

UPPER TRIBUNAL (LANDS CHAMBER)



Neutral Citation Number: [2016] UKUT 300 (LC)
UTLC: LCA/105/2015

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – Tree Preservation Order – cracks appearing in conservatory – refusal of consent to fell oak tree on adjoining land – claim for cost of rebuilding conservatory – whether loss or damage reasonably foreseeable when consent refused – whether loss or damage foreseeable by claimants when conservatory erected – compensation awarded at £25,000 - Town and Country Planning Act 1990, s203

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN:

(1) MR RICHARD GORDON BURGE
(2) MRS NICOLA ANNE BURGE

Claimants

- and -

SOUTH GLOUCESTERSHIRE COUNCIL

Compensating
Authority

Re: 27 Saxon Way,
Bradley,
Stoke
Gloucestershire
BS32 9AR

Before: His Honour Judge Stuart Bridge and Peter D McCrea FRICS

on
23 June 2016

Royal Courts of Justice, London, WC2A 2LL

Jason Evans-Tovey, instructed by DAC Beachcroft Claims Ltd, solicitors, for the Claimants
Nina Pindham, instructed by Aaron & Partners LLP, solicitors, for the Compensating Authority

DECISION

Introduction

1. This is a claim for compensation under section 203 of the Town & Country Planning Act 1990 (“the 1990 Act”) and article 9 of the South Gloucestershire District Council (Land to the rear of 25 Saxon Way) Tree Preservation Order, 2007 (SGTPO 15/07) dated 13 December 2007 and confirmed without modification on 4 June 2008 (“the TPO”) for losses alleged to have been incurred in consequence of a refusal of consent required under the TPO. The compensating authority is South Gloucestershire Council (“the council”) which on 28 May 2010 refused consent to fell an oak tree (“the Oak”) situated to the rear of a property known as 27 Saxon Way, Bradley, Stoke, Gloucestershire, BS32 9AR (“the claim property”). The claimants, Mr and Mrs Richard and Nicola Burge, are the owners of 27 Saxon Way.

2. The overarching issue is whether because the council refused to consent to the removal of the Oak, which was protected by the TPO, the claimants are entitled to compensation for loss and damage to a conservatory attached to the rear of the claim property.

3. Prior to the hearing, the claim amounted to £31,776.34 including £1,000 of general damages, plus interest. During the hearing, it was agreed between the parties that the claim, if upheld, would be in the sum of £25,000 including interest. The council, however, contended that no compensation is payable.

4. The council contended that the case raised an important point, namely whether there is an obligation to pay compensation for damage to a building which was not constructed in accordance with relevant industry guidance concerning the potential for tree root subsidence in an area of plastic clay. In its skeleton argument, it summarised its position as follows:

The Claimants contend that a right to compensation arose automatically upon the [council’s] refusal to fell the protected tree and thus all loss or damage which it was reasonably foreseeable would be incurred as a consequence of the refusal are payable. The [council] in turn contends that the conservatory was so inadequately constructed that it would have failed anyway, regardless of the presence of trees, but if that is not accepted it was reasonably foreseeable to the Claimants that a conservatory which did not comply with the relevant industry guidance concerning construction in areas of plastic clay would in due course suffer damage, and thus no compensation is payable.

5. Mr Jason Evans-Tovey of counsel appeared for the claimants. He called Mr Robert Evans BSc(Hons) CEng, MICE, MIStructE, a director of Robert J Evans Limited, and Mr Andrew Wyse, a subsidence consultant with Crawford and Company Adjusters (UK) Ltd.

6. Ms Nina Pindham of counsel appeared for the compensating authority, and called Mr Kenneth Brown BSc(Eng) CEng MIStructE, a director of KB² Consulting Civil and Structural Engineers.

7. In the week before the hearing, the council served on the claimants a supplemental report by Mr Brown. The report purported to deal with the issue of heave, the council wishing to allege that the removal of the tree would have caused such damage to the conservatory by heave that its total replacement would have become necessary and that no loss would therefore have been occasioned by the council's refusal to fell the tree. The claimants had made some reference to heave in correspondence as long ago as May 2011, indicating that it was not believed to be an issue, and the council had not responded. Five years then elapsed before the supplemental report was served.

8. The service of the supplemental report was so late that the claimant's experts did not have sufficient time to address it and that an adjournment would have been necessary to enable them to do so. We considered the council's application and informed the parties that we would not allow the council to adduce this evidence at such a late stage.

Facts

9. From a draft statement of agreed matters and from the evidence we find the following facts.

10. The claim property was constructed in 1994 as part of a housing estate scheme on a reasonably level site with no unusual topographical features. When viewed from the front, to the left of the property is No.25 Saxon Way, and to the right is No.29.

11. The claim property was purchased by the claimants in May 1997. It is a two-storey three bedroomed detached house of brick construction under a pitched tiled roof with a garage attached to the front and left side of the house. In about May 2003, a conservatory was built and attached at the rear and right side of the house. The house has foundations totalling 1.2m in depth. The conservatory, when first built (it has since been replaced as we outline below), had foundations of 0.4m. The property is sited on clay soil, having plasticity indices of between 39% and 50% which means it has a high shrink/swell characteristic.

12. By 2006, a number of trees and shrubs were in the vicinity of the claim property. In the front garden was a false Acacia tree, approximately 5m high and about 5.5m away from the front of the house. In the rear garden there was a eucalyptus tree, 5m away and with an estimated height of about 10m, and a conifer, 2m away and about 6m in height. The Oak is situated on land beyond the rear boundary of the claim property, adjoining its rear garden. It is about 13m away and 8-11m high. It was assessed in September 2009 to be significantly older than the claim property. There are also hawthorn trees in this area. In the rear garden of No.29 Saxon Way there was a magnolia tree, about 2.5m away and about 4m high.

13. In early Summer 2006, the claimants noticed cracks in the rear wall of the house and between the house and the conservatory. They reported this to their insurers, Axa Insurance Plc, who appointed loss adjusters, Crawford & Co to investigate and deal with the claim. Mr Wyse of the company's National Subsidence Unit visited the property on 1 November 2006 and in a report dated

2 November 2006 recorded that there were two areas of damage, one to the conservatory and one to the left rear corner of the house and in both areas there was cracking of 5mm or more which Mr Wyse categorised as moderate. He also said that “there are several trees and shrubs nearby, some with roots that may extend beneath the house foundations”. He noted that the eucalyptus and conifers were of particular interest and in relation to the damage to the house he expressed a view that the cause appeared to be clay shrinkage which was root-induced. In relation to the damage to the conservatory, Mr Wyse was more cautious and said that the cause was not clear to him from the information that he had. He thought it could be clay shrinkage due to shallow foundations or drainage problems and he recommended site investigations.

14. These investigations were carried out by a company called Mat Lab in December 2006 which included CCTV drain surveys and the digging of four exploratory trial pits.

15. It is common ground that the cracking to the house was caused by the eucalyptus tree which has since been felled and the claimants make no claim for this. The trial pits near to the conservatory revealed roots of an oak tree or sweet chestnut together with some unidentifiable roots together with small conifer roots. In the Summer of 2007, bore holes were drilled to a depth of 4m close to the conservatory. In respect of one bore hole, roots from oak, and to a lesser extent hawthorn and some surface grass were detected. In the other bore hole roots from magnolia and to a lesser extent oak and another species were detected. The moisture content of the soil from the bore holes was tested and ranged from 30%-35% with the soil type being confirmed as clay.

16. In or before September 2007 the property was inspected by the Marishal Thompson Group, which confirmed that the conservatory was rotating away from the junction with the house and stated:

“In our opinion [the Oak] will be exerting a significant influence across the whole of the rear elevation including the conservatory. Removal of this tree subject to heave assessment will help promote the restoration of stability of the currently affected areas. The influence of [the magnolia] is very much secondary to that of [the Oak].”

17. The report went on to say that pruning alone should not be considered as an effective alternative arboricultural solution and that removal was the only effective form of mitigation. The report accordingly recommended the removal of the magnolia and the Oak.

18. In September 2007 Mr Wyse prepared an addendum technical report in which he said that the underlying soil was shrinkable clay, with a significant moisture content deficit and swelling potential below foundation depth, confirming the soil below the foundations to be desiccated. He said that “the damage to the conservatory has also been proved to have been caused by clay shrinkage subsidence as a result of moisture obstruction by nearby trees/vegetation”. He recommended removal of trees and said that once they had been removed, the ground would rehydrate over the winter and closure of the cracks would occur. Once this process was complete Mr Wyse said that his firm would prepare a schedule of repairs for the two areas of the building that had been damaged.

19. In September 2007 the conifer in the garden of the property was removed and in or around April 2008 the magnolia in the garden of No.29 was removed.
20. The TPO was made on 13 December 2007 and confirmed on 4 June 2008.
21. Following the removal of the conifer and magnolia, movement to the conservatory continued, implicating the Oak as a continuing contributory cause of the movement. On 2 September 2008 the Marishal Thompson Group made an application on behalf of the claimants to the council to remove the Oak which was refused on 3 October 2008 on the basis that the council took the view that there was then insufficient evidence to implicate the Oak.
22. On 16 October 2008 level monitoring was commenced and on 30 September 2009 further soil samples were taken. Results from the monitoring showed that in the absence of the eucalyptus, conifer and magnolia, but in the continued presence of the Oak, ongoing movement to the conservatory was present but which was seasonal.
23. On 1 April 2010 the council received Marishal Thompson's application to remove the Oak, stating that this tree had been implicated as a contributory factor in subsidence damage relating to clay shrinkage. The application included an arboricultural report, an engineer's report, foundation details, soil analysis, root identification, a drainage report and level monitoring results.
24. On 28 May 2010 the council refused permission to remove the Oak as its removal would "have a detrimental impact on the existing and future visual amenity of the locality and would be detrimental to the character of the local landscape and wider contexts and would be contrary to National Policy, PPSI and Policy L1 of the South Gloucestershire Local Plan (Adopted) 2006."
25. On 5 July 2010 solicitors for the claimants served on the council a claim for compensation.
26. In August 2010 Mr Evans visited the property. In his view the cracking had widened significantly since Mr Wyse had taken photographs in 2006. Mr Evans was of the view that the pattern of cracks and distortions showed that the primary mechanism of movement was rotation of the conservatory away from the house caused by downward movement at its rear wall with maximum movement at the rear left corner closest to the Oak.
27. On 3 March 2011 the council advised, in an open letter, that it was prepared to compensate for additional costs incurred by the claimants as a result of their refusal of consent, limited to the cost of upgrading any foundation works beyond that necessary to repair the original damage and that necessary to protect against any future damage caused by heave. It said "the council's liability would be limited to the cost of any additional foundation works, if any, deemed necessary to protect against any future damage and that necessary to protect against any future damage as a result of the retention of the protected tree." The council requested a heave report and supporting engineer's recommendations for foundation works to address the results of the heave report. It went on to say that the heave report and recommendations would have been required if permission had been granted and as a consequence the council was not prepared to contribute to the cost of obtaining these reports, or the required foundation works.

28. On 11 May 2011 Mr Wyse prepared a response document, in which he said that heave was not an issue and that the only alternative to tree removal was to take down the conservatory and re-build it on newly piled raft foundations. This was served on the council on 12 July 2011.

29. The council instructed an independent structural engineer to examine the foundations, whose report was provided on 12 July 2011. On 19 July 2011 the compensating authority denied liability on the basis that the property was not designed or constructed to comply with NHBC guidance.

30. In February 2013 works to take down and reinstate the conservatory with piled foundations commenced and they were completed in about April or May 2013.

The Entitlement to Compensation

31. Section 203 of the 1990 Act provides that

“A tree preservation order may make provision for the payment by the local planning authority, subject to such exceptions and conditions as may be specified in the order, of compensation in respect of loss or damage caused or incurred in consequence –

- a. of the refusal of any consent required under the order, or
- b. of the grant of any such consent subject to conditions.”

32. Article 9 of the TPO provides, as far as relevant:

“(1) If, on a claim under this article, any person establishes that loss or damage has been caused or incurred in consequence of-

- (a) the refusal of any consent required under this Order;

...

he shall, subject to paragraphs (3) and (4), be entitled to compensation from the authority.

...

(4) In any [case other than the refusal of consent for felling in the course of forestry operations], no compensation shall be payable to a person-

....

- (b) for loss or damage which, having regard to the statement of reasons submitted in accordance with article 6(c) and any other documents or other

evidence submitted in support of any such statement, was not reasonably foreseeable when consent was refused or was granted subject to conditions;

- (c) for loss or damage reasonably foreseeable by that person and attributable to his failure to take reasonable steps to avert the loss or damage or to mitigate its extent;

...”

Issues

33. Following discussions between counsel immediately before the hearing, it is common ground that the damage to the conservatory at the claim property was caused by the roots from the Oak, rather than any other trees.

34. The council resists the claim on the basis that the foundations to the original conservatory were wholly inadequate, to the extent that they would have failed in any event. Further, or alternatively, that when the conservatory was constructed in 2003, it was in the full knowledge of a) the presence and distance of the Oak, and b) its status as a tree retained as part of the scheme for its substantial amenity value.

Discussion

35. Despite references in the council’s skeleton argument to the Town and Country Planning (Tree Preservation) (England) Regulations 2012 (‘the 2012 Regulations’), it is now accepted by the council that these Regulations do not apply to the circumstances of this case and that the claim is being made under the TPO itself as expressly provided for by section 203 of the Town and Country Planning Act 1990.

36. It is therefore for the Tribunal to apply the terms of the TPO.

37. It is for the claimants to establish that loss or damage has been caused or incurred as a consequence of the council’s refusal to give consent to fell the Oak, a consent that was required as a result of the TPO. The burden of proof is on the claimants, and the standard of proof is the normal civil standard, that is the balance of probabilities.

38. We have no doubt that the claimants have satisfied us in this regard. The claimants’ conservatory was damaged by the roots of the Oak, and in refusing consent to fell the Oak, further damage was caused. It seems to us that this is relatively uncontroversial, indeed common ground, and it follows that the claimants are *prima facie* entitled to compensation.

39. No compensation is however payable in two instances which the council contends are relevant to this case. In order to deny compensation that is otherwise payable, it is for the council to prove, on the balance of probabilities, that one or other of these instances applies.

40. The council contends that the claimants' loss or damage was not reasonably foreseeable when consent was refused: Article 9(4)(b) of the TPO. That is a difficult argument to sustain. Consent was refused in 2010, by which time it was apparent to all that the Oak was causing significant damage to the foundations of the conservatory. We do not consider that the council comes anywhere near satisfying us that further loss or damage to the claimants was not reasonably foreseeable at that date. On the contrary, we accept the claimant's contention that the Oak was a substantial and effective cause of the real risk of on-going and future movement of the conservatory.

41. The council contends, in the alternative, that the claimants' loss or damage was reasonably foreseeable by the claimants and attributable to their failure to take reasonable steps to avert the loss or damage or to mitigate its extent: see Article 9(4)(c) of the TPO. The basis of this contention is that the foundations of the conservatory were so inadequate, being of insufficient depth taking account of the relevant building standards, that they would have failed anyway. The council argues that, when the conservatory was built in 2003, it would have been reasonably foreseeable from the proximity of the Oak to the conservatory that loss or damage would ensue. No reasonable steps were taken to avert that loss or damage, for example by building deeper foundations.

42. The issue of the depth of foundations was investigated in the course of the hearing. The criticism made by the council, that the foundations of the conservatory were too shallow taking account of the ground conditions and the proximity of trees, is not contested by the claimants. Both experts (Mr Evans and Mr Brown) agreed (following a discussion held on 21 April 2016) that due to the depth of the foundations, some distortion or cracking of the conservatory might have occurred, the only difference being that Mr Evans believed that this 'might have occurred during prolonged periods of drought' whereas Mr Brown that this 'would be expected to occur through normal seasonal changes in moisture content of the clay even if no trees were present.' Both experts agreed that proper engineering advice would have been to construct the conservatory in accordance with the NHBC Guidelines, Mr Evans qualifying this by noting that this was 'not the industry standard for conservatories.'

43. There was as a result some exploration of the appropriate standard in the course of the hearing. Mr Brown had made reference in his Report to the NHBC Standards operative from October 1992, Chapter 4.2 of which deals with 'Building near trees'. It states (in bold) at D4 that 'The design shall make allowance for the effect of trees in shrinkable soils', indicating that the species and mature height of the tree was an item to be taken into account, Oak trees themselves having a high water demand. It states (again in bold) at D5 that 'Foundations shall be designed to transmit loads to the ground safely and without excessive movement', and continues:

"Irrespective of any foundation depths derived from this Chapter, all foundations should be constructed on soils capable of supporting the imposed loads. For foundations near trees, the depth should be established in relation to:

- water demand and mature height of trees
- movement potential of soils

Design of foundations to all permanent constructions, including those to dwellings, garages, porches, etc, should take account of the effects of soil desiccation caused by previous or existing trees and trees which are scheduled to be planted.”

44. Mr Evans sought to argue that this did not apply to conservatories, and it is right that when the NHBC Standards were reviewed in 2003, conservatories were included for the first time in the list of ‘permanent constructions’. He therefore contended that at the time that the claimants’ conservatory was built, there were no requirements for conservatories to comply with Building Regulations unless they formed part of a habitable room (which the claimants’ conservatory did not). It was not until 2007 that the Guide to Good Practice in the Specification and Installation of Conservatories within the UK published by the Glass and Glazing Federation recommended that conservatories should comply with Chapter 4.2 of the NHBC Standards.

45. We do not consider that this discussion advanced matters very far. We are prepared to accept that insofar as a particular conservatory was a permanent construction it would fall within the scope of the 1992 NHBC Standards and that the 2003 amendment merely clarified the existing position. We cannot see that there is a meaningful distinction to be drawn in this respect between, for example, porches and conservatories. But whether or not the claimants’ conservatory complied with the requisite building standards is in our view immaterial. It is accepted, as we have noted, that its foundations were too shallow, and that the builders should have dug them deeper. We do not see how that reflects adversely upon the position of the claimants with regard to the case being advanced by the council. Applying Article 9(4)(c) of the TPO, it is necessary to consider the position in 2003 immediately before and at the time of the erection of the conservatory. The question is whether at that time loss or damage to the conservatory being erected was reasonably foreseeable to the claimants themselves. It is for the council to show that the claimants knew, or ought to have known, that there was a real risk of the Oak tree causing subsidence damage to the new conservatory.

46. In our judgment, the council has failed to show this. There is no evidence that the claimants knew the depth of the foundations, the proximity of the Oak, or for that matter its potential effect in terms of subsidence damage of its proximity to the conservatory being built. The claimants employed professional contractors to build the conservatory and as far as is known put their faith in those so employed as they were perfectly entitled to do.

Conclusions

47. The council has sought to contend that the case has major implications for compensating authorities, and that if claims such as this succeed, ‘anybody would be entitled to erect an inadequate building near a protected tree contrary to all industry guidance and when damage is caused by that tree and the local authority refuses to grant consent to fell the tree they are liable to pay damages in any and all events.’ In her closing submissions, counsel for the authority referred to the claimant’s building as a ‘candyfloss conservatory’ and emphasised the danger of allowing such obviously defective buildings to be subsidised at public expense in this way.

48. This argument based on policy does not, however, sit at all comfortably with the facts of this case. The conservatory was built in 2003 at a time when there were no protected trees in the vicinity.

The TPO protecting the oak was made in 2007, confirmed the following year, and consent to fell was refused in 2010. We do not see how it can sensibly be argued that the claimants have sought from the outset to use the compensatory machinery available to those affected by TPOs to their personal advantage and to the disadvantage of taxpayers generally.

Result

49. The compensation payable to the claimants is £25,000, including interest. This decision is final on all matters except costs. A letter concerning costs accompanies this decision.

Dated: 27 July 2016

A handwritten signature in black ink, appearing to read "Stuart Bridge". The signature is written in a cursive, slightly slanted style.

His Honour Judge Stuart Bridge

A handwritten signature in black ink, appearing to read "Peter D McCrea". The signature is written in a cursive, slightly slanted style.

Peter D McCrea FRICS