

The Subsidence Forum Innovation Group

Innovation Newsletter

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THIS ISSUE – LEGAL ASPECTS

Welcome to the FOURTH edition of the Subsidence Forum's Innovation Group's newsletter! As with the previous newsletters this issue focuses on a key area of subsidence claims; in this case legal aspects.

We start with a welcome note from the new chairman of the Forum, Jill Mclean. Following, we have a number of articles on legal aspects and we thank our contributors, John Wickham of Greenwoods Solicitors, John Lytton of RICS, John Parvin of Zurich, Matthew Rogers of Keoghs, Graeme Phipps of SP Property Services and Tom Corrigan of Beachcroft.

The range of the articles: case law to protocols on Tree Roots and Drainage, The Party Wall Act and Injunctions, demonstrates the importance of this area of subsidence claims.

Tree issues feature in many of the articles and the recent publicity surrounding the Tree Root Protocol is an indication of the environmental aspects that are now an essential consideration. The subsidence industry will have to keep in mind these issues and approach tree issues with understanding, awareness and professionalism. Environmental issues should now be considered when investigating or recommending any work on trees or vegetation.

Appropriately, the next issue of the newsletter, to be issued in the Autumn, will look at the issues of sustainability and the environmental agenda.

John Wickham and Nick Deakin – Innovation Group

WELCOME NOTE

2008 will mark the 4th Anniversary of the launch of the Subsidence Forum.

The Forum developed from an initial idea by members of ASUC Plus to create a forum encompassing representatives from all elements of the subsidence process for open discussion and mutual understanding of key issues for the benefit of all parties, including our customers.

From this ambitious concept the Subsidence Forum has continued to evolve whilst still adhering to the original concept and I am very proud to take up the Chairmanship following on from my predecessors, Rob Withers and John Parvin.

Key themes for 2008 are :

- To encourage membership from a wider range of organisations involved in claims handling and related fields.
- To encourage our colleagues to specialise in subsidence in an effort to secure succession planning.

The Forum has a continuing commitment to encourage open and honest debate on relevant topics and the Forum should be seen as the natural arena for such debates.

I am encouraged by the positive reaction at the recent AGM of both new and existing members to this concept.

The recent successful launch of the Joint Mitigation Protocol demonstrates that parties with differing views can reach a consensus and with this in mind we are creating an opportunity to continue the debate with the assistance of tree officers and would encourage their involvement in the Forum.

RSA will be launching an updated version of the popular Subsidence Handbook and Forum members will play an active part in this update along with the content of new chapters.

I am leading by example in encouraging younger colleagues within my own organisation to join Focus Groups and meetings to secure future Forum members.

Following on from feedback taken from the AGM, the Executive Committee will be assessing the need for further Focus Groups to ensure that all members have a voice.

Within the Forum, member companies are piloting remote monitoring units and sharing information.

Our new, improved website has been launched and will be a vital tool in discussion and information sharing.

I am looking forward to an exciting year and would welcome any new members to join the Forum and share your knowledge and expertise with your industry for the benefit of your colleagues and our customers.

*Jill Maclean
Chairman, Subsidence Forum.*



BACK TO SQUARE ONE ON TPOs

The case of **Perrin & Another v Northampton Borough Council [2007] EWCA Civ 1353** is an appeal decision relating to Tree Preservation Orders. These are as the title suggests made to protect trees that provide an amenity to local residents and their purpose is to protect the tree(s) from operations that may cause damage to them. The protection is not absolute and the **Town and Country Planning Act 1990** provides under **S. 198 (6)**:

Without prejudice to any other exemption for which provision may be made by a tree preservation order, no such order shall apply-

(a) to the cutting down, uprooting, topping or lopping of trees which are dying or dead or have become dangerous, or

(b) to the cutting down, uprooting, topping, or lopping of any trees in compliance with any obligations imposed by or under an Act of Parliament or so far as may be necessary for the prevention or abatement of a nuisance.

It is the final part of (b) that is relevant to the case. The Claimants maintained that a tree, that was subject to a TPO, on a neighbour's property was causing damage to their property and applied to the Defendants to permit the removal of the tree as it was causing a nuisance. The Defendants argued that it was not *necessary* to remove the tree to abate the nuisance as there were other remedies available, e.g underpinning the property or installing a root barrier, and permission was refused. Such alternative works would be more expensive than removal of the tree.

At first instance the Judge disagreed with the Defendant's approach and stated that where the tree is the cause of the nuisance, the existence of alternative measures to abate that nuisance did not detract from work on the tree being necessary to abate the nuisance.

The Court of Appeal, however, stated that one has to consider that the purpose of the TPO is to protect the tree and read **S 198 (6) (b)** with that in mind. The Judge's interpretation of the word *necessary* was too broad when viewed in this way. In order to preserve the amenity value of the tree the planning authority was entitled to consider if work on the tree itself was *necessary* in a very strict sense and if there were alternative solutions, such as engineered works-e.g. underpinning- which avoided work on the tree then the planning authority could order that those works should be undertaken first.

There is provision under the Act for the Council to pay compensation where permission to undertake work on the tree is refused but in this case the planning officer had argued that as the tree was covered by a certificate specifying it as outstanding amenity value that no compensation should be payable.

The decision affirms the local authorities practice and puts insurers back to square one in having to fund expensive engineered works rather than remove the tree.

John Wickham

PARTY WALL ETC ACT 1996 – 10 YEARS ON

The late John Ansty used to refer to me as the "Parliamentary Midwife" of the Party Wall Etc Act 1996. John alas is no longer with us and his great talent as a man who combined art and culture with the then rather darker art of party wall legislation and practice, is no longer with us. Although he was a perfectionist who realised that some long established principles enshrined in earlier legislation were not going to make it through into the new Act, I venture to suggest that he would probably be reasonably well satisfied with progress to date.

Both existing Party Wall Surveyors and those who are new to the discipline have succeeded in rolling out the application of the 1996 Act with commendable efficiency. Inevitably there have been some teething problems.

Assumptions that underlay party wall practice and procedure in the former Metropolitan Area of Central London did not necessarily hold good out in the provinces. The interface between boundary law and practice on the one hand and party wall procedures on the other was also not well understood and there were the inevitable issues to do with the very narrow definition of those works that are actually notifiable and the potentially wider issues of the Section 10 Dispute Resolution Procedure. Nonetheless, ten years have come and gone in a trice; the Act is still in place and has not needed radical surgery. Moreover, there have been no decisions of the Courts to upset this thought there have been problems with inadequate guidance on the precise form for lodging appeals against Awards.

To say that the last ten years has been totally trouble-free would not however be correct; one of the main difficulties has been associated with firms who have set up in business to capitalise on party wall work but who have approached the matter using some extremely aggressive tactics matched in some cases by a complete lack of professionalism or even knowledge. There is still work to be done in convincing the general public that they do need to obtain competent professional advice though perhaps the same professionals should be making it clear how the better informed property owners can easily do a certain amount themselves.

Nobody can say that the public are not keen to discover the facts; the ODPM (now DCLG) guidance on party wall matters is one of the fastest moving publications of any booklet available to the general public. Whilst celebrating the past and the successful introduction of new legislation (well, new in national terms anyway) perhaps there is a clue here for the future. Professionals will be judged by the degree to which they can de-mystify the process and make the whole issue of party wall procedures as firmly embedded in the mind of those carrying out building projects as foundation depth and competence in construction.

John Lytton
12th June 2007

This article was written for RICS members in 2007 and is reproduced here with their kind permission.

RICS publish excellent guides on a wide range of matters and their Party Wall Guide has been posted on the Subsidence Forum website.

JOINT MITIGATION PROTOCOL UPDATE

The launch of the latest version of the Joint Mitigation Protocol (JMP) was held at the Old Town Hall, Southwark on Friday 16 May 2008. Some 100 or so attended the launch including tree officers, risk managers and loss adjusters to hear Jim Smith the London and Woodland Framework Manager and others give their views on how the protocol will work.

Historically levels of evidence and timescales have not been set. Insurers firstly on the balance of probability have to show that local authority trees are causing clay shrinkage subsidence and secondly for local authorities to take action to abate the nuisance.

The protocol seeks to address this by establishing best practice in the processing and investigation of tree root induced building damage, benchmarking time scales for responses and standards of evidence. It has taken three years of negotiation and effort to reach the point of publication. During the course of negotiations the Forum has been at the forefront and the Protocol Group has included and benefited from the input of insurers, local authority tree and risk managers, loss adjusters, engineers and arboricultural consultants.

The principal aims are to speed up the process of claims handling, decision making and mitigation implementation leading to resolution, while at the same time recognising the value of trees in the built environment and providing local authorities with all the investigative evidence required at the beginning of the process.

Certain timescales are outlined in particular there are 81 calendar days from the time of the first visit to enable the building insurer to collect the stipulated evidence. The level of evidence will vary dependent on the value of the tree which will be calculated using the CAVAT system. (Capital Amenity Value for Amenity Trees). CAVAT is designed not only to be a strategic tool but also to be applicable to individual cases, where the value of a single tree needs to be expressed in monetary terms.

A full copy of the procedure is available on the LTOA web site www.ltoa.org.uk. The trees will be categorised as low (less than £5,300), medium (£5,300 to £17,500) and high (greater than £17,500). It is not intended that the value of the tree will be compared with the value of the works but it is a method for the local authority to place a value on the tree for the benefit of the community.

The local authority has 13 weeks from receipt of the evidence to undertake the mitigation. In certain incidences it will be appropriate to undertake tree reduction rather than removal.

There has been some debate as to whether the protocol should extend to recoveries as well as mitigation but it has been agreed with all stakeholders that it relates to mitigation only.

For the pilot to provide meaningful results more councils and insurers are required to take part and early indications are that this will be the case. A list of subscribing parties will be published shortly

A long term objective recognised by the LTOA is for councils to set up a data base of their pre valued trees and provide remote access to those data bases for Insurers and Adjusters. This would allow the Insurers to agree the level of site investigations at the outset of the claim. The protocol is a significant step towards a new era of co-operation and partnership working between the building Insurers and Local Authorities so that claims will be processed quickly with resident's properties being repaired without unnecessary delay. . - *John Parvin*

Injunctions – what are they and how are they used?

Where damage to a property has already been caused by a tree, the property owner may take the view that “prevention is better than cure” and ask that the tree is removed. If the tree owner refused the only way to achieve this result would be to obtain a mandatory injunction from the Court requiring removal of the tree.

In the recent case of Paula Mills and Mr Holly –v- Dr William Dunne I was instructed on behalf of the Defendant tree owner. HHJ MacKay, sitting in the Technology and Construction Court in Liverpool, provided a useful summary of the case law in this area.

The case involved an ongoing dispute between two neighbours with adjoining properties. In the front garden of the Defendant's property was a large plane tree. The Claimants' alleged this had not only caused damage to their property in the past but was also likely to do so in the future. The Claimants therefore claimed damages and sought a mandatory injunction requiring removal of the tree.

The parties jointly instructed an arboreal expert and an engineer. Both experts agreed that damage to the Claimants' property in 1999 had been caused by the Defendant's tree. The Claimants argued that more recent damage to the property had also been caused by the tree, but the engineer did not agree and his evidence was accepted by the Court.

The damage in 1999 had occurred more than six years before proceedings were started and was therefore time barred. The claim for damages was dismissed and the only issue for the Court to decide was whether the Claimants should be granted a mandatory injunction requiring removal of the tree.

The experts had differing views on the likelihood of further damage to the Claimants' property by the tree in the future. The arboreal expert thought it more probable than not that sometime in the future there would be damage caused by the tree as it was close enough to do so, being within the “zone of influence”. He recommended removal of the tree. The engineer did not agree. He said that the risk of future damage to the Claimants' property by the tree was low, relying on the fact that the damage in 1999 was minor and there had been no damage since then.

Having heard evidence from the parties and the experts, the Judge considered the leading case on mandatory injunctions of Redland Bricks –v- Morris (1970). In this case the House of Lords stated that:

1. A mandatory injunction will only be granted when a Claimant can show that there is a strong possibility of grave damage in the future; and
2. Damages will not be a sufficient remedy to the Claimant if such damage does occur; and
3. The question of the cost to the Defendant of complying with any mandatory injunction must be taken in to account by the Court as well as whether the Defendant has acted reasonably.

The Claimants argued before the Judge that:

- They should be entitled to a mandatory injunction to remove the Defendant's tree based on the evidence of the arboreal expert that it was more likely than not to damage their property.
- The Defendant's tree had blighted their property and affected its value as a result of its presence.
- As a result they should be entitled to an injunction.

However, the Judge decided that because neither expert had said that there was a strong possibility of grave damage, the Claimants' request for the injunction failed. The Judge also dismissed the Claimants' argument that the effect on the sale price of the property was relevant, pointing out that this was a claim for pure economic loss and not recoverable.

The lesson for those seeking to apply to the Court for a mandatory injunction to remove a tree is not to rely solely on the fact that the tree has caused damage to property in the past and is likely to cause some damage in the future.

Before granting the injunction, the Court will require proof that there is a strong possibility that the tree will cause grave damage in the future. The Court will also consider whether an award of damages would be sufficient to compensate the Claimant if that damage does occur and if the Defendant has acted reasonably.

Matthew Rogers

INSURANCE CLAIMS HANDLING PROTOCOL RELATED TO PUBLIC SEWERS

Back in Nov 2002, Post Magazine ran an article entitled "**Loss Adjusters in the dock over sewer subsidence - Loss Adjusters have been accused by the water industry of regularly trespassing and potentially damaging public sewers in their attempts to investigate subsidence claims**". Headline-grabbing maybe, but the underlying issues clearly highlighted the fundamental lack of understanding over the two sides position and that communication between insurers (and their representatives) and water companies needed to improve.

With the support of Severn Trent Water, a working party was established involving GAB Robins, Crawfords and SP Property Services, to exam the issues in greater detail and to formulate a draft protocol in order that drainage issues could be resolved easily and quickly.

Nearly six years on (!), the protocol is ready to be launched with Severn Trent Water and with the proposed changes to private sewer / drain adoption in the 'pipeline', the document will have even greater significance for the insurance industry.

The purpose of the protocol is to:

- Provide effective means of communication between water companies and insurers (and their representatives).
- Publicise a telephone help line, which can be used to check the potential presence of public sewers within a property.
- Ensure that drainage investigations are carried out to the standards set out in the current edition of "The Drain Repair Book" published by Water Research Centre.
- Ensure that any CCTV survey of a potentially public sewer is carried out and report provided in accordance with the current edition of "Manual of sewer Condition Classification" published by Water Research Centre.
- Ensure that CCTV and electro location survey is carried out by either the water company or Water Research Centre accredited contractor, so as to ensure health and safety compliance.
- Publicise an agreed checklist of information, which should be supplied by insurers to water companies, if it is considered that a public sewer has caused, or is contributing to subsidence.

- Publicise a single water company address, to which, all initial claims and supporting checklist documents is to be submitted.
- Set out agreed timescales for responding to claims by a water company.

It is intended that application of the protocol will lead to a professional working relationship in which matters are resolved promptly, in the interests of the homeowner.

It is proposed that the protocol will be initially piloted within the Severn Trent region with a view to a roll-out across the UK with other water companies. A formal launch of this protocol will be jointly organised by the Subsidence Forum and Severn Trent in the future.

Derek Lord (Sewerage Asset Protection Manager) of Severn Trent and Graeme Phipps, (member of the Subsidence Forum and director of SP Property Services) are pleased that perseverance and belief finally paid off! - Graeme Phipps

LEGAL DEVELOPMENTS

The Third Edition of the Subsidence Handbook came out in 2005 and since then there have been a number of legal developments in the subsidence arena. A fourth edition of the book is planned but in the meantime it is worth highlighting the developments on the issue of causation.

The leading case causation in subsidence claims is *Paterson v Humberside County Council* which established the test that you must demonstrate that the Defendant's tree is the "effective and substantial" cause of the damage. If you are able to satisfy the test you will recover all reasonable costs associated with the subsidence damage.

In May 2003 this approach was thrown into doubt in *Loftus-Brigham & another v London Borough of Islington*. The case concerned three limes and a plane tree in the control of Islington which were adjacent to the property's front right hand corner. There was also substantial growth of Virginia creeper and Wisteria, across the front and side-walls of the property, which were owned by the Claimants. Islington denied liability, arguing that the climbers were to blame. The Judge found that, to succeed in their recovery action, the Claimants had to prove that Islington's trees were "probably the dominant cause" of the damage. The Judge decided that the Claimants had failed to convince him that this was the case and rejected the claim. The Claimants appealed on the ground that the Judge had applied the wrong test.

The Court of Appeal accepted that the Trial Judge had erred in his approach and held that "dominant" "carries comparative implications, in a way that substantial does not". Interestingly, Lord Justice Chadwick added "the Judgment... in *Paterson v Humberside CC...* is of valuable relevance to the present case; but that is because it applied general rules up to a factual situation similar to that in the present case, and not because it lays down special rules for cases falling to a narrow factual category".

The Court of Appeal referred to a number of none tree root claims such as the mesothelomia case of *Fairchild 2002*. In *Fairchild* the House of Lords held that all the Claimant had to do was "make it appear that at least on balance of probabilities, the breach of duty caused or materially contributed to his injury". The Court of Appeal adopted the *Fairchild* test of "materially contributed to".

In *Gerard-Reynolds v London Borough of Brent* (2005) His Honour Judge Knight QC considered another asbestos case, *Holtby v Brigham Cowan (Hull) Limited* (2001), and accepted

that both the Claimant and Defendant's trees had an effect on the damage stating "...the effect of the lilac was more of an exacerbatory nature than a primary cause and that a lilac was a contributory factor of less preponderance in terms of effect than that of the plane". However although the Judge found that the plane was the dominant cause of the damage rather than ordering the full costs he apportioned the damage between the Claimants and Defendants trees on an 85/15 split. This is a County Court decision and therefore not binding and is, arguably, wrong but it does highlight the current confusion which has, perhaps, not been helped by the association with the mesothelomia cases.

The recent cases have somewhat "muddied the waters" with regard to what the correct test or causation is, substantial and "effective", "materially contributed" or "dominant" and whether or not if you are successful in proving the test the damage can be apportioned between competing vegetation.

Hopefully by the time the fourth edition of the Handbook is published the position will be a little clearer!

Tom Corrigan- Beachcroft

Case Roundup

Finally, some legal decisions of interest:

- Where there is tree root nuisance does the limitation period run from the date the underpinning works are completed? This is an area where there have been problems due to the tree roots damage being classed as a continuing nuisance. In **Hiscox Insurance v London Borough of Haringey, TCC, Judge Bailey, July 2007**, this argument was rejected and the Judge indicated that the cause of action accrued at such time as the damage occurred, the relevant damage being impairment of the subsoil which manifests as cracking in the superstructure of the property. In other words when the cracks were observed and any damage that occurred more than 6 years prior to the issue of proceedings will be statute barred. As underpinning is intended to arrest damage that is likely to continue, the date that the works were completed had been used previously as the test following **Delaware Mansions Ltd V Westminster City Council (2001)**. However, the Judge indicated that to accept that argument requires the nature of the damage to be re-characterised or the law on limitation to be modified.

- **Raphael v London Borough of Brent [2008] TCC.**, is a recent case on causation. It concerned allegations that the Defendants plane tree had caused damage to the Claimants property. The Defendants had argued that the Claimants evidence, purely level monitoring, was inadequate even though the experts agreed that the level monitoring showed seasonal movement caused by vegetation. The Judge accepted the experts view as evidence that the damage was caused by the tree. That the Court was prepared to attribute causation to the tree on the balance of probability in this way goes against the approach adopted by most local authorities who request a checklist of evidence before accepting a claim that a tree is to blame.

The Judge went further and commented that the fact that the Defendant had taken reasonable precautions to prevent or minimise the risk will not of itself exonerate him from liability. This reflects a practical view that, in most cases, the presence of trees close to properties founded on clay soil is a calculated risk, whatever regular tree maintenance is undertaken

Plexus Law kindly supplied the details of this case.

- In **Mr C Charlton & Mrs N Charlton v Northern Structural Services [2008] EWHC 66 (TCC)** the Court considered a claim in respect of heave damage as a professional negligence claim against the Defendants. Following the discovery of cracking and building movement in a pre-purchase survey the Defendants advised that several mature Leylandii trees be removed. They had wrongly assumed that the soil conditions were sandy whereas they were of clay. As a result once the trees had been removed the clay soil rehydrated with the well known consequence of heave (upward movement of the ground) occurring. The Judge held that the Defendants were in breach of their duty to the Claimants for advising that the trees be removed instead of a recommending maintenance of the trees in such a way that the hydration of the soil was properly managed.

The decision on damages was also of interest. The Claimants property was affected by the stigma of its history and the Judge allowed the diminution in value as a measure of the Claimants loss. This was based on a 2007 valuation because that was the only evidence before the Judge. Normally the value at the date of the breach of duty, in this case 2000, would be used but the Judge was prepared to use the 2007 value though he did not allow any interest on this sum. A claim for compensation relating to having to live in a property for over 5 years with plaster removed from the walls and this was awarded in the sum of £5,000 to cover a family of 5 people over that period. It reflects the Courts general approach to awards of compensation in such cases restricting them to relatively modest sums.

- The case of **Steve Domsalla (T/ Domsalla Building Services) v Kenneth Dyason [2007] EHC 1174 (TCC)** is of interest in relation to an insurance backed reinstatement. The Defendants house had been destroyed by fire and his insurers had recommended the use of the Claimant firm for the reinstatement works. The Defendant had completed a JCT Minor Building Works form of contract but the works were all controlled by the loss adjusters instructed by the insurers. There were delays in the performance of the contract and the Defendant raised issues over the workmanship, eventually the Claimant suspended work and referred the dispute to arbitration under the contract.

The adjudicator found in favour of the Claimant and he sought to enforce the award by an application for summary judgment. It was argued for the Defendant that the contract terms did not apply to him as a residential occupier and that they were unfair under the terms of the **Unfair Terms in Consumer Contracts Regulations 1999**.

The Judge considered the position of the Defendant as being that of agent of the insurers in signing the contract as it was the insurers who would make any payments to the Claimant and who would agree any variations to the contract. Thus the Defendant had little authority under the contract and it was unfair to impose terms on the Defendant that he could not utilise, such as the clause that allowed the Claimant to withhold work and which lead to the arbitration.

The adjudicator had decided that the Defendant was bound by those clauses without considering the Defendants inability to claim a set off and in such circumstances this was unfair to the Defendant and he should be allowed to defend the claim. This is a decision based on its own facts and on the particular contract used. Whilst it may be typical of the arrangements adopted by most insurers it should not be regarded as setting a precedent.

John Wickham

FORUM WEBSITE

The website is currently being updated to incorporate the latest technology and to enable the website to be kept fully up to date and for members to be aware of developments as they happen.

Using the website will be more efficient for the user and the content will be updated regularly for both members and non members.

The website also has an improved forum to encourage members to use this as an area for debate and discussion on current issues within the industry.

The new site will go live shortly and each member will be notified so that they can sign up for immediate access.

If you want mailings sent to more than one person in your company, this is acceptable. Please contact Lauren Fairley at the Subsidence Forum offices.

If you wish to have access to the member's area on the website please remember you must register with your email and password first.

Lauren Fairley

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