Dry weather can have consequences for the insurance market — in particular, the risk of increased subsidence claims. If soil is not hydrated sufficiently, clays and other shrinkable soil types lose some load-bearing capability, and buildings can suffer associated damage.

It has been suggested in the press that claim numbers for 2018, the driest and warmest year since 2006, are 10,000 above those experienced in 2017, with an overall increased exposure of £64m. The last time there was such a ‘surge’ in claims was 2006 – an unusually long break of 12 years.

Claims against domestic Defendants are now rare, with the Association of British Insurers having put in place a Domestic Subsidence Agreement. The increase in first-party claims will however result in an increase in recovery claims against commercial including, in particular, local authorities.

In this article, Adrian Foster, Associate Director – Liability of Charles Taylor Adjusting, discusses some of the issues that may arise when making a recovery claim due to tree root nuisance. He draws on existing case law which may be helpful to claimant & local authority insurers pursuing & defending subrogated recoveries and provides some comments on quantum and reserves, noting that these claims are often complex to resolve.
What is subsidence?

Subsidence causes cracks to open up within the walls of a property, usually around weaker areas such as the openings of doors and windows. The Building Research Establishment has published guidance (BRE 251) categorising such cracks, with categories 1 to 3 capable of cosmetic repairs and categories 4 and 5 requiring some additional structural work.

Given that weather is transitory, if a property is affected by cracks in categories 1 to 3, the damage should be limited, and the cracks may well close up as the clay rehydrates to its normal equilibrium. If the cracks are more severe, other works may be required (for example, underpinning, piling, strapping, etc.).

Most buildings move up and down as the soil hydrates (in winter) and dehydrates (in summer), but those influenced by tree roots will show increased downwards movement closest to the tree(s).
The Initial Claim

The recovery claim will often be submitted via solicitors, or the adjusters handling the first-party claim, acting on behalf of the relevant insurers. Their claim should include as much as possible of the following documentation, though clearly some – in particular, monitoring results – may be missing if the notification has been made at an early stage. This is not a criticism, as an early notification ensures that investigations can take place and the Defendant should be allowed to take "reasonable steps to prevent the loss" as per Robbins v London Borough of Bexley[2013] EWCA Civ 1233.

1. Description of the type of damage.

2. A drainage survey.

   Any defects within, and leaks from, the drainage will influence the tree roots’ location and their activity – when it gets dry, the roots will be drawn towards the water, so the drains need to be repaired (promptly), after which the 12 months monitoring can start.

3. Monitoring of seasonal movement of the building over a 12-month period.

4. Levels and distortion survey.

5. Visual evidence of the damage.

6. Confirmation of the depth of the foundations.

The foundation depth needs to be recorded for both the main property and also any extensions. The Building Regulations came into force in England in 1965, with Building Control thereafter inspecting foundations to ensure they are a suitable depth before they are filled with concrete. A more helpful date is 1992 when the NHBC published guidance for new-build properties. Chapter 4.2 of the NHBC guidance covers foundations and trees, and provides a chart for calculating the depth of house foundations when proximate to trees - the tree type, height and water demand giving a foundation depth. If a new build fails to have adequate foundations then subsidence may occur as a consequence and this may not be foreseeable from a Council's perspective (Berent v Family Mosaic Housing Ltd [2012] EWCA Civ 961). Further, if an extension – such as a porch – has different foundations to the main structure, differential movement may occur as the foundations move at different rates. This again may not be foreseeable and may in fact be unavoidable – see, for example, Burge referred to below.
7. Analysis of the soil under the foundations.

Soil analysis will confirm if the soil type (for example clay) is subject to seasonal shrinkage, though there is a UK plan showing this information generally and a particular Council should have records of the soil types in its area.

8. Details of the trees present on and around the site – this will usually be a plan.

The tree plan should be checked and ownership of the trees confirmed. It is not uncommon for there to be a dispute over the ownership of trees on a boundary line. If necessary, Land Registry entries can be checked to see if they assist in confirming ownership (see below). Also, do check to see if any of the trees are recent additions – the warm and dry summer may initially explain why movement has now occurred, but it is quite possible the Claimant or neighbour has also planted new trees, prompting an existing mature tree to search for a new source of water.


Tree roots need to be within the Claimant’s property boundaries and normally at a point where it can be shown that they would influence the foundations. As a general principle, trees can draw water from neighbouring properties and only in exceptional circumstances will a nuisance arise from natural water (itself) above or below land (see, for example, John Green v Lord Somerleyton [2003] EWCA Civ 198). Often the roots are found within the trial pit used to find out the foundation depths and it is those samples that should then be tested for type.

10. Evidence of causation between the Defendant’s trees and the damage.

11. A schedule of the remedial works proposed – this will provide the cost of remedial works after the trees are removed, but it may also outline underpinning costs in the event that the tree(s) are not removed; the latter can be compared to the trees amenity value (see below).
Background Enquiries

Following notification of the claim, it is then vital that the claims background is obtained and fully understood. A Land Registry search may be required to confirm who owns the land as well as the trees – for example, school grounds may be the property of the school governors, a diocese or academy, even if the local authority has some tree inspection role or has arranged the relevant insurance.

The insurance background should also be checked. Nuisance causes damage over time (e.g. Kelly v Norwich Union [1989] 2 Lloyds Rep 333 CA) such that a ‘damage occurring’ insurance policy will only respond to damage occurring during its period of cover and therefore previous insurers should be notified.

In addition, check (and double-check) whether there has been a previous claim – if there has, the Council will have been on notice and documentation will already exist which may assist in the current investigation.

Google Earth will provide a helpful plan of the site and neighbouring properties. Its time-lapse feature will also confirm if there have been any alterations to the property concerned or if any trees or other vegetation have been planted or increased in size, thus increasing the water demand.

The Council should have inspected the tree concerned and should have an inspection programme. The inspection interval will be dependent upon the type of tree and risk: highway trees are inspected according to the road grade and other factors, with those on private land having their own timescales. It should be noted that inspections focus on the risk of personal injury created by the tree and thus it does not follow that liability will arise for property damage if that timescale is not followed. For example, in Witney Parish Council v Andrew Cavanagh [2018] EWCA Civ 2232 a tree branch failed, causing serious injury to a bus driver. The tree’s location made it high risk and it should have been inspected every two years, yet this may have no bearing on its risk to cause property damage through the action of its roots below ground.
Subsidence claims involve the Defendant creating a nuisance with an ongoing state of affairs – specifically, tree roots growing within land owned and used by the Claimants. As such, the claim can be split into two elements – the removal of the nuisance and then any claim for damage caused whilst the nuisance was ongoing.

Removal of the nuisance is mitigation and the costs will not normally be covered by a third-party liability policy (Yorkshire Water v Sun Alliance [1997] 2 Lloyds Rep 21). If the nuisance is not removed however, the damage will almost certainly increase (with the potential for costly underpinning being required) and the Insurer’s exposure will increase, so many liability insurers will look to get this aspect resolved (as soon as possible), particularly if the Council is self-insured.

The Claimants should be asked to stipulate which trees they want removed and why. This places the onus on them to decide what is reasonably required.
Whether the Council agrees to remove the tree will depend upon a number of factors and each case must be judged on its merits:

1. The amenity value of the tree. There are now recognised systems (such as CAVAT – Capital Asset for Amenity Trees) for placing a financial value on tree(s), and those in urban environments can be worth a significant sum. A Council will not wish to remove a tree with an amenity value close to or exceeding the cost of repair. Conversely, if Google Earth shows the trees concerned are one of many or are of little significance, it may be easy to persuade the Council that the Claimant’s request for their removal is appropriate.

2. The tree may be in a conservation area or there may be local pressure groups keen to maintain tree levels such that the Council needs to liaise before the tree is taken out – whether it is replaced with a smaller more manageable variety or not.

3. The tree(s) may be covered by a Tree Preservation Order (TPO) as per Section 198 of the Town & Country Planning Act 1990. TPOs are managed by the Council through a Tree Preservation Officer, but his role is defined in statute and can be subject to separate judicial review – in other words, there is no favouritism. A copy of any TPO needs to be reviewed as it may allow for compensation, in which case, this may impact on legal and policy liability (see Burge below). Variation of a TPO is via an application and there is no harm in suggesting to the Claimant’s representatives that they make a request for any variation directly, thus ensuring they have submitted everything required and there is no suggestion of bias over any decision taken.

4. Planning permission. With modern developments, it is not uncommon to find that mature trees on site have ‘absolute’ priority. Thus to pollard or remove them (without good reason such as a risk to public health) would breach the site’s original planning permission. If the tree is older than the house concerned, any restrictions may be on the land registry entry or in the original planning permission (if the Council has kept a copy). In such cases, the foundations should have been constructed to the depth required (e.g. by the NHBC guidelines) taking the tree into account, albeit, on occasion, this can be overlooked and a more conventional 1m foundation adapted for a new build or later extension.
Legal Liability

As this is often a complex matter, we will provide a brief overview. Further, it is well accepted that liability in nuisance is subject to a test of foreseeability and, in particular, that Councils have the benefit of expert opinion and their knowledge will be judged accordingly. The Claimant need only show that the tree materially contributed to the damage to the property, not that it was the sole cause (see *Loftus Bingham v London Borough of Ealing* [2003] EWCA 1490). There are however a number of points that allow for some arguments on liability.

The bulk of the existing case law concerns a local authority’s role as the ‘authority’ in accordance with the Highways Act 1980. It does not follow that academies, leisure centres and some other non-statutory bodies operating from private land will have the same obligations.

A Council is entitled to assume correct building practice has been followed such that if the damage has been caused by below-specification foundations, liability can be denied [see Berent]. It should be noted, however, that normally the Defendant must take their victim as they find them, so this argument will not apply to old properties – where the quality of foundations is guesswork – and once the Council is aware that the foundations are not to standard, they are on notice that additional mitigation may be required.

If removing the tree would create a real risk of heave (the building moving back up, causing further damage), then liability for any existing damage can be denied – see, for example, *Denness v East Hampshire DC* [2012] EWHC 2951. If the Claimant still wants the tree removed, the Council agrees to do so and there is a risk of heave, then the Claimant can be asked to sign a disclaimer stating they accept such risk.

In the case of highway trees, whilst the local authority may have a non-delegable duty under the Highways Act, it may subcontract day-to-day management to a third-party contractor. The indemnity clauses within that contract may be material to who has ultimate liability or who should be handling the claim in the first instance.

Finally, with respect to liability, the right to pursue the claim rests in the land such that a new owner may pursue a claim for damage done before his purchase (*Delaware Mansions v Westminster City Council* [2002] 1 AC 321), though a Court may award a limited nominal sum for diminution in market value if the property was purchased with the knowledge of the damage and the purchase price was negotiated and reduced accordingly.
Quantum

Where subsidence is severe and underpinning, piling or strapping, etc. is required, it should be ascertained whether this results in any betterment and double-checked as to whether there are other factors at play.

The cost of cosmetic repairs may be limited to a four-figure sum. Underpinning rarely costs less than £30,000 and can cost much more when alternative accommodation and engineers’ fees are factored in.

In addition to the cost of repair, the Claimant’s Insurer’s representatives will seek to recover the costs of their investigation. These can be significant as engineers, arboriculturists and trial holes will have been involved in monitoring over a 12-month period. In some cases, there will have been more than 10 visits to the property. The case of *Khan & Khan v Harrow Council & Kane [2013] EWHC 2687 (TCC)* is often pleaded to support such costs being recoverable; however, the judge only allowed the costs claimed for supervision of the reinstatement work itself (the work needed supervision) as opposed to the adjusters’ and surveyors’ costs of investigating the matter for the Insurers concerned. We would contend that Khan will rarely be followed with low-value claims as the experts will have been appointed in any event and their costs will be seen as a claims-handling cost paid for directly by the first-party insurers – as this is the case, the Claimant will have no liability to pay those costs and thus there will also be no claim in subrogation. Further, the case of *Cuthbert v Gair [2008]* is authority that adjusters’ and experts’ costs are only recoverable as a disbursement if the instruction is via a solicitor and not by insurers directly.
Distress and inconvenience may be awarded on claims involving substantial underpinning, but in accordance with *Berent v Family Mosaic Housing Limited* [2012] EWCA Civ 961, damages are unlikely to exceed £1,250 per person resident in the property per year of inconvenience.

There are many innovative alternatives to underpinning or removal of the tree. For example, a root barrier located within the property’s garden can provide long-term protection. This can be explored if underpinning or piling is being considered.

The investigation of claims for tree root encroachment can be complex. Visits are often required to the Council’s offices and site, and the collation of documents and evidence can easily take up to 12 months. Where the damage falls within categories 1 to 3 (of BRE 251), there is often an imbalance between the cost of repair and handling costs, particularly if there are TPOs or other restrictions stopping the removal of the offending trees. The 2016 case of *Burge v South Gloucestershire Council* [2016] UKUT 300 (LC) requires specific mention. It also relates to damage in 2006. The Claimant sought damages from the Council due to the Council’s refusal to remove an oak tree protected by a TPO. There is a provision with s.198 of the Town & Country Planning Act 1990 for the TPO to include payment of compensation, but the specific TPO needs to have the detail of the compensation contained within it. The Court held that, without this, there was no general right to compensation. Of note, this case involved damage to a conservatory where the foundations were 400mm deep as opposed to the main house where they were 1,200mm. The oak tree – albeit at that time unprotected by the TPO – existed for many years before either were built.
Conclusion

It remains to be seen whether the 2018 surge will create any new case law. If it does, it is likely to involve the use of CAVAT or similar surveys to determine what is reasonable, with a Court being asked to find there was no nuisance. Inspection intervals will become a hot topic given Witney above. It is also possible that Burge will be challenged – in particular, with an argument that the Council owes a separate duty in tort, though it is reasonable to expect a Court to rule that the Town & Country Planning Act 1990 is a self-contained piece of legislation (following similar principles to Marcic v Thames Water [2003], and the application of the remedies with the Water Industry Act (1991).

In the meantime, 2006 case law shows that liability for tree root nuisance is not always deemed to lie with the Council, especially where inadequate foundations or differing foundation depths between a house and its extension are concerned, or where the removal of a tree could infringe protection orders or cause a property to heave.

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