

Subsidence recovery: the burden of proof



Maximising the prospects of recovery from the outset

Tree root induced subsidence is caused by extraction of moisture from subsoil by the roots of trees. The extraction of moisture causes the volume of the soil to shrink, undermining properties' foundations and is by far the most common cause of subsidence damage to properties in the United Kingdom.

When the policyholder reports signs of cracking, the assumption might invariably be that the cause is vegetative and ground investigations to identify the presence of roots and soil moisture deficit will follow as standard.

Where the material damage claim is concerned, these investigations inform claims handlers' approach to reinstatement. However, when it comes to the recovery, these investigations are the means of evidencing legal causation, the burden of which rests with the Claimant.

The standard of proof, for recovery purposes, is whether the Claimant has established, on the balance of probabilities, that the tree was an 'effective and substantial cause' of the damage – *Loftus Brigham v London Borough of Ealing* [2003] EWCA Civ 1490.

Practically, in order to evidence that a Third Party's tree is the effective and substantial cause, the following criteria will be key:

- the presence of a shrinkable subsoil
- evidence of soil moisture deficit
- evidence of roots at the underside of the property's foundations
- a pattern of seasonal cyclical movement.

Together, evidence of these criteria will be highly persuasive of a vegetative cause; however, site investigations will not always provide evidence of each and every one of the key criteria.

Tree root induced subsidence cannot prevail without shrinkable subsoil and it is fair to say that without evidence of this, it would be very difficult to satisfy the standard of proof; however, it is unlikely that damage would be attributed to tree root subsidence in the absence of shrinkable soil.

By contrast, claims handlers may reasonably draw a conclusion of tree root subsidence despite the absence of certain other key criteria. Whilst it by no means precludes a vegetative cause, it can present a significant hurdle when striving to meet the burden of proof for recovery purposes.

Therefore, claims handlers should always weigh up the costs of obtaining additional site investigations against the benefits to maximising recovery prospects down the line, even if these additional site investigations may appear surplus to the requirements of the material damage claim.

Site investigations are not only necessary for evidencing the key subsidence criteria, but also for eliminating alternative causes. If the Third Party can venture a credible alternative cause based on the site investigations, or lack thereof, the standard of proof may not be met.

Perhaps most persuasive in evidencing tree root induced subsidence is monitoring, and specifically level monitoring, which is invariably more informative than crack monitoring. Level monitoring demonstrates the pattern of movement of the foundations of the property through the seasons. Tree root induced subsidence produces a unique cyclical pattern of movement, which reflects the dehydration of the subsoil during the growing season and the rehydration of the subsoil in the winter, when trees' roots are no longer functionally active and there is typically more rainfall.

A seasonal cyclical pattern of movement evidenced by monitoring will go a long way to rebut any argument from a Third Party of a non-vegetative cause. However, it will then be necessary to evidence that the vegetative cause was the Third Party's tree, rather than one under the ownership and control of another party, or indeed the policyholder.

Not uncommonly, roots associated with the implicated tree are not present amongst those extracted during ground excavations. However, without roots the Third Party will certainly argue that, whilst the cause may be vegetative, there is no evidence to implicate their tree. Practically, instructing contractors to return to site to harvest additional roots is inexpensive and something that could dramatically improve the recovery prospects.

Level monitoring can also be highly persuasive in distinguishing between more than one vegetative cause. Where there is more than one implicated tree, level monitoring will provide an indication of where the most pronounced damage is, and which tree is most proximate to it. Level monitoring may also provide evidence of ongoing movement after the removal of one of the implicated trees, which will support the conclusion that the other was the effective and substantial cause.

Notwithstanding the above, if there is more than one implicated tree, the Court does not take the view that legal liability should be apportioned based on their respective influences.

'Apportionment in law has to be based on liability, not simply on causation'

Loftus Brigham v London Borough of Ealing [2003]
EWCA Civ 1490.

What is material is liability and in order for there to be liability, there must also be evidence of foreseeability and breach of duty, subjects which we will cover in more detail in future publications.

Considerations for claims handlers:

- causation is the first hurdle when it comes to establishing legal liability for the recovery of insurers' outlay
- contemporaneous site investigation reports are fundamental to establishing causation
- gaps in causation evidence can be exploited by Third Parties to undermine recovery prospects, creating litigation risk, which could preclude or dramatically reduce the recovery
- the costs of obtaining comprehensive site investigations are modest compared to the benefits they could provide to the recovery
- site investigation costs are recoverable from the Third Party alongside the reinstatement costs.

If you have any questions in relation to causation or legal liability for recovery purposes more generally, please feel free to contact Ally Yeandle.



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