

# Case Alert - Tree Root Subsidence Claims

## - what's changed since Berent?

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### Fundamentally, nothing....

#### **The facts of Berent v Family Mosaic Housing**

Mrs Berent claimed damages in nuisance and negligence for subsidence to her property in Highbury New Park, which she claimed was due to the roots of trees under the control of the defendant housing association and local authority. The defendants alleged that there were other causes of the damage - nearby railway tunnelling works; leaking drains; the nature of the subsoil. Mrs Berent maintained that the damage to her house was reasonably foreseeable to the defendants because they knew that the clay soil on which the house and trees were located was likely to become desiccated and shrink if the trees extracted moisture.

His Honour Judge Wilcox held at first instance that the trees were an effective and substantial cause of the damage, applying the usual test for establishing causation in tree root subsidence claims.

On the facts of the case he found, however, that all the relevant damage had taken place by the end of 2003 and, that whilst a reasonable local authority in administering a conservation area such as that containing Highbury New Park would have been fixed with the knowledge of a possible risk of damage from its street trees, there was no basis on which to infer that before September 2003 either the Housing Association or the Council should have appreciated that there was a real risk that their trees would cause damage to Mrs Berent's property, either alone or in conjunction with other factors.

There was no assertion by Mrs Berent that the relevant trees should have been identified as posing a greater risk

than others and the arboricultural evidence did not support an argument that the Defendants should, before 2003, have identified the trees as posing a risk to the property of a nature and extent which imposed upon them a duty to take some preventative or remedial action over and above whatever sort of tree management was already in place.

On the evidence in the case, the only way of removing the possible risk of damage was to remove the trees. Because of the state of the Defendants' knowledge as to the damage caused to the house, the extent to which the trees were implicated and the lack of alternative remedial measures, the judge found that there was no breach of duty by the defendants in failing to remove the trees before autumn 2010.

Whilst Mrs Berent recovered general damages, she was not entitled to the cost of repairs to her property.

The Court of Appeal upheld the Judge's decision and in doing so set out the matters to be considered in assessing liability in a case such as this. The position can be summarised as follows:

- 1) Tree root subsidence claims are subject to the general law of negligence and nuisance - well established principles of causation and foreseeability apply - no special rules apply to these cases
- 2) In establishing whether there has been a breach of duty a balancing exercise between the risk of damage, the seriousness of the potential damage, the cost of removing the risk and social value needs to be undertaken



### Robbins v London Borough of Bexley

The Berent decision has been quickly followed by and considered in Robbins.

Mrs Robbins owns 6 Radnor Avenue in Welling, Kent. At the rear of her property is Danson Park owned by the Council on which a row of mature Hybrid Black Poplars grows.

Subsidence damage occurred to the property in 2003 and 2006. One of the Poplars was blamed for the damage and Mrs Robbins put the Council on notice of the damage in 2005. Site investigations confirmed that the damage was tree root related but it was not until 2010 that a positive root identification from a Poplar was found. The Council argued that other vegetation was to blame and that it was not under a duty to take any action in relation to the tree until it was faced with a reasonably foreseeable risk, which the Council maintained was in 2010.

Mr Justice Edwards-Stuart said that Berent made clear that there are no specific principles of law that relate to tree root cases and that they are subject to the general law of negligence and nuisance. He applied the established principles of causation and foreseeability in finding, on the facts of the case in Robbins, that:

- 1) The damage was caused by the Council's Poplar trees
- 2) The damage was reasonably foreseeable to the Council - in making this finding it was relevant that other property owners in the same road had made claims and had been paid for damage to their houses caused by the same row of Poplars - the Council's knowledge dated from 1998
- 3) The Council was in breach of duty in:

- Failing to prune the Poplar trees before the summer of 2003, which would have prevented the 2003 damage
- Failing to undertake planned pruning works before the summer of 2006

### Conclusion

- The law relating to tree root subsidence claims remains unchanged
- Lack of notice, whether by providing evidence of a tree being implicated in causing damage, of damage having occurred or otherwise, is no automatic defence to a claim
- The focus on foreseeability arguments in Berent and Robbins will no doubt mean that parties spend more time in addressing this aspect. Tree owners will need to cooperate in providing disclosure of tree policies, maintenance records, earlier claims and the like to ensure that claims can be progressed quickly and fairly - consideration is likely to focus upon both whether the Council's tree maintenance policy and its application were reasonable in relation to the nature of the risk
- The outcome of each case will depend on its individual facts - in both decisions the factual findings were key to the findings made upon liability
- Robbins makes clear that where there are reasonable measures available which are not taken, then the burden of proof is upon the Defendant to show that if taken these would not have succeeded



## Practical implications for insurers and their representatives

- The onus is still on the Claimant to establish causation, breach of duty, damage and foreseeability.
- Gather information as to whether the house has suffered previous damage and if so whether Council notified/obtain documents from policyholder/insurers' records etc.
- Determine whether neighbouring/nearby properties have suffered damage and obtain documentation - make enquiries of neighbours with policyholders' agreement/assistance.
- Ask arborist to investigate whether trees in the same street have been removed/replaced/maintained and when.
- Investigate/request documents regarding a Defendant's tree policy, pruning cycle and notifications of other claims in the area etc; the tree owners will still need to respond to reasonable requests for documents to be made available, as each case will, as ever, be based on its own facts.
- Seek disclosure of tree policies and previous claims to identify any references to "hot spots" or high incidences of damage in particular streets especially in cases where tree removal is the only viable measure prior to the initial damage; to avoid expensive and repetitive disclosure applications Councils should also be persuaded make such data generally available; this could be anonymised to avoid Data Protection issues.
- Collate own evidence of "hot spots" through database searches and make available to Councils.
- Notify immediately damage is observed with supporting evidence (e.g. SIs/root ids/photographs).
- Query whether amenity value of a tree will fall within the definition of "social utility" - consider CAVAT valuations and whether this is likely to be raised as an issue and marshal arguments to counter any such claim.
- Ask arboricultural experts to consider specific steps taken by tree owners or which ought reasonably to have been/be considered at the relevant stage/stages by tree owners.

### Contact Us

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