



Creative legal solutions that won't cost us the earth
www.treelaw.co.uk

Legal Tree Report

| | |
|---------------------------|--|
| Alleged Damage | Subsidence Damage |
| Property Address | 9 Barnard Way, Bretton, Peterborough, PE3 9YZ |
| Instructing Client | Mr John Hopkins Trees of Peterborough |
| Date | 19 February 2022 |



Confidential – Not to be posted on social media

Instructions

Tree Law is instructed by Mr John Hopkins of Trees of Peterborough to advise in relation to the 'Save the Bretton Oak' campaign and in readiness for a meeting of the Peterborough City Council on Monday 21 February 2022.

My Experience

I am the solicitor owner of Tree Law Limited. I have 20 years of experience working with legal claims involving tree root subsidence on behalf of both insurance companies and local authorities. I am the current Chair of the industry Subsidence Forum and am a member of the London Tree Officers' Association.

Documents

I have seen the following documents:

1. Auger site investigation report dated 24 October 2018
2. Auger drainage investigation dated 1 November 2018
3. CET level monitoring started 23 November 2018 – 27 March 2020
4. CET site investigation factual report dated 19 December 2018
5. Auger geotechnical analysis dated 13 February 2019
6. Auger site investigation report dated 14 February 2019
7. Root sample report dated 5 March 2019
8. Engineering appraisal report of Sedgwick dated 10 April 2019
9. Arboricultural report of Property Risk Investigations dated 30 July 2019
10. TPO statement of reasons for T1 Oak
11. TPO statement of reasons for T2 Oak
12. Application form to remove TPO dated 20 May 2020
13. Peterborough Council decision noticed dated 3 July 2020
14. Arboricultural report of John Harpham of Ethical Arboriculture dated 22 December 2021
15. Notes for Peterborough Council's Scrutiny Committee meeting of 15 February 2022
16. Public document pack – Tuesday 15th February, including:
 - a. Paul Harris Report of 22 December 2021 and
 - b. remedial options chart
17. Youtube recordings of Council meeting 15 February 2022
18. BBC news article

The information that I give in this report is based on my legal experience in this area. Any opinion I give on engineering or arboricultural issues will need to be clarified with an expert of suitable experience and qualification in those fields.

Background

The property involved in this claim is 9 Barnard Way, Bretton, Peterborough, PE3 9YZ (“the Property”). The Property is a detached house which was built in around 1998/1999. There is a conservatory to the rear of the Property which we understand was added by the previous owners and without securing the relevant approval from the Peterborough City Council planning or building control.

In around summer 2018 the owners of the Property noticed crack damage at the Property and notified their insurers of a claim. For confidentiality purposes we do not know the identity of the owner of the Property or their buildings insurer as that information has been redacted in the documents that we have seen.

Summer 2018 was a hot dry summer and has been noted in the industry as being a ‘surge’ event year as there was a significant increase in the number of claims made to insurers for subsidence damage, when compared with a normal year.

Once the claim was notified, insurers instructed Sedgwick loss adjusters to investigate. Site investigations were started in autumn 2018 and level monitoring of the Property began in November 2018. An Arboricultural report was prepared in July 2019.

The site investigations showed:

- The Property is founded on a clay soil
- Damage to the Property is moderate, as per category 3 of the BRE guide
- Crack damage to the conservatory and to the living room and hallway
- There are 2 Oak trees to the rear of the Property which need to be removed. T1 in the Property garden and T2 to the outside of the rear garden adjacent to a public path. Both Oaks are protected by a Tree Preservation Order
- The conservatory foundation is 850mm deep
- The Property foundation is 1300mm deep
- Live Oak roots were found beneath the foundations of both the conservatory and the main house. Roots down to 1500mm beneath the conservatory and 2300mm beneath the main house

Sedgwick’s initial engineering appraisal report followed in April 2019 and concluded, having seen the site investigation results, that the cause of the damage was likely tree root induced subsidence and that the Property could be repaired by robust superstructure repairs. They recommended mitigation works to prevent ongoing damage.

PRI arboriculturalists were instructed to provide a report into the influencing trees and the mitigation work required. That report concluded that 2 Oak trees to the rear of the Property needed to be removed in order to stop the ongoing movement of the Property. These trees were labelled as T1 and T2. Both are Oak trees. T1 in the garden of the Property and T2 to the outside of the Property boundary, adjacent to a public path. Both Oak trees are protected by a TPO – TPO 06/00004.

An application was made by PRI to the planning department of the Peterborough City Council on 20 May 2020 for permission to remove T1 Oak tree. Following the application the Council contacted PRI to confirm that T2 was also protected by the same TPO and to ask if this should be included as well. PRI replied by email that they understood that T2 was owned by the Council but, after an

initial error, confirmed that it also needed to be removed. PRI sent a statement of reasons for the removal of both T1 and T2 to the Council. The Council replied that the ownership of T2 was still not clear.

Following these email queries, the Council's decision notice was issued on 3 July 2020. That notice granted permission for the felling of both Oak trees, T1 and T2 subject to generic conditions around replanting and a 2 year timescale for removal.

It is understood that T1 Oak has been removed from the garden of the Property. We presume that level monitoring continued past March 2020 as it is standard practice to continue monitoring following tree removal to show that removal has effected stability of the Property. We do not know what effect removal of T1 has had on returning stability to the Property, whether any further tree works are needed now that T1 has been removed, and what the scope of the required repair works to the Property is.

The issue surrounding the removal, or not, of T2 is the cause of dispute in this matter. The council have obtained a report from Paul Harris, engineer.

We note that number 10 Barnards Way has now also suffered crack damage and Sedgwick loss adjusters are involved in that claim. There is reference to that claim progressing as at January 2022. We have not seen any site investigation evidence in relation to that claim or know whether a conclusion has been reached that T2 is a cause of that damage. It is too early to make any comment in that respect.

A CAVAT value has been put on T2 of in excess of £300,000.

Monitoring results

I have spoken to an engineer that I regularly use in tree root subsidence cases and his comments on the monitoring results are that they are consistent with tree root subsidence and not heave:

Level Monitoring

From Nov 18 through to May 19, this suggests recovery. However, from Jun 19 to Sep 19, downward movement occurs to stations 10 and 11 mostly (rear lefthand corner of the rear conservatory). Recovery then occurs through to Feb 2020. The range of this movement (maximum to minimum) is around 8-9mm which is slightly higher than the threshold of 5mm for level monitoring whereby structural movement starts occurring.

The remainder of the monitors show fairly static movement within a permissible range of 5mm

Crack Monitoring

Crack monitors are more pronounced with max to min range of 8mm (high level between house and conservatory) which is well above the threshold of 1mm.

I would suggest that the results show a pattern of seasonal movement to the rear section of the conservatory which is causing a more pronounced pulling away mechanism from the main house.

Issues for consideration

I make the following observations on the evidence and factual scenario in this claim:

1. The ownership of T2 is unknown at this point. Whilst the Council are the planning authority responsible for TPO 06/00004, they have not established whether they are the tree owner. They set out that they would have deemed responsibility for the Oak as they have taken-on the maintenance works to the area of land on which the Oak is situated
2. The application to remove the TPO was only made in respect of T1. The Council treated the application as if it applied to T1 and T2 and provided a decision notice consent to removal of both trees. It is arguable that due process was not followed in relation to the application under the Town and Country Planning Act 1990.
3. The Council feel under a pressure of time to act to make the decision to remove T2 before the 2 year timeframe in the decision notice expires in July 2022. Given that the decision notice should not apply to T2 and given that the Council are both the tree owner and the planning authority it is unclear why this deadline is putting them under so much pressure as it is arguably irrelevant.
4. T1 has been removed since the decision notice. We have not seen monitoring which would have followed that tree removal. That monitoring will provide an indication as to whether there is continued movement as a result of the ongoing presence of T2. If the Property stabilised following the removal of T1 there could no longer be any need to remove T2. Any influence which T2 might be having on the neighbouring property of number 10 is not known yet. We would need to see the site investigation results linking T2 to the alleged damage. In short, there may no longer be a need to remove T2.
5. Based on what I have seen it seems that the damage to the Property is likely to be tree root subsidence damage. The monitoring does not support the suggestion that it is heave damage. The monitoring does, however, show the movement is minor and only just outside threshold movement of 5mm for level monitoring where structural damage occurs.
6. I agree with the comments that Paul Harris makes in relation to heave. Heave is rare, it comes from the reswelling of a clay soil underneath a property's foundations. He is correct that removal of the T2 could pose a risk of heave damage to the Property and other neighbouring properties due T2 being older than the surrounding houses and those houses would have been built on a soil already dry from moisture removal by the Oak. If you build a property on those dry soils and then remove the Oak, the soil will rehydrate and swell past the point at which it was when the houses were built, thereby posing a risk of damage to the properties by that upwards movement. Heave assessments would need to be done to see whether this was a risk. If the Council are asked by the Property insurers to remove T2 and that removal causes heave to the Property then the Council are not liable for that damage, however, unless a heave indemnity is provided by the insurers of the Property in relation to possible damage other properties, the Council could be liable if heave damage occurs to other properties in the area.

7. There is reference to the foundations of the Property not taking into consideration the presence of the tree. That is true, the foundations do not seem to have been built deep enough to keep the Property stable in the presence of the well established tree. The foundations of the house are 1.3m deep, with roots from the tree found at 2.3m and the conservatory is 0.85m deep with roots found down to 1.5m. However, in law, this does not mean that the tree owner can avoid liability as it is no defence to say that the Claimant 'came to the nuisance'.
8. There is some reference to differential movement as the cause of the damage. This is where two parts of one Property are built on different foundations meaning one part is more stable than the other and cracking occurs where they are both influenced by different extents. For example, the cause of the damage could be the shallow foundations of the conservatory causing differential movement with the house despite roots being found beneath the house foundations. The comments on the monitoring suggest this is the case.
9. The Council make some observations in the agenda note of 15 February 2022 which are incorrect. At paragraph 4.3.3 they say that failure to follow the advice of the Property insurers on tree removal would render the Property uninsurable, therefore affecting its market value. I note there was also comment in the meeting itself of the Property becoming worthless. This is not correct. The Property would not be uninsurable if, for reasons outside of the control of the Property's insured, the causative factors could not be addressed. The issue regarding Property value is not straight forward. Once the insurers deem the Property to be stable (whether as a result of tree removal, root barrier, underpinning or any other solution) the value of it should be as if the claim has not happened.
10. At paragraph 4.5.5 the Council say that the original damage may have been unforeseeable to them but that now that they know about the damage all future costs are uninsurable. That is not correct. The insurers of the Property will still cover their insured in respect of the cost of repair works from the point at which the Council were put on notice. However, what this does mean is that any additional costs incurred as a result of the Council's actions (or inaction) from the point at which the Council were on notice of the damage, the insurers can seek to recover from the Council at the end of the claim, in a claim for legal damages.

Possible solutions

The solutions that are suggested are as follows:

1. Retain T2
2. Prune T2
3. Fell T2 and replant
4. Root barrier
5. Substructure stabilisation works to the Property

I have some observations on the possible solutions and some inaccuracies that I feel that there are in those solutions and the feared cost.

The Council are right to have established the CAVAT value of T2 so that a financial 'balancing act' can be done with the tree and the possible repair costs.

Reference to root barriers being too difficult across land of multiple ownership seems to be an irrelevant point here if the barrier would be between number 9 and 10 as both of those properties would appear to be likely to consent given that they have both suffered damage. Root barriers are quick to instal and can be extremely effective and allow for a tree and properties to remain in harmony. Note a root barrier can result in roots being severed so a TPO application to allow for that to be installed might need to be made given that we do not think that the TPO application already made correctly extends to T2.

Since this claim started other repair solutions have come to the market. Insurers are now using geotechnical polymer injection as a quick repair scheme and an alternative to underpinning in the continued presence of a tree. This would seem to be an option worth considering here given that it is quick, of reasonable cost and would allow T2 to remain. Sedgwick will be able to advise insurers on this option. Rehydration schemes are also a lesser used option which could be considered.

I think that a fear that damage to adjacent properties will result in a legal claim against the Council which will run into the hundreds of thousands is unfounded. For the moment I am confident that the CAVAT value of T2 will far exceed any claim for damages that the Council might face. Note there is no suggestion at the moment that a claim for damages is actually going to go ahead. The insurers of the Property have until April 2024 (6 years from the onset of damage) to go ahead with that legal claim.

Conclusion

My conclusion at this point is as follows:

- The damage to the Property is relatively minor
- The evidence suggests that the Property has suffered damage as a result of tree root subsidence
- In respect of the Property, the Council will not be liable for the cost of the damage which happened before they were put on notice (in 2019/2020). It is possible that following removal of T1, no stabilisation works are needed to the Property in which case there will be no claim for damages which the Council should pay as all of those costs incurred will be unforeseeable.
- We need more information about what has happened to the Property since the removal of T1
- We need more information about what has happened at number 10

The Council might face a claim from the insurers of the Property in negligence/nuisance to recover the cost of the repair works to the Property. At the moment we do not know how much money they ended up spending to repair the Property. If T1 stabilised the Property there is a chance that no claim will go ahead. The Council can only be pursued for the cost of the works from the point at which they were on notice of the damage and providing those repair works are reasonable.

The Council are worrying about being exposed to hundreds of thousands of pounds of legal damages. I do not think this is correct. The Council need more information to correctly make their financial balancing act between:

CAVAT Value of £300,000 – v – Cost of reasonable repair
works to the Property

An ideal way forward here would be for the Council to put further consideration of what work to do to T2 on hold and gather more information. For the reasons I set out above, I think the time pressure of acting before July 2022 is irrelevant.

This gathering of more information should start with a without prejudice meeting with Sedgwick to discuss the missing pieces of information from the claims at number 9 and 10.

Since this claim started in 2018, the position with insurers and the obligations they have to consider environmentally sustainable options has changed. Those insurers should be willing to discuss and work together with the Council to reach a solution which can be accepted by everyone despite their main obligation being to give their insured a lasting repair of their property.

Depending on that information the Council might then want to obtain their own expert engineering report and Arboricultural report into what work, if any, should be done to T2. Experts with past experience in claims such as this should be used. I would recommend:

- Tim Pither, Engineer of Subtilis Consulting
- Dr Dealga O'Callaghan – Arboriculturalist

What can be done to force the Council?

Whilst my conclusions are above, there is a chance that the Council will not want to accept this way forward.

In the near future the Council would be obliged by law to consult with residents before removing their own trees. This is the new 'duty to consult' which has been launched by the Environment Act 2021. However that doesn't come into force until later on this year as DEFRA are only now writing some guidance about what Councils must do to comply with this duty.

Therefore as local residents you only have a couple of options to object to the Council's action:

1. Raise a complaint pursuant to the new route within the Environment Act 2021 – with a possibility of being able to raise a complaint to the Office of Environmental Protection. This is a brand new avenue for people to hold public bodies to account on issues of environmental law. This should be able to be done now, even though the Act is still new.
2. Consider a possible judicial challenge of the planning decision to remove the TPO given that the application did not relate to T2
3. Apply to the Court for an injunction to prevent the Council removing T2. This has been done in other press covered Oak cases and involved protestors getting Extinction Rebellion involved in their claim.

I list those options in order of cost. The complaint will be cheapest but unlikely to really result in much action. The injunction will be incredibly expensive and would require tens of thousands of pounds in legal costs to pursue effectively.

Sarah Dodd
Tree Law
19 February 2022