.

4. The authority was represented by Mr James Neill, who called Mr Simon Pryce BSc, FArborA, RCArborA, CBiol, FICFor to give expert arboriculture evidence and Mr Tim Freeman MA(Cantab) to give expert engineering evidence. Written evidence of fact was provided by Ms Sharon Davidson, Planning Decisions Manager for the authority, who was not called for cross-examination.

5. It was agreed by the parties that I would not make a site inspection since the property had been sold after being repaired and the factors affecting the claim were well evidenced by photographs and reports from the period before repair.

Factual background and chronology

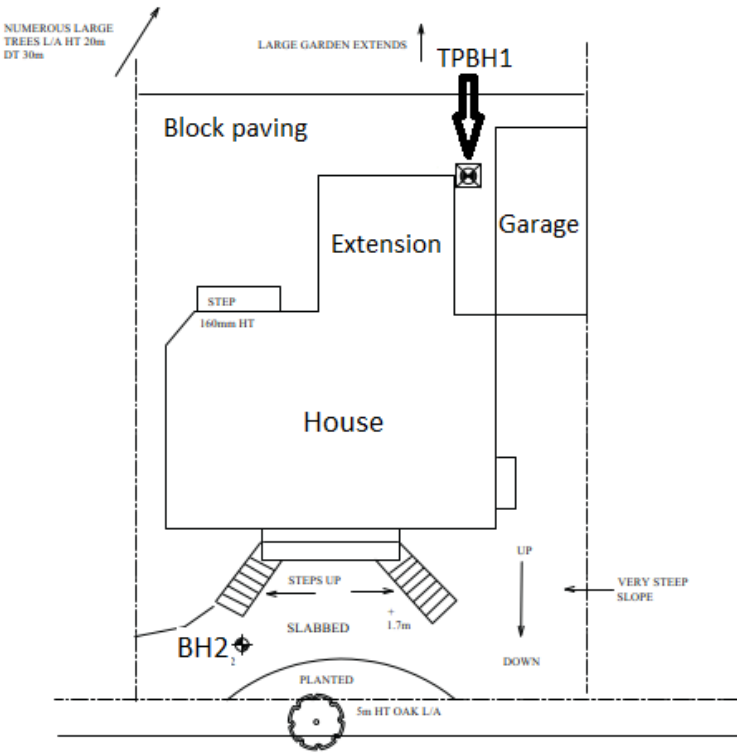
6. The property is a detached, traditionally constructed two-storey house, with attic rooms under a hipped roof, built in the early part of the 20th century. It has a two-storey extension to the rear right hand side (looking from the front) and a single storey garage/workshop abutting the rear righthand corner of the house. The rear garden of the property backs on to grounds belonging to Bush Hill Park Golf Club ("the Golf Club") in which is a row of trees protected by a Tree Preservation Order confirmed on 20 May 1958 ("the TPO"). The row includes, close to the boundary of the property, two oak trees which have been referred to as T1 and T2. T1, the subject of these proceedings, is agreed to be 28m high. It is 29.15m from the garage and 31.65m from the extension. T2 is also 28m high. It is 33.1m from the garage and 35.4m from the extension. There are two cypress trees in the rear garden, one 8.0m high on the right hand boundary with No 96 and one 4.5m high on the left hand boundary with No 100.

7. Mr and Mrs Mackinnon moved to the property in 1975 and were the insured owners in January 2014 when they noticed internal cracking in the kitchen and external cracking at

the junction of the rear boiler room (in the extension) and main house. The damage worsened during the summer of 2014 and was reported to the claimant in December 2014.

8. The claimant instructed loss adjusters Crawford Specialist Property Services UK ("Crawford") to investigate and prepare a technical report. Crawford issued a report ("the Crawford Technical Report") to the claimant on 11 March 2015. It described, inter alia, 2mm internal cracks in the bathroom and kitchen, a 7mm diagonal tapering crack to the rear right hand side of the extension at first floor and a 6mm vertical tapering separation of the garage junction to the main house. The pattern and nature of the cracking was described as indicative of an episode of subsidence apparently caused by clay shrinkage. T1 was identified as a possible cause of root induced shrinkage. The subsidence ought therefore to have been reversible, by rehydration of clay soils in the winter months causing the cracks to close, provided the cause of the movement was dealt with. The report recommended further investigations, involving trial pit(s) to determine the depth and type of footings, boreholes to determine the nature of the subsoil and influence of any roots, and monitoring to establish the rate and pattern of movement. A specialist arboriculture report would also be necessary.

9. Crawford instructed CET Structures Ltd ("CET") to carry out ground investigations. CET visited the property on 1 June 2015 and in the course of their investigations dug a trial pit and sank two boreholes. The block plan below is extracted from their site investigation factual report and shows the relationship of the house, the extension and the garage, together with the location of the trial pit and borehole 1 (TPBH1) on the rear right corner of the extension. As notes on the plan show, the site slopes down from rear to front and from left to right looking from the road frontage. Borehole 2 (BH2) was sunk at the front of the house as a control. The findings of the site investigation ("the CET report") were supplied to Crawford, including an analysis of root samples dated 4 June 2015 and laboratory test results dated 10 June 2015.



10. On 19 June 2015 Crawford issued an addendum technical report ("the Crawford Addendum report") to the claimant setting out the findings of the CET investigations. It concluded with a recommendation that T1 should be removed, confirming that they were satisfied there would be no adverse risk of heave to the property in doing so. The CET survey of drains at the rear of the property had identified the need for repair to drains around the extension, but drainage was not believed to be a factor in causing the structural movement. The drains were subsequently repaired in September/October 2015.

11. Crawford next instructed MWA Arboriculture ("MWA") to provide a report for the purpose of assessing the potential role of vegetation in respect of subsidence damage. MWA carried out a site visit and reported to Crawford on 20 July 2015. The report concluded:

"Based on the technical reports currently available, engineering opinion and our own site assessment we conclude the damage is consistent with shrinkage of the clay subsoil related to moisture abstraction by vegetation. Having considered the available information, it is our opinion that on the balance of probabilities T1 will be the principal cause of any damage due to clay shrinkage subsidence. If an arboricultural solution is to be implemented to mitigate the current damage and allow the soils beneath the property to recover to a position such that an effective repair solution can be implemented we recommend that T1 is removed. We have given consideration to pruning as a means of mitigating the vegetative influence, however in this case, we do not consider pruning offers a viable long term solution."

12. On 28 July 2015 Crawford instructed Knight Associates to commence level monitoring. Monitors were installed at 12 points around the rear of the house, the extension and the garage. A total of 11 readings were taken from the date of installation through to 18 January 2018.

13. On 26 August 2015 MWA made the first application to the authority for removal of T1. It was accompanied by the four reports produced between March 2015 and July 2015, that is: the Crawford Technical Report, the CET report, the Crawford Addendum Report and the MWA report. These reports, which I will refer to as "the 2015 reports", were the basis of the claimant's case in each of their three applications to the authority for consent to fell T1. The application stated briefly the reason for applying to have the tree removed:

"The neighbouring property 98 Old Park Ridings is suffering movement/damage identified by engineers as being due to clay shrinkage subsidence and the above tree has been recommended for removal to restore stability. Due to the size and proximity of the tree to the property , pruning does not offer a viable alternative solution in this case. Oak roots have been recovered from below the foundations in a plastic clay soil of high plasticity/volume change potential which from the soil test results were found to be desiccated."

14. The evidence provided by Ms Davidson shows that the authority's Tree Officer, Mr Downing, was responsible for reporting and making a recommendation for each of the three applications. It is therefore helpful to review the full sequence of applications, with the reasons for refusal in each case, to understand the context for third refusal with which this case is concerned. Mr Dowding made a site inspection on 1 October 2015 and then wrote a concise analysis of the 2015 reports. In his report Mr Downing noted the lack of any level

monitoring or crack monitoring, which was a required submission where a tree was alleged to be the cause of subsidence building damage. Without it a progressive and cyclical pattern of building movement related to vegetative subsidence could not be demonstrated. He went on to say:

"Nevertheless, the submitted evidence does not show on the balance of probabilities that the tree in question is a significant material cause in subsidence damage to the property. Live tree roots have not been found and desiccation of soil is not shown in the upper soil horizons where live tree roots would be expected to be found. The soil is only shown to be desiccated at significant depth where it only appears ancient relic tree roots have been found. The tree is approximately 30m distant to the property damage. It is unlikely that the tree has rooted this far and more likely that prior to development of the residential buildings the whole area was forested and this is the explanation for any roots found."

15. In recommending refusal Mr Downing noted that no other reasonable alternative solutions had been presented by the applicant, although it appeared that a root barrier installed across the garden could be achievable to prevent tree root encroachment and any potential damage to the property. A refusal notice was issued on 15 October 2015.

16. Level monitoring over the next 12 months demonstrated continuing movement at the property. MWA made a second application for consent to fell T1 on 5 October 2016, supported by the 2015 reports together with the results of level monitoring between 28 July 2015 and 22 September 2016. This application contained extended reasons as set out below, with information underlined which has subsequently been agreed by the parties to be wrong and misleading:

"Investigations into the damage have been conducted and the following information/evidence obtained:
1. Engineering opinion is that damage is due to clay shrinkage subsidence.
2. Foundations extend to 900mm bearing on to clay.
3. Site investigations and soil test results have confirmed a plastic clay subsoil of high volume change potential (NHBC Classification) susceptible to undergoing volumetric change in relation to changes in soil moisture.
4. Suction values <u>indicate severe to very severe desiccation in BH1</u> (BRE Digest 412) located to the rear of the property and closest to the offending tree.
<u>5. Live oak roots have been recovered from below foundation depth in TP/BH1 & depth of 5600mm below ground level.</u>
6. <u>The observed desiccation is coincident with recorded root activity.</u>
7. Desiccation is at depths beyond ambient soil drying effects and entirely consistent with the soil drying effects of significant vegetation.
8. Level monitoring for the period 28.07.15 to 22.09.16 clearly shows a cyclical pattern of movement indicative of the effects of the offending tree on soil moisture and volumes to the rear of the property. The uplift phase of the building can only be attributable to an expanding clay soil from a desiccated sate due to the soil drying effects of the oak.
9. Drains can be discounted as a causal factor given the recorded desiccation and by reference to the level monitoring data.

Established evidential and legal tests pertinent to subsidence damage claims have been met and the evidence confirms there can be no other cause of the movement and associated damage at the rear of the property other than the indirect influence of the subject tree.
Removal offers the only predictable arboricultural solution in abating the influence of T1. Pruning does not constitute a viable long term alternative solution in restoring stability to the property.
In the event the tree is retained, underpinning is very likely to be required at significant cost."

17. Before issuing a notice of refusal on 6 December 2016 Mr Downing produced a lengthy report which included an acknowledgement that:

"Some (not all) evidence of damage to the rear of the extension and the garage appears to be conducive with seasonal movement of foundations. However, the level monitoring results do not appear to be clear, being that the initial summer (2015) monitored was extremely wet and although a downward trend of foundation movement is shown in the latter part of 2016, the monitoring is ceased and foundation recovery is not shown, I would suggest without a further period of level monitoring, there is uncertainty as to whether seasonal movement of foundations is adequately demonstrated although it may be likely that seasonal movement has occurred."

18. Expanding on his previous analysis, Mr Downing referred to the leaking drains noted in the CET report as a likely reason for the high moisture content of the soil sample taken from under foundations at BH1. He also commented that a quantitative assessment of heave should be undertaken to support the statement in the Crawford Addendum Report that there was no adverse heave risk to the property, which was contrary to a statement in the earlier Crawford Technical Report that a soil risk analysis had suggested a potential heave risk. His conclusion included the following paragraph:

"Without a quantitative soil heave assessment I am unable to determine this application adequately informed. A simple qualitative assessment, together with the data from the soil investigations appears to suggest that the buildings were built on a clay soil with a deep-seated moisture deficit without the appropriate precautions to prevent seasonal movement as a result of any vegetation. Removal of the tree is unlikely to be an effective means to stabilize the foundations and in fact is likely to be more damaging causing soil heave as the soil re-hydrates. The Local Authority cannot authorize the removal of the tree given that further damage is potentially likely to the property as a result of the trees removal."

19. A third application for consent to fell T1 ("the 2017 application") was made by MWA on 8 November 2017, enclosing the 2015 documents together with level monitoring results from 28 July 2015 through to 17 May 2017 (a further reading on 23 November 2017 was made available before the Tree Officer reported) and a heave calculation. The reasons provided in the application form were identical to those listed above from the 2016 application, with the addition of a further paragraph dealing with the risk of heave:

"The previous refusal notice (Ref: 16/04564/TPO) refers to a deep-seated persistent moisture deficit and removal of the tree may result in further damage to the property. There is no evidence of a deep-seated persistent moisture deficit provided by the council. A heave

calculation has been undertaken (attached) and engineering opinion is that the level of predicted heave is concluded to be acceptable. This allows the council to make an informed decision in relation to heave."

Again it was stated that: "In the event the tree is retained, underpinning is very likely to be required at significant cost and insurers reserve the right to recover these costs in the event consent for removal is refused."

20. The application was assessed by Mr Dowding, who noted that the level monitoring did not appear to show the seasonal summer shrinkage and winter recovery associated with root related moisture extraction. His report included comments made by the authority's structural engineer. In particular these challenged the interpretation of CET data which had concluded that the subsoil was desiccated and introduced the idea that a previous equilibrium had been compromised by the planting of new trees closer to the property within the garden. The conclusion was that the most probable cause of damage to the property was the softening of foundation stratum due to leaking drains. Consent was refused on 2 February 2018 ("the third refusal") for three reasons:

"1. The Council does not consider that the grounds specified by the applicant/agent (i.e. damage to property) sufficient reason to justify the proposed removal of a tree of significantly high amenity and bio-diversity value that makes a positive contribution to the amenity of the locality and wider environs.

2. The Council does not consider that it has been adequately demonstrated that the tree is a material cause in structural damage to the property in question.

3. No reasonable alternative solutions to the alleged structural damage have been adequately considered or instigated, such as the installation of a root barrier.

Informative: The tree is significantly older than the property and the applicant is hereby advised that the removal of this tree may lead to heave which can cause damage to property."

21. The claimant then instructed Crawford to provide an engineering solution to the problem. Crawford, in their Specification Request Document for the claimant dated 1 March 2018 stated: "Roots noted to a depth of 5.6m bgl in the site investigation so a piled solution will be required on this occasion." They sought arboricultural advice and reported to the claimant on 11 April 2018 that installation of a root barrier would not be possible due to the lack of access to the rear for an excavator, and because it would need to extend into neighbouring properties whose owners may not give consent. On 17 April 2018 the claimant notified the authority that it intended to seek reimbursement of the cost of underpinning necessitated by the third refusal.

22. Crawford sought tenders for remedial repair works to the property, to include the underpinning solution, and appointed Optera to carry them out. Works were carried out to the property between September 2018 and June 2019. During the course of piling works to the garage a land drain was encountered 1.2m below ground level which ran parallel with the back of the garage and was on the line of piles. This was excavated, removed and diverted around the piles with the existing clayware pipe replaced, but there is no evidence

that it was damaged or leaking. The footing in the garage was found to vary in depth with a 1.0m deep footing on the right-hand side and a 100mm footing on the left-hand side.

23. The total cost of works was £220,596.41, including professional fees and VAT. It was agreed that repairs to the property would have been required even if consent to fell had been given and therefore that only the costs of underpinning should be the subject of a claim. The expert engineers were directed to provide, after the hearing, a joint statement showing their respective positions on the apportionment of the total cost between repairs and underpinning, and between the garage and the extension. For the claimant Mr Allen apportioned £126,581.53 to underpinning, of which 67.5% was attributed to the garage and 32.5% to the extension, with £16,899.22 on top for professional fees giving a total of £143,480.75. For the authority Mr Freeman apportioned £88,453.91 to underpinning, of which 68% was attributed to the garage and 32% to the extension, with £10,759.08 on top for professional fees giving a total of £99,212.98.

24. The claimant sent a letter of claim to the authority on 3 August 2020, confirming a total outlay of £253,548.39 with quantum of claim to be clarified in due course. A response, denying liability, was made on behalf of the authority on 27 January 2021. The claimant made a reference to the Tribunal on 31 January 2024.

Legal background

25. On 22 July 1957 the authority made the Enfield Tree Preservation Order No 2 ("the TPO") pursuant to section 28 of the Town and Country Planning Act 1947. It was confirmed by the Minister on 20 May 1958 and protects, inter alia, trees within Bush Hill Park Golf Course, which adjoins the property.

26. Under section 193 of the Planning Act 2008, TPOs made prior to 6 April 2012 take effect with the omission of all their provisions except those which identify the trees to which the order applies. In their place the provisions of the Regulations apply.

27. Regulation 13 prohibits, inter alia, the felling of protected trees without the consent of the local planning authority, subject to certain exemptions in regulation 14. Regulation 16 prescribes the form and content of an application to carry out works to a protected tree. Regulation 17 provides that an authority to whom an application is made may grant consent, with or without conditions, or may refuse consent. There is a right of appeal to the Secretary of State against an authority's refusal of consent.

28. Regulation 24 provides for compensation. So far as material, it states:

> "(1) If, on a claim under this regulation, a person establishes that loss or damage has been caused or incurred in consequence of—
>
> (a) the refusal of any consent required under these Regulations;
>
> …
>
> that person shall, subject to paragraphs (3) and (4), be entitled to compensation from the authority.
>
> …

(4) In any case other than those mentioned in paragraphs (2) or (3), no compensation shall be payable to a person—

(a) for loss of development value or other diminution in the value of the land;

(b) for loss or damage which, having regard to the application and the documents and particulars accompanying it, was not reasonably foreseeable when consent was refused or was granted subject to conditions;

(c) for loss or damage reasonably foreseeable by that person and attributable to that person's failure to take reasonable steps to avert the loss or damage or to mitigate its extent; or

(d) for costs incurred in appealing to the Secretary of State against the refusal of any consent required under these Regulations or the grant of any such consent subject to conditions.

…

(6) Claims for payment of compensation by virtue of paragraph (1) shall be made in writing to and paid by the authority.

…

(8) Any question of disputed compensation under this regulation shall be referred to and determined by the Upper Tribunal.

(9) In relation to the determination of any such question, the provisions of section 4 of the Land Compensation Act 1961 (costs for proceedings of Upper Tribunal) and sections 22 (Tribunal Procedure Rules) and 29 (costs or expenses) of the Tribunals, Courts and Enforcement Act 2007 shall apply subject to any necessary modifications and to the provisions of these Regulations.

…"

29. Interest is payable on compensation awarded under regulation 24 pursuant to section 80 and Part 1 of Schedule 18 to the Planning and Compensation Act 1991 and section 32 of the Land Compensation Act 1961 at the rates specified by the Acquisition of Land (Rate of Interest after Entry) Regulations 1995.

The issues to be determined

30. Counsel for the parties had agreed the following statement of issues:

"The overarching issue is whether the claimant has established that part or all of the claimed cost of works to the property was incurred in consequence of the authority's third refusal. This breaks down into the following sub-issues:

(1) Was the oak tree T1

(a) (on the claimant's case) **an <u>effective and substantial cause</u>**, not the sole or predominant cause, (based on the test for a claim in nuisance)

or

(b) (on the authority's case) **the natural and probable cause** (based on the test in a statutory claim for compensation)

of subsidence damage to the property?

It was common ground that the evidential burden is on the balance of probabilities.

(2) Having regard to the third application for consent to fell and the documents and particulars accompanying it, was the loss to the claimant (the cost of underpinning) reasonably foreseeable by the authority when consent was refused?

(3) Was the loss reasonably foreseeable by the claimant and attributable to its failure to take reasonable steps to avert the loss or mitigate its extent?

(4) What is the quantum of loss attributable to the third refusal?"

31. Simply stated, the issues to be determined are causation, foreseeability (by the authority and the claimant) and the quantum of loss. During the two days of the hearing a great deal of technical evidence and expert opinion was adduced on the issue of causation, on which each of the four experts had been asked to give their opinion. This is at the heart of the case, and the basic question to be answered is: on the balance of probabilities was T1 a cause of subsidence to the property? (Whether the cause must have been "effective and substantial" or "natural and probable" was a detail on which the parties disagreed.) This would demonstrate that its removal, in the absence of an alternative feasible preventative measure, would have enabled the claimant to avoid the cost of the underpinning to prevent further damage. The relevant date at which that determination must be made is the date of the third refusal, 2 February 2018, and the determination must be made on the basis of evidence available to the authority at that date. The burden of proof is on the claimant.

Technical evidence of causation

32. The key technical factors which need to be considered in determining a causal relationship between T1 and the subsidence damage are: the extent to which the subsoil was desiccated, which would indicate removal of moisture through the roots of vegetation, leading to subsidence; whether identified movement to the structures showed a seasonal and cyclical pattern, which would indicate cyclic root-induced shrinkage and recovery; whether the evidence of oak tree roots in BH1 was sufficient to indicate that T1, at a distance of 29.15m from the garage and 31.65m from the extension, would extract sufficient amounts of moisture to cause subsidence.

33. Determination of the causal relationship in this case was also influenced by other factors, which included: the discovery in June 2015 of leaking drainage in the vicinity of TPBH1, which the experts agreed led to high moisture content readings at depths of 0.9m and 1.5m; the close proximity to T1 of a second oak tree, T2, and the possibility that roots in BH1 were from that tree; the discovery of a land drain behind the garage when piling works were carried out in late 2018 – early 2019; the discovery at the same time that the footing to the left side of the garage was only 100mm deep. Obviously the last two factors were not known to the authority at the date of the third refusal.

34. In order to reduce, as much as possible, reiteration of the core material I will first review the evidence available to the authority, including commentary on elements agreed and not agreed by the parties and their experts. I will then review the submissions made by the respective counsel on how that evidence should be interpreted in the light of the expert evidence and cross-examination.

The Crawford Technical Report

35. This initial report to the claimant was not relied on by either party and will therefore not be considered further.

The CET Report

36. The CET report comprised 12 pages of technical data, without index or narrative. It formed the basis of subsequent reports submitted with the applications and it has formed the basis of analysis by all the experts in this case. The data included:

- a profile description to 1.1m below ground level ("bgl") for TP
- a profile description to 6.0m bgl for BH1 and BH2
- laboratory analysis of the soil samples taken from BH1 and BH2, showing moisture content, liquid limit, plastic limit, plasticity index, liquidity index, modified plasticity index, soil sample suction and shear vane strength to 6.0m bgl
- graphs to show soil moisture content (%) against in situ shear strength (kPa) to 6.0m for BH1 and BH2
- graphs to show soil moisture content (%) against soil suction (kPa) to 6.0m for BH1 and BH2
- laboratory analysis of root samples taken from TP (underneath the foundations) and from BH1 between 1.1m and 2.0m;
- a drainage layout plan showing repair work required around the extension

37. The expert engineers agreed that the findings of the CET report showed the extension foundations were supported on soft clay at 900 mm below ground level. Above the 500mm thick foundation was a 150mm layer of made ground, a 70mm concrete slab supporting 50mm stone, 200mm sand and 50mm block pavers. Beyond the edge of the foundation the made ground was 700mm thick (550mm + 150mm). The description of the soil below foundation level in BH1 was typical of London Clay. Laminations of orange silt and fine sand were noted between depths of 1.1m and 1.9m; pockets of orange silt and fine sand were noted below 4.0m. Water seepage was noted in BH1 at 4.0m depth.

38. The subsoil tests confirmed the clay subsoil below 900mm had a plasticity index (PI) varying from 44% to 52%. Mr Freeman considered that the subsoil was devoid of desiccation. Mr Allen considered that the results indicated possible desiccation between 2m and 2.5m depth, but not severe desiccation from 1.5m to 6m as had been stated by Crawford (see below).

39. The arboriculture experts agreed that the two root samples taken from TP (underneath the foundations) and the two root samples taken from BH1 between 1.1m and 2.0m were identified as oak and therefore from an oak on Golf Club land, most likely T1 but possibly T2 also. All samples were less than 1mm in diameter and none contained starch, although that would not necessarily be present in live juvenile roots in early summer. The presence of identifiable roots confirmed that they had been active. Mr Pryce described T1 and T2, just 6m apart, as a co-dominant pair with individual crowns hard to distinguish, and likely to have a combined root system. The dead and decomposing root fragments to 5.6m depth were not identified.

The Crawford Addendum Report

40. This report to the claimant provided narrative interpretation of the CET findings, as set out below. The underlined words are agreed to be an error.

41. "DISCUSSION

The results of the site investigations confirm that the cause of subsidence is root-induced clay shrinkage. The clay is plastic and thus will shrink and swell with changes in moisture content. Roots have extracted moisture content below the depth of the footings, thus causing differential foundation movement to occur. This is supported by the following investigation results:

- The foundations are at a depth of 900mm which is below the level that normal seasonal movement would occur.
- The moisture content profile indicates a reduction in moisture content between a depth of 0.9m and 2.5m which is indicative of desiccation at this level. This is also coincident with the depth of root activity.
- Atterberg limit testing indicates that the soil has a very high plasticity and hence will shrink and swell with changes in moisture content.
- Suction tests indicate severe to very severe desiccation between a depth of 1.5m and 6.0m coincident with the depth of root activity.
- Roots were found to a depth of 2.0m and were identified as either Quercus or Castanea. Quercus are oaks and Castanea include sweet chestnut. In this instance, we consider that the roots will emanate from the large oak beyond the rear boundary. The roots recovered were juvenile and therefore starch was not present.

RECOMMENDATION

The cause of movement needs to be dealt with first. From the results of the site investigation, we are satisfied that the Oak tree within the golf club land can be removed. Based on our analysis, we are satisfied there is no adverse heave risk to the property. Our Mitigation Unit will liaise with the third party in this respect.

Following completion of the tree management works, we will undertake a suitable period of monitoring to confirm stability has been achieved before undertaking repairs to the property."

The MWA Report

42. The conclusion of the MWA report has been provided earlier, but it is important to note that the report relied on the technical data from the CET report and the Crawford Addendum Report, in which there was an error. In one important respect, as underlined below, it is agreed that the MWA report misrepresented the technical data on the depth at which roots (by implication those that had been identified) had been found, by stating:

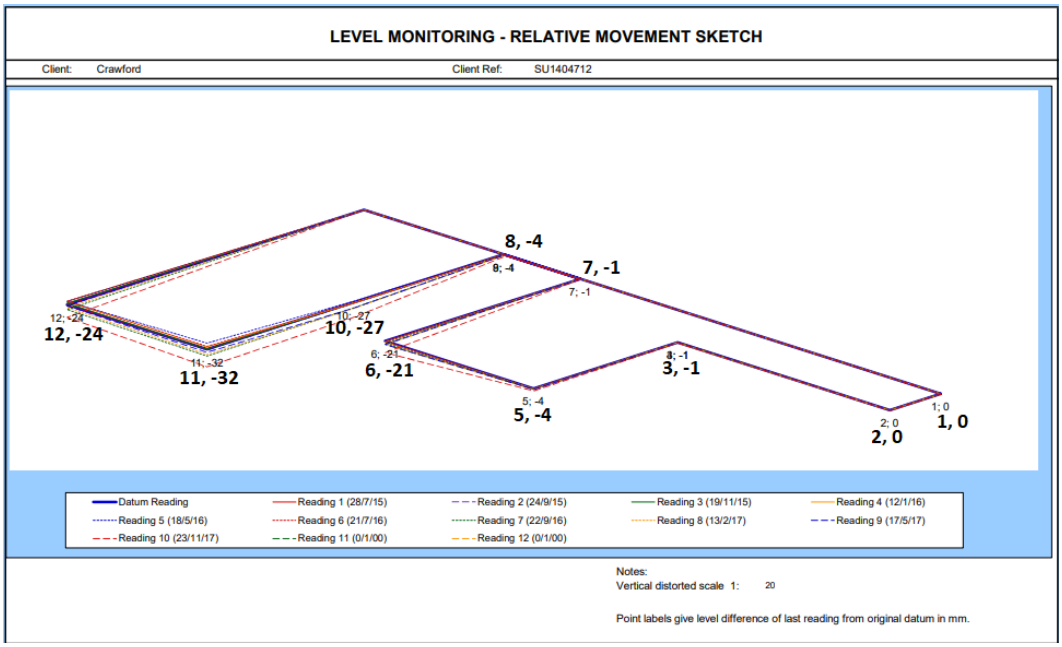
"Roots were observed to a depth of 5600mm bgl in borehole 1 and recovered samples have been positively identified (using anatomical analysis) as either Quercus (Oak) or Castanea (Sweet chestnut), the origin of which will be T1 confirming the influence of this vegetation on the soils below the foundations. The root samples recovered were found to be very juvenile which would explain why no starch was present."

The heave calculation

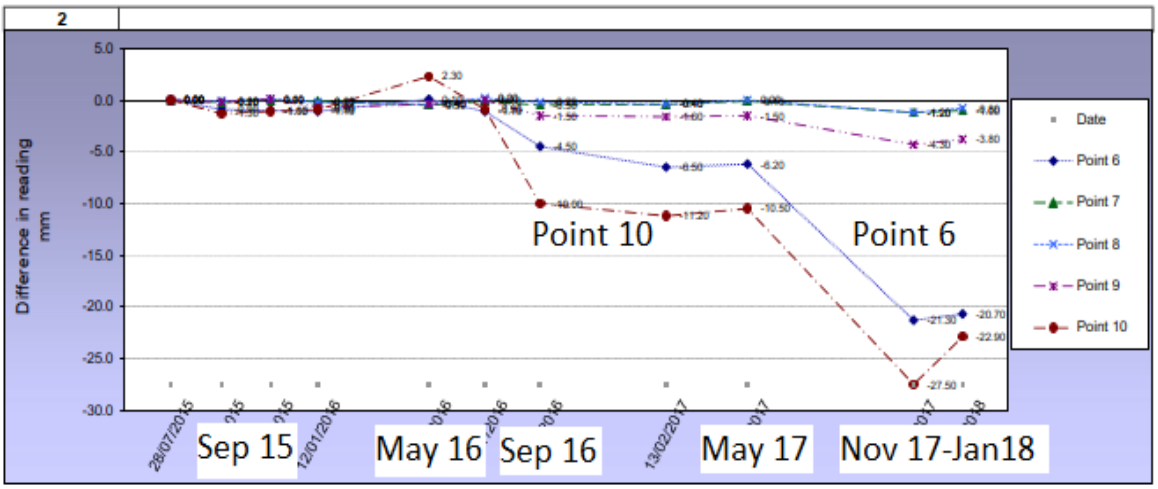
43. The heave calculation, made as at 1 June 2015 using data from the CET report, indicated a heave risk of 6.5mm. This is considered to be very low. However, it was Mr Allen's opinion that the subsequent downward movement of 34mm recorded to the garage by November 2017 would indicate a "real risk of heave" by the time the decision to underpin was taken.

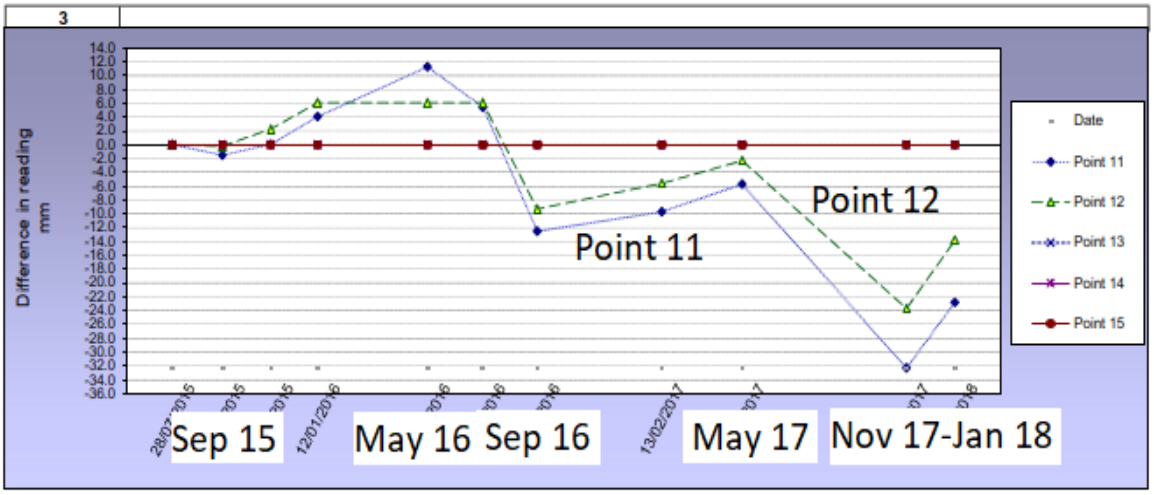
The level monitoring from 28 July 2015 to 18 January 2018

44. The positions of level monitors and the maximum reading at each are summarised in the relative movement sketch below. The first number is the point number and the second number is the greatest level difference in mm recorded at that point over the period. Two points are missing: point 4, which is close to point 3 and showed very similar readings, and point 9, which is close to point 8 and showed very similar readings. Visually it is apparent that the greatest movement was to the rear of the garage at points 10 (-27mm), 11 (-32mm) and 12 (-24 mm). The only significant movement on the extension is shown at point 6 (-21mm). It will be noted that point 6 is the corner of the extension where the TPBH1 investigations were made.



45. The level monitoring results over the period for points 6 – 10 and 11 - 12 are shown in the charts below, with labels added as an aid. It should be noted that the y axis scale is different on each chart to accommodate the relevant range of movement. These charts were analysed by the experts to look for evidence of seasonal and cyclical movement, which would be indicative of tree root desiccation of shrinkable clay, so particular note was taken of any recovery over the winters 2015-16, 2016-17 and 2017-18.





46. The engineering experts agreed that the monitoring at points 10, 11 and 12 around the garage displayed a seasonal pattern of movement indicative of tree root desiccation of a shrinkable clay subsoil below the foundations, but Mr Freeman considered that this could have been caused by any of the trees at the rear of the property, including the cypress tree and privet hedge growing close to the garage. There was obvious progressive downward movement recorded at points 6, 10, 11 and 12 and Mr Freeman considered that the soil at the rear had been affected by sub-surface erosion. The moisture contents recorded in BH1 at depths of 0.9m and 1.5m were unnaturally high and indicative of a soil that had undergone swelling and softening, which can only occur where a void is created by excavation or erosion. The presence of the soft layer was confirmed by the suction tests and the exceptionally low shear vane reading of 39kPa at 0.9m. In his view the only plausible explanation for the progressive downward movement was sub-surface erosion caused by water escaping from the leaking drainage and running down the slope under the foundations to the extension and the garage. Softened soil was a symptom and it was compression of the voids that would cause downward movement to the supported foundations. Drainage repair in autumn 2015 may have encouraged erosion by lowering the water table, allowing a higher flow of water through the soil in the summer. No investigation was made in June 2015 of the downpipe and drains at the rear of the garage to rule out leakage there too.

47. In Mr Allen's opinion, whilst the high moisture content was likely to be the result of nearby drain failure, the subsoil still had adequate strength to resist the loads applied by the foundations. 39kPa equated to a safe bearing pressure of 65 kN/sqm, which exceeded the estimated load applied by the foundation of 40kN/sqm. London clay soil would swell if it had been previously desiccated and there was no evidence of void formation below foundation level in the BH1. The sub-surface erosion mechanism described by Mr Freeman would have been present since the property was constructed and not commenced in 2014. In his opinion the reduced amount of upward movement, compared with subsidence, resulted from a persistent moisture deficit in the clay subsoil where winter rehydration was less than the desiccation of the previous summer. Once the drains were repaired in 2015 the roots were likely to have been desiccating to a greater depth than recorded in the 2015 site investigation.

48. The arboriculture experts also considered the level monitoring results. In Dr Dobson's opinion the high moisture content of the soil around TPBH1, in June 2015 when the drains were found to be leaking, probably caused oak roots to proliferate and then continue to

extract water after the drains were repaired in September 2015, causing progressive desiccation and downward movement superimposed on the general pattern of subsidence and recovery. He considered that the limited upward recovery in the winter of 2016-17 may have been because of drier than average conditions in October and December 2016, and again in early 2017, limiting soil rehydration.

49. It was Mr Pryce's opinion that development of a persistent moisture deficit would require a high density of active live roots, which would tend to occur close to the trees rather than at the periphery of the root system. T1 and T2 were mature trees so their rooting zones would be unlikely to have altered appreciably in recent years to have caused the downward movement. Mr Pryce agreed that roots would proliferate where conditions were favourable, but considered those found in TPBH1 were outliers that would have become redundant once the leaking drains were repaired. The trees (T1 and T2) had good rooting conditions in every other direction so would have stopped supplying these roots with their energy supply of starch, in favour of roots closer to them with easier sources of water.

50. Dr Dobson referred to reported research in which monitoring of ground level on shrinkable clay near to an oak tree had been carried out since 2006 by Mr Freeman's company on behalf of the Clay Research Group. Subsidence movements were found to be greatest at a distance of 1.2 times the height of the tree and Mr Freeman had commented that the zone of influence of a larger tree could extend beyond 1.2 tree heights away. In this case where T1 was 28m tall, the zone of influence could therefore extend beyond 33.6m, which was further than the distance to the garage and the extension. Dr Dobson reiterated that oak roots were present under the foundations of the extension, and although only a few were found in the borehole, it was only 70mm in diameter and they must have been plentiful.

51. Mr Pryce considered that measures of tree height to influencing distance were convenient in providing a guide for risk management exercises but were not reliable as an indicator of root spread in individual trees. From published research, the maximum distance at which oak tree roots had caused damage was 30m, and then for only a small fraction of the tree population. He acknowledged, fairly, that the presence of roots meant there was a possibility that the oak tree roots had spread sufficiently to be the cause of damage but, in his long experience as a tree inspector, this seemed unlikely.

Submissions for the claimant on causation

52. It was essentially the claimant's case that the presence of a clay subsoil with high volume change potential, the presence of oak tree roots beneath foundation level, a record of seasonal and cyclical structural movement, and the presence of a high water demand tree (T1) at a distance of 1.1 times its height, were clear evidence that T1 was an effective and substantial cause of damage to the property.

53. Mr Green made comprehensive submissions on the authorities which had considered the appropriate tests for causation.

Submissions for the authority on causation

54. Mr Neill submitted that the claimant could not establish on the balance of probabilities that the movement to either the extension or the garage occurred as a result of the roots from T1. It was important to note that two different structures were in issue, with different sets of foundations at different depths. The claimant's case essentially turned on the identification of two sets of juvenile oak tree roots, present in a borehole, at a depth of less than 2.0m. The claimant was asking the Tribunal to draw inferences from the pattern of measured movements at the property that it was attributable not just to root-based subsidence but to T1.

55. It was the authority's case, based on the views of Mr Freeman, that movement of the extension was caused not by root-induced tree subsidence but by drainage failure. Unnaturally high moisture content was found in BH1 at depths of 0.9m and 1.5m, for which the only plausible explanation was water escaping from drainage. Drainage failure is likely to have caused sub-surface erosion and therefore the settlement identified within the extension. Whilst the damaged drain discovered in 2015 was repaired, there were other drains subsequently identified on the property (during the underpinning works) that could also have contributed to water escape.

56. Whether the results of the investigations made in June 2015 were consistent with root-induced subsidence relates to the question of desiccation, which is a sign of root-induced subsidence. It was now agreed that there was no desiccation in the subsoil.

57. Whilst it was common ground that there was some downward movement to the extension, it was the authority's case that this was progressive, not cyclic and not indicative of root-induced shrinkage. It was common ground that the movement to the garage displayed a seasonal pattern indicative of tree root desiccation, but no borehole was dug behind the garage to ascertain the extent and depth of any roots, and whether they were attributable to T1, so the burden of proof could not be met.

58. T1 was growing at a considerable distance from both the garage and the extension and it was Mr Pryce's view that the roots observed were beyond the maximum published tree to damage distances. Such roots as were found in BH1 were unlikely to be capable of extracting sufficient amounts of moisture to cause significant subsidence. And there was no evidence whether the root samples belonged to T1 or its neighbour T2.

59. The claimant's case was not that T1 caused any shrinkage in 2014 which gave rise to the damage to the property, but that from 2015 to 2017 the net downward movement was caused by T1's root system continuing to extract water even after 2015 when the drain was repaired. The authority submitted that it was unlikely a mature oak tree would behave in this way and the roots found were more likely to be 'outliers' attributable to the broken drain.

60. The authority's case was that T1 was neither the 'natural and probable' cause of the subsidence that occurred, nor did it pose a real risk that subsidence might occur in the future. But even if it had had some influence on the degree of movement identified to the two structures the claimant had not established on the balance of probabilities that it was the 'effective and substantial' cause.

Discussion of causation

61. A notable feature of the expert evidence adduced by the parties is that both the engineering experts and the arboriculture experts have had to speculate on causation beyond what can be determined from the facts available. This is not to criticise them, because each was very experienced in their field and able to use the benefit of that experience in analysing the somewhat limited technical evidence. Their reports have been an invaluable aid to interpreting that evidence but, in making my determination on causation, on the evidence available to the authority when they made their third refusal on 2 February 2018, I must exercise caution in choosing whether to rely on any element of speculation.

62. The first and key factor to be considered in determining a causal relationship between T1 and the damage at the property is the evidence on desiccation in the subsoil, which would indicate removal of moisture through the roots of vegetation, leading to subsidence. Much has been said about desiccation in all the expert reports but, in the end, the engineering experts agreed that there was no evidence of severe or very severe desiccation in the subsoil at TPBH1 when tested in June 2015. There was speculation as to what might have happened in the subsoil in the period of over two years after the drains were repaired, during which movement of the structures was recorded, but no further site investigations were carried out to establish whether desiccation had occurred. The absence of evidence of desiccation is a significant weakness in the claimant's case for causation in respect of damage to the extension, for which the evidence from TPBH1 is relevant. As the authority has pointed out, there was no site investigation at all behind the garage to establish whether there was desiccation of the subsoil either initially or subsequently which might have suggested a causal relationship with T1.

63. The second factor to be considered is evidence of a seasonal and cyclical pattern of movement to the structures, which would indicate root-induced shrinkage and recovery. The engineering experts agreed that the movement at points 10, 11 and 12 around the garage did display a seasonal pattern of movement, but they were not agreed on the mechanism causing the underlying progressive downward movement. Mr Freeman's theory was that this was a result of sub-surface erosion caused by water running down the slope under the foundations as a result of drainage failure. Mr Allen's response was that such a mechanism would not have commenced in 2014 as a result of drainage failure and, in any event, the drains were repaired in September 2015. However, Mr Allen's only alternative explanation for the continuing downward movement, which he called a reduced amount of upward movement, was the development of a persistent moisture deficit in the clay subsoil. Dr Dobson had postulated that the roots of T1 proliferated while the drains were leaking and then continued to extract water after repair, causing progressive downward movement and desiccation. Again, without any subsequent site investigation evidence this remains speculation. Dr Dobson also commented that limited upward recovery may have been attributable to drier than average weather conditions over winter 2016-17. Mr Pryce did not disagree that roots would have proliferated as a result of the leakage, but he considered that they would have become redundant after the drain repair and since T1 and T2 were mature trees their rooting zones were unlikely to have altered appreciably in recent years.

64. I conclude that whilst there is obvious evidence of seasonal shrinkage and some recovery around the rear of the garage, there is only speculation as to what might have happened in the subsoil to cause the progressive downward movement during the period of monitoring.

Without any factual evidence the causation argument for movement of the garage is weak. For the extension, the only significant evidence of seasonal shrinkage was at point 6, and there was barely any evidence of winter recovery afterwards. Again, Mr Freeman relied on his sub-surface erosion theory to explain the progressive downward movement and Mr Allen relied on the theory of root proliferation to explain it. Whilst neither theory on the cause of downward movement can be relied on, the evidence is clear that there was no pattern of seasonal shrinkage and recovery to the extension. This is another significant weakness in the claimant's case for causation of damage to the extension.

65. Finally, I must consider whether there was evidence in the documents submitted with the 2017 application to indicate that T1 and its roots would extract sufficient moisture to cause subsidence. The evidence of identified oak tree roots in BH1 was indisputable, but the arboriculture experts were not agreed that this was sufficient evidence. Only four roots were found, all of which were juvenile. T1 was at a distance of 29.15m from the garage and 31.65m from the extension. Dr Dobson considered that research confirmed these distances were within the potential zone of influence of an oak tree, and that it was likely that roots were plentiful in areas outside the borehole. Mr Pryce did not dispute the research, or the possibility that the oak roots could spread sufficiently to be the cause of damage, but he remained firmly of the opinion, based on his long and extensive experience that it was unlikely at these distances. He was also firmly of the opinion that the roots identified could have been either from T1 or T2, which were so close as to be likely to have a combined root system. Dr Dobson did not dispute this possibility and in their joint statement the arboriculture experts expressed the situation as: "The oak roots were from an oak on golf course land, most likely T1, but possibly T2 also.".

66. My conclusion from the evidence and the expert opinions is that it has not been demonstrated that T1 and its roots extracted sufficient amounts of moisture to cause subsidence to the garage and the extension. The distance from the tree to the structures is at the margin of the maximum distance where damage has been recorded in research. The roots identified in June 2015 were few and juvenile and only found to a depth of 2.0m. It is speculation that roots were plentiful outside the borehole. It also requires speculation to infer that roots which had proliferated during the period when drains were leaking continued to extract water after the repair sufficient to cause progressive downward movement of the structures. Without evidence of further site investigation during the monitoring period this speculation is not persuasive. The fact that the identified roots might even have belonged to T2 is a complicating factor in causation, but I consider that the evidence was insufficient without that factor.

67. I conclude that the evidence on desiccation, on seasonal movement and on the presence of oak roots in TPBH1 does not establish on the balance of probabilities a causal link between T1 and subsidence damage to the property at the date of third refusal.

68. Having decided the factual issue of causation against the claimant the remaining issues do not arise.

69. For these reasons I dismiss the claim.

Mrs Diane Martin TD, MRICS FAAV

14 February 2025

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.