# Root of the problem

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**Andrew Plunkett discusses ?foreseeable damage? in cases of tree root-related subsidence damage to property and the importance of surveyors highlighting potential risks to clients and advising on preventive steps to be taken**

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In July 2012, the Court of Appeal gave its decision in Berent v Family Mosaic Housing and London Borough of Islington [2012] EWCA Civ 961 . It addressed the issue of foreseeability in terms of relevance to future tree root subsidence claims and, to some extent, for claims for nuisance and negligence generally.

Subsequently, in August 2012, in the first published judgement on a claim for tree root property damage following the Court of Appeal judgement, the court considered the application of Berent in the different factual circumstances found in Robbins v London Borough of Bexley [2012] EWHC 2257 (TCC) .

Tree root subsidence claims are generally brought in both nuisance and negligence. In practice, there is little or no distinction between the two. A party responsible for maintaining the relevant tree(s) will only owe a duty to a property owner if it is reasonably foreseeable that the tree would cause damage to the property in question.

## Duties before Berent

The fact that a property is in an area known to have a clay sub-soil, and therefore susceptible to subsidence, has (generally) been sufficient for the courts to find that the risk of subsidence damage by street trees was ?reasonably foreseeable? by a body such as a local authority, and therefore for a duty to property owners to arise merely by the proximity of trees to property.

Contrary to this, the trial court in Berent held that (on the facts) the defendants could not know there was a real risk that the trees would cause damage to the claimant?s particular property until after they had been notified and provided with supporting evidence. There was no duty, and no liability for damage, before that date. This finding was upheld by the Court of Appeal in July 2012.

This tilts the balance on liability for such claims away from those who own or maintain trees (for example, local authorities) and their insurers, and toward property owners and their insurers.

In Robbins, the court held that damage was ?reasonably foreseeable? and that the relevant trees would cause damage to the claimant?s property long before notification by the claimant, chiefly because the trees had given rise to a number of earlier claims in the vicinity. This was in itself sufficient to make the risk of damage reasonably foreseeable by the local authority, which ought to have acted to reduce/maintain the trees accordingly. Having failed to do so, it

was liable for consequential property damage.

## Focus on the facts

The finding of the court in Robbins is not at odds with that in Berent. Robbins does emphasise, however, that the issue of whether damage by tree roots is ?reasonably foreseeable? depends on the facts in any particular case. Reasonable foreseeability does not necessarily depend on the claimant providing notice to the defendant that the tree is causing damage.

Following Berent, it remains the case that tree root damage to property is not reasonably foreseeable for the purposes of a legal claim in nuisance or negligence unless there is something to elevate the level of risk above that which one might expect simply by the presence of a tree in a residential area with a clay-based soil.

The original claimants in Berent lodged an appeal to the Supreme Court but this appeal has been discontinued: the decision of the Court of Appeal is therefore likely to stand as the leading case on the issue of foreseeability in property subsidence claims for some time.

These cases highlight the risk of subsidence damage caused by nearby trees and the importance, in appropriate cases, of identifying this as a potential risk ? for example, by identifying any emerging signs of damage, such as cracking ? and/or advising on the preventive steps that ought to be taken.

The fact that, post-Berent, the costs of such damage are more likely to fall on the property owner ? or their insurers ? rather than a third party emphasises the need to ensure that the risks are properly flagged and, if possible, addressed by the relevant professional.

One further point for professionals engaged in such disputes: insurers and local authorities in some London boroughs have been working on a tree root protocol, providing guidance for both parties on how claims of alleged tree root damage should be handled. It appears that, at the early stages at least, this protocol was not adopted by the parties in either of the above cases. Had it been used as it is intended, it may well have reduced the damages and legal costs in both cases.

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