



Tree Root Nuisance

The recent summers of 2018 and 2022 have been among the hottest and driest on record. These weather conditions have resulted in an increased volume of claims submitted to property insurers involving subsidence damage to buildings.

The effect of prolonged dry weather is the shrinkage of clay subsoils and the downward movement of buildings constructed on these soils. Where there are trees in the vicinity, extracting moisture from the subsoil, the risk of building movement and damage increases.

The consistent increase in subsidence damage claims in recent years has seen the formation and development of specialist mitigation firms who investigate and assess the causes of a particular subsidence incident. Where trees are identified as a causation factor, these mitigation firms approach the tree owners and request tree removal, often supporting the interested property insurers or their appointed solicitors.

Claims involving tree root encroachment and the extraction of moisture from neighbouring land are generally pursued as a private nuisance action. The law of nuisance identifies a balance between the opposing interests of neighbouring landowners. This is reflected by the McLarens strategy, to investigate the circumstances and determine a fair and transparent resolution, whilst applying the relevant law and professionally representing our instructing principals.

The reasons for this approach are as follows:

The defendant tree owner, generally our principals, will be concerned at the asset and amenity value of the tree at the centre of the claim. They will expect a full assessment of the circumstances rather than a capitulation to the likely claimant argument that the tree has little or no value.

It is likely that the claimant will be a homeowner and a resident within the local authority. Not all claimants will have insurer or legal representation. They must be treated fairly, and this approach must be apparent.

McLarens instructing principals can be:

- local authorities
- rail and tram operators
- property owners/occupiers
- rural landowners.

Our approach to professional casualty claim handling is designed not to risk complaints of unfairness to councillors or ombudsmen.

The following is an example of a mitigation request and prospective claim that might be referred to McLarens Casualty Team for attention.

“We act for the owners and insurers of the mid terraced property at 12 Park Road. The rear extension of the property is affected by subsidence caused by an oak tree in the park at the rear of the property. The tree is under your control and you are requested to remove it.”

The local authority responsible for the park seeks advice on whether they should remove the tree and therefore agree to the request for mitigation. The tree is an attraction within the park and has a significant amenity value.

The following enquiries arise:

- When was the property extension constructed and at what depth are the foundations?
- Does the geotechnical evidence presented by the mitigation firm show the presence of oak tree roots beneath the extension foundations?
- Does the geotechnical evidence show dehydrated subsoil beneath the foundations where the roots are located?
- How tall is the oak tree and what is the distance of the tree from the extension?
- When was the subsidence damage first observed? Has this followed a period of hot dry weather?

The basis for a successful request for tree removal/mitigation is evidence that roots from the tree have encroached onto the property owners land and have caused damage by drying the below foundation subsoil to the extent it is desiccated and causes building movement.

McLarens would analyse the geotechnical and arborist evidence presented by the mitigation firm and consider whether such evidence implicates the tree as causative of the subsidence damage. Does the evidence show significant subsoil desiccation? Are there roots from other trees implicated?

If subsidence damage affects a relatively modern extension, is it confirmed that the extension was built with full regard for the trees in the nearby park. Property owners are perfectly entitled to build on their land, but regulations and guidelines exist regarding building methodology and foundation depths in the vicinity of trees.

Is there evidence that the tree is a dominant cause of the subsidence damage? Will the damage continue or occur again in the future even if the tree is removed? Geotechnical evidence as to the moisture content of the

subsoil beyond the area influenced by the tree is important data and should be requested as evidence that the tree is an effective cause of the subsidence.

It is the McLarens approach that the data should be assessed and discussed with the tree officer from the local authority or other professional body so that an informed decision can be made regarding tree removal.

In most situations, requests from mitigation firms for the removal of a tree are followed by claims made by solicitors or insurers, against the tree owner, for the cost of property repairs consequent upon subsidence damage.

Consideration of these claims involves the previously mentioned assessment of encroachment and causation followed by the consideration of a third test – foreseeability.

The legal position is that the owner of the tree must have been on notice that the tree presented a real risk of damage to the property prior to the damage occurring.

In recent years the legal pendulum has swung away from the previous “rule” that all tree root damage was foreseeable to a local authority or rural landowner on account of their knowledge and experience of such matters. Legal authority since 2012 requires claimants to show that the tree owner was on notice that a particular property was at risk.

The pendulum has not moved entirely to the side of the defendant tree owner. There are still arguments available to the claimants based on the knowledge of the tree owner. Taking the previous example of the oak tree in the park, foreseeability is likely to be established if the tree owner is aware that its presence has previously caused damage to properties in the same terrace of houses.

The law of nuisance and the handling of tree root claims is a developing area consequent upon the increasing number of claims and the increasingly varied circumstances that result in new and different legal arguments. The experience of the McLarens Casualty team allows us to respond to these developing situations, supporting our instructing principals in the process. We remain alert to the arguments and demands from claimants and also the environmental, fairness and regulatory policies that influence the handling of these liability claims.

Contact the Casualty Team



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