Tree Related Subsidence Cases Require the Best and most Experienced Arboricultural Experts

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In the previous issue of The Expert Witness Vol. 1 Issue 1 (2012) I made the case that legal cases involving trees require specialist arboricultural advice and expertise and set out the principal areas where trees may cause conflicts that result in legal proceedings, from personal injury as a result of failing trees; through building subsidence caused by trees to the planning and utility sectors. In this second article in the series I concentrate on the area of tree caused subsidence.

The Problem

When buildings insurance policies are written they include 'subsidence' as an insured peril. Trees can cause damage to structures and buildings either directly or indirectly. Direct damage is usually obvious and can be spectacular, i.e. trees fail in high winds and strike buildings, power lines, vehicles and in some instances people. However, trees can also cause subsidence damage to buildings through their normal growth processes. Tree roots extract moisture from the soil, and if the soil underside of foundations is shrinkable clay, the clay shrinks causing the foundations to move downward and this results in cracks to the building. The insured makes a claim on his/her policy and the insurer, through their loss adjusters either repudiate or validate the claim. Once a claim is validated detailed site investigations are undertaken to determine the cause of the damage and if there are trees in proximity to the building and the area of damage, the investigations include an Arboricultural investigation. If the trees are implicated, then the only way to stop the subsidence and prevent it happening again is to remove the tree. Research has shown that pruning the tree has little or no effect in reducing or preventing subsidence once the damage has occurred, removal is the only way to eliminate the problem.

If the tree(s) is removed the insurers proceed to repair the superstructure. If however, the tree(s) cannot be removed then the repair will inevitably involve

underpinning of the foundations at considerable additional cost. When this happens, the insurer will seek to recover the additional cost from the person or agency that has effective control of the tree(s) and prevented the removal; a local authority for example may have refused consent to remove the tree(s) if there is a tree preservation order (TPO) in effect, or the tree(s) are located within a conservation area; a highway authority may refuse to remove the implicated tree(s) if it is located within its estate. If a settlement in recovery cannot be negotiated the case(s) proceed to court.

Evidential Tests

The test in civil procedures in tree root cases is that one has to prove that on the 'balance of probabilities' the tree(s) is 'a material cause' of the damage (Loftus-Brigham v LB Ealing [2003] EWCA Civ. 1490).
The evidential tests in causation required are simple (1) have the tree roots encroached underside of foundations; and (2) was the damage a direct result of the encroachment?
The 'hard' evidence to support the tests include recovery and identification of roots; evidence of desiccation in the soil; opening and closing of the cracks in a cyclical pattern i.e. opening during the growing season (April to September) and closing during the dormant season (October to March).

The Legal Framework

The significant case law in the area of subsidence is well summarised in:

- Solloway v Hampshire County Council [1981] 79 LGR 449
- Patterson v Humberside County Council[1996] Const. LJ 64
- Delaware Mansions v Westminster City Council [2001] UKHL 55 [2002] 1 AC 321
- Jones v Portsmouth [2002] EWHC 1568 (TCC)
- Loftus Brigham v Ealing [2003] EWCA Civ.1490
- Perrin v Northampton [2007] EWCA Civ. 1353

Delaware established that knowledge of an ongoing nuisance was not a defence; while Jones established that *"... lawful exercise of control over a tree, in the absence of ownership is sufficient to make the defendant capable in liability to the claimant."* This goes to the point where a tree is privately owned but subject to a TPO and the local authority refuses consent to fell. Loftus-Brigham established that the tree(s) only have to be a *'material cause'* of damage not the *'substantive'* or *'major'* cause of the damage. The Court of Appeal case of Perrin v Northampton over turned the lower court's ruling that tree caused subsidence is a 'nuisance' and therefore if a tree was the cause of subsidence and that tree was the subject of a TPO, it was exempt by way of the statutory exemption at Section 196 of the 1990 Town & Country Planning Act.

In 2012 there were three further significant cases in tree root damage:

- Berent v Mosaic Housing Association & L B Islington [2021] EWCA Civ. 961
- Robbins v L B Bexley [2012] EWHC 2257 (TCC)
- Denness v East Hampshire [2012] EWHC 2951 (TCC)

All three are significant both for the rulings and the evidence of the arboricultural expert witnesses. The Berent case established that cases involving tree root damage are subject to the same rules of law as a claim brought in common law negligence. The Robbins case reinforced the determination of the Court of Appeal in Berent, i.e. *"The judgment of Tomlinson LJ in Berent is to make clear that there are no special principles of law that relate to tree root cases: they are subject to the general law of negligence and nuisance."*

Berent was all the more significant in that it went to the issue of foreseeability, i.e. what could the tree owner/controller have reasonably done to prevent the damage occurring some years before the subsidence event, when the possibility of the tree(s) causing damage was merely a 'risk'. The arboricultural expert for the claimant suggested in written and oral evidence that the defendants should have been pruning their trees as a preventative measure years before the event but failed to convince the judge and the appeal failed on that narrow point, among others. The suggestion that the trees should have been pruned as a preventative measure proved to be unfortunate for the arboricultural expert because he was co-author of a scientific paper the title of which was 'Tree Related Subsidence: Pruning is not the answer' and faced a difficult cross-examination on that issue.

Robbins is significant because it reinforced Berent in the area of nuisance but also because the Judge stated that neither of the arboricultural experts were of much assistance to him. This is an indictment of the quality of the arboricultural experts and reinforces my contention that this area of expert work requires only the best and most experienced Arboricultural consultants/experts. In addition the joint statements that both arboricultural experts produced were of no assistance to the Court, the Judge said this;
"I regret that I have to say that I derived relatively little assistance from the evidence of either of the arboricultural experts. The experts' joint statements, such as they were, were for the most part discursive and argumentative and were of very limited use."
The Denness case is significant because, although this

case was one involving tree root damage; no expert arboricultural evidence was put before the Court. There was one jointly instructed single expert who was an engineer, and s/he could not speak authoritatively on arboricultural matters. The Judge concluded *"On the evidence before me, I am unable to conclude that the Claimants have shown to the requisite standard of proof that the damage to the Property was caused by the Beech trees or their roots. [The witness'] evidence is, at best, equivocal."*

On reading Denness it becomes obvious that the Judge knew more about the arboricultural issues in tree root claims that the single joint (engineering) expert. He relied on the witness statement of the local authority arboricultural officer, who did not give oral evidence, to support his conclusion that the claimants failed to show the requisite standard of proof. This again supports my contention that in tree root cases only the best and most experienced arboricultural consultants/experts will do.

The Benefits of Arboricultural Expertise

I was recently instructed on a tree root subsidence case where the claimant's house, an end terrace, suffered major crack damage and trees growing on the adjoining car park were implicated. The damage occurred in 2005 and the case came to Court in 2012. Upon reading through the file it seemed to me to be a classic 'open and shut' case of tree root damage. Roots were recovered from underside of foundations and were identified as the same genus as those implicated trees, which were within influencing distance of the damage; the soil was a medium shrinkable clay; there was both desiccation and onset desiccation evident in the trial pits and bore holes. It was only when I analysed the crack monitoring data that I realised that there was no cyclical pattern of opening and closing in the cracks. Three of the cracks opened during the growing season but closed only slightly in the dormant season. The other three cracks opened during the growing season but continued to open in the dormant season. It was obvious to me that there was another mechanism involved. My engineering colleague had come to the same conclusion and offered a number of structural mechanisms, not involving trees that could have been responsible.

The case went to Court in November 2012 listed for three days, with the claimant arguing in essence that although there could have been other mechanisms involved, the trees were 'a material cause' of the damage. The claimant was relying on the Loftus-Brigham v Ealing case. However, after first morning's evidence it became evident that the claimant could be in some difficulty. The case settled over lunch on the first day at a quantum favourable to the defendant.

This case is unreported because it settled, but it does emphasise that experienced arboricultural expertise is of invaluable assistance. My instructing Solicitors had thought that the case was a lost cause and a negotiated settlement would be the only way out. I was initially instructed to provide a second opinion before negotiations were initiated. However, as it turned out, there was a vital piece of evidence in the papers, the significance of which had not been realised. ■

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