

The Council as Tree Owner

(Seeing matters from the other side)

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1.0 SUMMARY

This paper explores the approach from subsidence claim handlers to councils seeking mitigation and/or to pursue a claim and considers areas where there are opportunities for the subsidence claims handlers to improve the process, reduce conflict and increase collaboration in solving a practical problem.

The process of asking for mitigation / making a claim is straightforward from the point of view of the subsidence claims handlers and much more complex from the point of view of the local authority and yet the subsidence claims handlers have substantially more expertise than the councils.

There are opportunities for subsidence claim handlers to offer technical training, and to facilitate organisational improvements within local authorities. There are corresponding opportunities for council insurers / external claims handlers to increase the degree of their leadership in relation to such matters.

There continues to be some confusion within councils over the mitigation and claims approaches and despite some good practice there remain opportunities to reduce this by better targeting and coordination between different organisations, or parts of the same organisations dealing with these issues.

There is substantial scope for subsidence claims handlers to tailor their presentations more directly to the needs and abilities of council officers and to present information in a more helpful, productive and persuasive manner. In particular there would be benefits from better photographs/sketches/descriptions of the damage, interpretation of the results of site investigations and persuasive explanations of the causal conclusions (rather than bare statements), including ruling out alternative causes.

There are opportunities to improve the handling of requests for further information, clarification or discussion.

2.0 INTRODUCTION

Local authorities are the largest combined group of tree owners. In England and Wales there are 174 principal authorities of which only about two thirds contain materially shrinkable soils. The discovery that trees, owned by a council, are implicated in subsidence damage usually triggers an approach to the authority concerned asking for mitigation (most usually a request for tree felling) and a claim.

With the exception of a few councils where specific agreements have been reached, and the few signed up to the Joint Mitigation Protocol (JMP) there is little or no collaboration in the process. Councils and their claims handlers are often seen as obstructive about both mitigation and claim recovery and the relationship between

"I know that many of them think that Councils are obstructive, however I don't think that they appreciate our other obligations."

Council Insurance Officer

the subsidence claims handlers and councils is often perceived as being one of conflict. This impression is made worse by the fact that each council is different.

This paper explores such approaches, from the local authority perspective. It considers the ability of the council to deal with such matters and the extent to which their officers are able to understand the approach, especially the technical aspects. The paper is focussed on the **process** of such approaches and **not the technical or legal merits** of requests for mitigation or claims. It has a greater emphasis on mitigation (where councils often have little or no outside support) rather than on claims (where outside support is more often available).

The intention is to illuminate the local authority perspective on such matters and to invite those who make such approaches to consider whether their approach could be better tailored so as to reduce the conflict over the process and ease the resolution of the underlying request or claim.

The paper represents my own views, based on experience of handling claims for more than 30 local authorities, including small district and borough councils, metropolitan councils, shire counties and London boroughs, over many years, supported by the results of a questionnaire sent by me to, and completed by, a number of local authority tree officers and claims handlers in May 2012. My thanks go to those who participated. None of the local authorities concerned is signed up to the JMP or has reached a processing agreement with any subsidence claims handlers, where slightly different considerations might apply.

3.0 THE IMBALANCE BETWEEN THE PARTIES

3.1 The claims handlers

1. The largest subsidence claim handlers have formed specialist teams dealing with mitigation and recovery, others utilise solicitors (for recovery and sometimes mitigation) and/or arboriculturists (for mitigation); a few have the project engineer/adjuster who is dealing with the case also dealing with mitigation and sometimes recovery. With the possible exception of the latter group the process is highly organised. There are clear objectives of mitigation and claim.
2. The claim handling personnel are well trained and specialised in relation to tree related subsidence (at least by experience, if not by more formal training); they are experienced by virtue of the number of these cases that they have handled – most will be handling such cases most of their time.
3. Asking for a tree to be removed is simple and straightforward; it requires no consideration of other factors or stakeholders. The subsidence claim handlers are assisted in relation to both mitigation and claims by a high degree of standardisation in of both documentation and process. The subsidence claim handlers control the timescale.

3.2 The Councils

1. Within the council the mitigation aspect is usually dealt with by a tree officer, sometimes by a highways officer. In some councils the tree or highways officer is employed outside the council following privatisation of council services. The claim aspect is usually dealt with by an insurance officer with or without an insurer / external claims handler; an external expert might also be involved. The personnel are therefore inevitably fragmented with differing objectives.

The volume of such cases within each council is insufficient to enable the formation of teams and few councils have a formal process for such matters. In my survey no tree officer and only one insurance officer spent more than 10% of their time dealing with tree related mitigation/claims and for most the proportion was between 1% and 5%; this militates against the development of processes to simplify consideration.

My experience suggests that there are wide variations between local authorities as to the efficiency with which this 'cross-departmental' process is managed, often depending on the individuals concerned and their personal degree of organisation and experience; there appear to be few formal procedures in place.

2. Tree and insurance officers are relatively poorly trained in this field and have limited experience. Only a few tree officers are likely to have had some formal training on tree related subsidence – most others, and insurance officers, rely on occasional ad-hoc attendance at seminars run by solicitors, insurers, tree officers associations or experts. Many insurance officers have no training at all and have to build experience by themselves from scratch. The fact that most officers spend less than 5% of their time on such matters discourages the building up of expertise.

3. Considering a request for tree removal is not straightforward and involves considering and balancing:

- The technical merits of causation and the extent of the involvement of each tree. Tree officers are suspicious that it is easy for the subsidence claim handler's arboriculturist to request the removal of a swathe of trees 'just in case';

- The financial implications of tree removal v tree retention – the natural conflict between the two may sometimes be difficult to manage because tree officers who wish to retain the tree are under different departmental control from insurance officers who will wish to minimise the claim. It is often difficult to obtain a clear idea of the value of the claim (and particularly of additional costs likely to arise from retention of the tree) whilst few tree officers appear to carry out tree valuations and insurance officers are unable to do so (and many do not realise that such a thing is possible);

- The council's obligations to provide an attractive environment (aesthetically and environmentally) and the council's financial obligations;

- The position of stakeholders including other local councils, elected representatives, residents groups and the householder (in a small number of cases the affected householder is against tree removal and disgruntled with the approach of his or her insurers).

"The claimant engineers/adjusters must understand that Councils have obligations to provide and protect the urban environment so cannot simply cut a tree down when requested; a balance needs to be struck between the environmental issues, amenity value, the value of the claim and likelihood of future damage should the tree remain but is managed.

Requesting instant removal is a far too simplistic reaction from claimant engineers/adjusters in my view."

Council Insurance Officer

Council policy does not allow the removal of healthy trees without good reason, so no action can be taken unless the tree is dying/causing a danger, until evidence the tree is causing a nuisance is provided.

There is little or no opportunity for standardisation. The council officers cannot control the timescale and must balance dealing with these matters against other activities.

3.3 Council insurers / external claims handlers

Receipt of a claim by a council may precipitate notification to an insurer/ external claims handler.

- Insurers / external claims handlers vary in their approach to mitigation; some accept that mitigation is central to the claim and address both issues at the same time whilst others regard mitigation as the concern of the council alone and avoid being involved. Mitigation and the claim are inextricably linked and in the authors submission the insurer / external claims handler should be involved in mitigation.
- The expertise available is very mixed. This is aggravated by the fact that teams are generally centred on councils, not on area of technical expertise. On occasion this may result in the insurer / external claims handler having less expertise than the council. Subsidence claims handlers sometimes complain about unhelpful requests for information based on standard lists rather than on knowledge – these come as frequently from council insurer / external claims handlers as from council officers. A reference to a council insurer / external claims handler may result in issues becoming more confused, not less.

3.4 Conclusions

1. There is a substantial imbalance between the parties in terms of the organisational approach to these matters. Subsidence claims handlers are able to form specialist, experienced, knowledgeable, teams whilst for most local authorities this will be a peripheral activity (typically taking up less than 5% of tree or insurance officers time) inevitably fragmented between departments.
2. There is likely to be a substantial imbalance between the technical abilities of the two parties, in favour of the subsidence claim handlers.
3. Subsidence claims handlers could provide more training to councils. Every respondent to my survey indicated that they would be interested in free seminars run by subsidence claims handlers (subject to location). Such training might address the technical shortfall within local authorities but could also facilitate organisational improvements by bringing together both tree and insurance officers and highlighting areas within councils where constructive procedures could be introduced.
4. Some subsidence claim handling/mitigation organisations have taken the trouble to identify specific individuals within particular councils to whom approaches for mitigation and/or claims can be addressed so as to improve the consistency of the approach within the council.
5. There are opportunities for council insurers / external claims handlers to provide more leadership in dealing with these cases.
 - a. Should/could they become more consistently involved in mitigation?
 - b. Could they offer greater assistance to councils by forming specialist teams so as to ensure that those dealing with these cases were suitably knowledgeable and experienced?

4.0 THE INITIAL APPROACH

The first approach to a council usually takes the form of a letter or email containing a letter which says something similar to *“Based on our investigations to date, the Project Manager has concluded that the cause of damage is clay shrinkage subsidence, due to roots from adjacent vegetation extracting moisture from the soil, thus altering its moisture content”*. The letter goes on to ask for mitigation or make a claim or both (or sometimes fail to make a clear statement of either).

There is considerable variation in such approaches ranging from some very good practice to some that is confusing and fails to present the case to its best advantage.

4.1 Mitigation, or a claim, or both?

It is not always clear whether the approach relates to mitigation, or a claim, or both. This may result in uncertainty on the part of the local authority. My survey suggests that where a request for mitigation is received by a council officer only 50% will assume that a claim will follow.

- Few organisations identify their profession on their headed notepaper; local authorities (and their claims handlers) sometimes assume that arboriculturists or engineer/loss adjusters asking for mitigation are solicitors making a claim.
- At least one organisation pursues mitigation and claims from different teams, but with no indication on the letter as to which team the letter is from.
- Where a party is pursuing only one aspect (for example an arboriculturist pursuing mitigation or a solicitor pursuing a claim) it is not always clear either who is pursuing the other aspect or when or if they will pursue it.
- Where two separate organisations are pursuing mitigation and the claim (this particularly occurs where solicitors are pursuing the claim and another organisation is dealing with mitigation) they may not co-ordinate their approaches, appreciate that both depend on causation and on the same documentation or that there is a link, from the local authority perspective, between the two (the cost of retaining the tree and the cost of losing it).

It is in the interests of the presenting organisation to be as persuasive in their approach as possible. Both mitigation and claim depend in the first instance on causation which will be demonstrated by the same evidence. Lack of co-ordination between the approaches for mitigation and claims may:

1. Result in confusion as to whether the matter should be dealt with by the tree officer or insurance officer which, in some cases, can lead to delays. More than one of the tree officers who responded to my survey commented that the request for tree removal was only followed up once it became a claim and that they would only deal with such requests via the insurance office. In a number of cases councils suffer from a lack of leadership in taking these matters forward with the tree and

With regard to a tree felling request in respect of subsidence I would seek the advice of our insurance team in the first instance. Tree felling requests in general (i.e. not claim related) are dealt with on their own merits and only undertaken if the trees are dead, diseased, dying or causing a hazard.

Council Highways Officer

insurance officers each leaving the other to drive the resolution of the matter; that situation is aggravated if there is no leadership shown by the insurer / external claims handler – asking arboriculturists for claim reserves is not uncommon.

2. Result in a failure to place relevant information in front of the local authority (or may result in confusing evidence, for example where the tree officer has monitoring to one date and the insurance officer monitoring to another one). This may result in delays, not least because council officers are sometimes reluctant to ask for further information (because they are not sure what to ask for).
3. Fail to engage outside experts – outside experts are almost always engaged by the insurance department of the council in response to a claim and only rarely by the tree department in response to a request for mitigation. In cases where the local authority has difficulty coming to a conclusion the appointment of an outside expert will frequently precipitate a decision. If an outside expert is to be appointed eventually in relation to a claim then it is probably in the interests of all parties that they are appointed at the start and deal with both mitigation and the claim.
4. In the case of mitigation may fail to capitalise on the ‘threat’ of the cost of underpinning if the tree remains. Most of those who responded to my survey accepted that the cost of retention of the tree (ie in terms of increased claim costs from underpinning or future risks) was likely to take precedence over the value of the tree unless the tree was exceptional.

4.2 Aggressive claims at an early stage

Claims that are pursued aggressively (perhaps demanding an admission of liability ‘within 21 days’) before mitigation has been addressed risk derailing the mitigation process whilst the matter is passed to the insurance department and/or an insurer / external claims handler, particularly if the insurer / external claims handler is one of those which does not wish to become involved in mitigation.

4.3 Early notification

There is an increasing trend for notification of claims and/or a request for mitigation, at a very early stage of the matter, before site investigations or a report have been prepared. My survey suggests that whilst a few local authorities might welcome the opportunity to ‘flag up’ a potential future problem, the majority would prefer the approach to wait until a full package, sufficient for the council to conduct their own investigation, is available. One officer said *“It’s a waste of time to send anything until all the data is collected”*.

4.4 Conclusions

1. Clear reference to what is wanted (mitigation and/or a claim) may minimise confusion and facilitate leadership within the local authority concerned, both of which should improve the speed of response and help to prevent periods of apparent inaction.
2. Co-ordination between the mitigation and claim aspects should minimise uncertainty within the council, result in the engagement of outside consultants earlier rather than later and improve the persuasiveness of the approach. Some organisations already have very good practices with regard to this but complications are most likely to arise where there are different organisations handling different aspects.

3. A clear statement (on the face of the approach and not hidden within the attachments) of the financial consequences of tree retention may add to the persuasiveness of the approach.
4. Although it might be sensible to notify the claim at the same time as mitigation it is clear that mitigation should take precedence thereafter; aggressive claims at that stage are likely to have a negative impact on mitigation.
5. There seems to be little to be gained from early notification before site investigations and reports are available.

5.0 THE PRESENTATION

Subsidence claims handlers typically present a bundle of technical results of site investigations and laboratory tests, an engineer's initial appraisal report and an arboricultural report. The arboricultural report may repeat/summarise the contents of the other documents. Solicitors and arboriculturists sometimes only present the arboricultural report.

They are overly technical
More specific training in this area to allow tree officers or those who handle claims to deal with them appropriately, in an informed manner, would be good.

Council Tree Officer

The presentation generally comprises 'what is available' rather than 'what might best persuade the local authority to accede to my request for mitigation or settle my claim'.

Local authorities are given the impression that 'it's obvious, isn't it' when, in fact, the officers concerned might not find it so.

5.1 Site investigations

On average, tree officers (and highway officers responsible for such matters) who completed my survey felt that they had a reasonable understanding of trial holes, cctv surveys, root identification, crack and level monitoring although only a third indicated that their grasp was sufficient for them to be able to argue confidently on these technical issues with the subsidence claim handlers engineer. However, when it came to soil testing, particularly suction, oedometer strains and penetrometer testing only one fifth had a good grasp and more than two thirds had very little knowledge at all, or insufficient knowledge to make a detailed confident judgement.

My experience suggests that many tree officers want to see the potential of the soil for shrinkage to be classified by Atterberg Limits and that they cannot infer sufficient (or often, anything) from soil suction, oedometer tests or penetrometer testing.

Insurance officers were worse off. Only one fifth considered that they had a reasonable grasp of the types of technical information referred to above and 70% said that they either had very little knowledge at all, or insufficient knowledge to make a detailed confident judgement.

From a novice point of view it would be a great help if it was explained in very simple terms.

Council Insurance Officer

Site investigations are only persuasive as to the cause of the damage if the reader understands them, or if they are accompanied by a persuasive interpretation. It is rare to find an engineer's report that contains a persuasive interpretation of the results of the investigations and monitoring. It is even rarer to find one that also contains a persuasive

elimination of alternative options; a statement that *“the project engineer has concluded that drains are not involved”* is not persuasive without an explanation of how he reached that conclusion.

Every respondent to my survey said that it would be helpful if the presentation included an explanation of the results of each of the tests carried out as well as the results in their raw format.

EXPLANATION OF THE RESULTS – examples:

- The results show that the soil is shrinkable because they show that.....
- The oedometer tests show desiccation consistent with tree related subsidence because.....eg *they are raised beneath the affected part of the building, but not elsewhere.....they are raised in the root zone but not above or below it.....,*
- The drain survey shows.....,

Explanations may be particularly important where some of the technical data is contrary.

5.2 Engineer’s report

The reports are generally designed for other purposes (eg the policyholder or insurer) and not particularly well suited for the purposes of persuading tree officers to accede to mitigation requests.

The quality of engineer’s reports is highly variable, mainly because of a high degree of standardisation:

- Many still do not include photographs of either the site or the damage. Whilst tree officers may inspect the site they will rarely carry out an internal inspection (because, they tell me, they are not structural engineers and therefore do not know what to look for).
- Descriptions of damage are superficial, eg *“there was rotational cracking at the rear right corner”*.

Tree officers must inevitably consider the value of ‘their’ tree against the extent and severity of damage; it remains common for tree officers to make comments like *“the loss of these two, 150 year old oaks, is disproportionate to damage described as Category 2, slight”*. Information on the damage serves to illustrate the effect of the damage on the house owner (a number of subsidence claims handlers have de-personalised the process by removing the policyholders name and referring only to the address – is there not an argument that making the process more personal makes it easier for the council to see the effect of tree retention?).

Logistics and time constraints often prevent, or delay, inspection of the property, even externally, by tree officers; the inclusion of sketches and (labelled) photographs, including both general ones of the site and the trees and more detailed ones of the damage, may enable to tree officer to deal with the matter without site attendance, with consequent improvements in speed.

Every respondent to my survey said that it would help them to have photographs of the site and photographs of the damage. Most said it would help to have descriptions of the damage (ie more than the purely general ones often found currently).

- Conclusions as to the cause are ‘broad brush’, for example *“The pattern and nature of the cracks is indicative of an episode of subsidence. The cause of movement appears to be clay shrinkage. The timing of the event, the presence of shrinkable clay beneath the foundations and the proximity of vegetation where there is damage indicates the shrinkage to be root induced.”* Such conclusions are obviously (to the council tree or insurance officer) standard comments and are neither instructive nor persuasive.
- Most engineers’ reports are prepared before site investigations and monitoring – local authorities are rarely provided with updated reports setting out the conclusions arising from those investigations. Every respondent to my survey said that it would help if the report included an interpretation of the conclusions of the investigation.

INTERPRETATION OF THE CONCLUSIONS - examples:

- The pattern of damage indicates.....eg *subsidence centred at front left corner...., the damage at first floor level reflects pulling by the trussed rafter roof....*
- The subsidence could not be the result of filled ground, poor or shallow foundations because.....eg *the brick intrusions in the soil show filled ground but any subsidence from this would have been manifest in the early years after construction and not now.....the foundations are too deep for surface weathering to be the cause.....*
- The subsidence could not be the result of leaking drains because...eg *the location of the leaking drains is inconsistent with the location of the subsidence.....the monitoring pattern is inconsistent....*
- We have confirmed the presence of shrinkable clay soils and roots from.....trees
- The following evidence points to the subsidence being the result of tree related subsidence.....eg *the monitoring pattern shows a cyclical trend, with winter recovery that could not be the result of any other cause.....soil suctions show a degree of desiccation below the area of subsidence but not well away from the trees.....*

5.3 Requests for further information, clarification or discussion

Requests for further information or queries can sometimes be problematic. The highly ‘process driven’ approach adopted by many subsidence claim handlers and their mitigation/claims personnel sometimes produces unhelpful responses; a request for an update engineers report following site investigations might produce yet another copy of the preliminary report and the comment *“I have sent you all that I have on my file”*; a recent query by me as to why the tree owning council needed to investigate the matter in view of a non-shrinkable sand soil, a leaking drain and progressive non-cyclical monitoring results prompted a response that *“our project engineer has concluded that your tree is responsible”*.

The process driven approach adopted by many subsidence claims handlers also stifles genuine discussion; the personnel concerned often give out the impression that ‘their’ engineer is infallible and ‘their’ arboriculturist’s conclusion as to which trees should be removed is beyond question when, in practice, there is often considerable scope for debate, particularly in the case of groups of trees.

5.4 Conclusions

1. The presentation is the subsidence claim handlers' opportunity to persuade the local authority to accede to a request for mitigation and/or to pay a claim. Unfortunately it generally comprises 'what is available' rather than 'what might best persuade the local authority to accede to my request for mitigation or settle my claim'. This is therefore an area with considerable scope to reduce conflict and smooth the process.
2. Presentations to councils benefit from photographs/sketches or more detailed descriptions because that information establishes the physical link between the location of the damage and the tree(s), because it serves to illustrate the impact of the damage on the house owner and the consequential proportionality between the damage and the request for tree removal, and because it may reduce the need for time consuming site inspections.
3. There is scope for reports to be more instructive and persuasive by including:
 - a. An interpretation of the results of site investigations as well as the raw results that are currently provided.
 - b. An interpretation of the conclusions of the investigation, including the constructive elimination of other potential causes.
 - c. Local authority officers accept the need for standardisation but that should not prevent the production of documents (perhaps in box or tabular format) designed for the matter in hand.
4. More constructive handling of requests for further information, clarification or discussion is unlikely to delay matters and might allow a more constructive collaborative approach to solving a practical problem, rather than an adversarial one.