In the matter of the Town and Country Planning Act 1990
And in the matter of the South Cambridgeshire District Council Tree Preservation Order 01/12/SC
And in the matter of the Old Rectory, Little Gransden, Bedfordshire, SG19 3DU

Advice

Background

1. The Old Rectory at Little Gransden is an attractive building built originally in the sixteenth century and extended in 1840. It was listed by the Secretary of State as a building of special architectural or historic interest, Grade II, in 1986. It is in a conservation area, designated by South Cambridgeshire District Council in 2006 following an appraisal carried out in 2005. The Old Rectory has been owned and occupied by Mr and Mrs Seabright since 1998, and is now for sale on the open market at £2.5 million.[1]

2. In the garden to the north-east of the Old Rectory are two trees, a cedar and a wellingtonia. They are apparently visible from a number of local viewpoints, and are considered by many local residents to be of considerable amenity value. The cedar is in reasonably good condition; the wellingtonia appears to have been struck by lightning at some time in the past, and its western side has been suppressed by the proximity of the cedar.

[1] *Historic Properties for Sale in East Anglia*, Country Life, 12 July 2012.

The proposed works

3. The Council received on 30 January 2012 from Mrs Seabright a notification under section 211 of the Town and Country Planning Act 1990 of the proposed felling of a cedar and a wellingtonia tree in the garden of the Old Rectory. It has been supplied with the following documents (listed below in date order) said to justify the works:

    - a site investigation report by Mat Lab Limited for Crawford & Company Adjusters (UK) Ltd ("Crawford"), dated 23 March 2010, containing foundation exploratory hole records and a penetrometer plot;
    - a laboratory report, also produced by Mat Lab for Crawford, dated 7 April 2010, containing a test schedule, root identification, swell / strain test results, moisture content readings, plasticity index readings and Atterberg limit calculations;
    - an addendum technical report by Crawford, dated 4 May 2010;
    - an arboricultural implication assessment by OCA UK Ltd, and a consultant report advice note, both dated 28 May 2010;
    - an arboricultural report from Writtle Park Ltd dated 10 October 2011 but based on a visit on 13 September 2011; and
    - a report by Crawford dated 23 January 2012 reviewing the results of level monitoring carried out at roughly quarterly intervals from 23 March 2010 to 20 December 2011.

4. The Writtle Park report accompanied the section 211 notification, and the level monitoring report was supplied to the Council prior to that notification. I am not entirely clear whether the other reports accompanied the notification or were supplied separately, but it matters not, since they are all now in the possession of the Council. Crawford, OCA and Mat Lab are all firms with considerable experience in this area of activity.

5. It appears that the Old Rectory is built on a thin layer of clay, above lighter sandy soil. The level monitoring plan is slightly confusing, as it somewhat diagrammatic. And the more detailed plan included with the house sale particulars[2] is also unhelpful, as the north point appears to be incorrectly oriented.[3] However, the level monitoring data seems to show that seasonal movement is indeed occurring at the Old Rectory, with the greatest movement being along the side closest to the two trees. And the root identification showed the presence of live cedar roots.

6. In the light of that technical information, the owners of the Old Rectory considered that it would be prudent to fell the cedar, to prevent any further subsidence damage. They also proposed to fell the wellingtonia, as the removal of the cedar would lead to an increased risk of it falling. They accordingly notified the Council of the proposed works, under section 211 of the Act.

The tree preservation order

7. The notification was publicised, and was the subject of much local concern and controversy.

8. As a precautionary measure, on 9 March 2012, the Council made the South Cambridgeshire District Council Tree Preservation Order (01/12/SC) ("the Order"), a tree preservation order under section 198 of the 1990 Act and the Town and Country Planning (Trees) Regulations 1999, to protect the two trees while it considered whether to allow them to be felled.

[2] http://www.bidwells.co.uk/view_property.php?property_id=CAM110273&property_type=residential; brochure, p 10.
[3] Compare the plan at p 11 of the brochure.

Local reaction

9. The Parish Council took an active role in coordinating opposition to the proposed felling, and support for the making and confirmation of the Order.

10. Dr Charles Turner, a retired university lecturer in geological sciences living in Great Gransden, in a memorandum of 5 March 2012 to the Parish Council, considered carefully the underlying geological conditions, and concluded that they (not the trees) had been the cause of the structural problems at the Old Rectory – any more than they had been the cause of those at the nearby parish church.

11. Dr Giles Biddle, the eminent arboriculturist and author of the standard work in this field[4] carried out a desktop study based on the material listed above. In a report for the Parish Council dated 15 March 2012, he concluded as follows:

> "29. The cedar is at a distance from the building where the risk of damage is considered to be extremely remote. However, if there is no other possible vegetation, I would agree that the cedar would be the most likely cause of the movement and damage … .
>
> 30. There is no evidence to suggest the involvement of the wellingtonia.
>
> 31. If it is definitely established that the cedar is the cause, I agree that felling would prevent any seasonal movement. There is no risk of long-term heave. …
>
> 32. However, in this situation it would appear that the underpinning to correct the variations in foundation depth would be a more appropriate remedy.
>
> …
>
> 34. … I consider that a root barrier is unlikely to provide an effective remedy."

He recommended the imposition of a tree preservation order, so that any resulting application for consent to fell the cedar could supply further information, and so that a replacement tree could be required. An order could also protect the wellingtonia, which had not been implicated in any damage.

[4] *Tree Root Damage to Buildings*, Willowmead Publishing, 1998.

12. Mr Mike Miller of Richard Jackson, a firm of engineers very familiar with problems of this kind, in a report for the Parish Council dated April 2012, noted that the damage to the house was slight (category 2 in terms of the BRE Digest 251). He concluded that, if the trees were going to cause problems to the house, they would have done so many years ago, particularly in view the relatively thin clay layer. And he too recommended obtaining further information.

13. The Chairman of the Parish Council in a summary report dated 5 April 2012 concluded that the underpinning of the area under discussion would remedy the situation and prevent further seasonal movement, avoiding the need for the trees to be felled.

14. Whether as a result of the Parish Council's activity or otherwise, a large number of local residents wrote to the Council, opposing the felling and supporting the Order – drawing attention to the amenity value of the trees and expressing the hope that some way could be found to save them. To that end, consent under the Order (if sought) should be refused unless there was absolutely no alternative

Reports obtained by the Council

15. More recently, the Council has sought independent advice from John Cromar's Arboricultural Company Limited and AFP Consulting Engineers Ltd.

16. Mr Cromar considers the material summarised above, and also the possible remedial measures. He concludes that the trees are of sufficient amenity value to justify being protected by a tree preservation order. As to causation of damage, he rejects the analysis of Dr Turner and usefully summarises the position as follows, in a subsequent email:

> "the trial pit findings … make it clear that a clay soil (39% Plasticity Index) does underlie the relevant part of the structure; that live cedar roots are present below the structure; and that seasonal movement has been recorded to the damaged part of the building, which, put simply, is going up and down seasonally (up winter, down summer). **All of this establishes to the balance of probabilities and indeed, in my view, beyond reasonable doubt, that the cedar is causing the damage to the structure by way of clay-related shrinkage.**"

17. And as to possible remedies, he explains in his report that neither regular pruning nor the installation of a root barrier are likely to be effective as means of preventing future damage. On the other hand, he suggests that:

> "it appears perfectly possible to install a relatively small amount of underpin to support the affected section of external and internal walls. … The costing of any scheme for repair would allow a comparison to be made between repairing the property and removing the tree as possible solutions."

18. John Howlett of AFP summarises the position somewhat along the same lines:

> "We concur with the previously expressed opinions that the cracking and vertical movement has been caused by seasonal changes in the moisture content of the thin layer of clay beneath the foundations, caused by the extraction of water by the cedar tree, and perhaps also by the wellingtonia tree. The cracking is relatively minor, but nevertheless presents the owner with the expense of having to frequently make good the cracks and decorations. It also makes it difficult to sell the property, leading inevitably to a diminution in the value of the property.
>
> The level monitoring indicates that significant movement has only occurred along the east side of the building. Seasonal structural movement will continue … if it is not underpinned. … Underpinning the east wall would prevent it from undergoing seasonal movement.
>
> …
>
> The cost of this work is likely to be in the region of £20,000. In addition to this there would be professional fees of around £2,000 and building regulations fees."

19. I am instructed that the Council's internal advice is that these costs may be a significant under-estimate.

My instructions

20. The Council is now considering whether or not to confirm the Order, particularly in the light of the possibility – indeed, probability – that, if it is confirmed, the owners of the Old Rectory will put in an application for consent under the 2012 Regulations to fell the trees, and, if such consent is not forthcoming, submit a claim for compensation.

21. In the light of the foregoing, I am asked to advise the Council as to the best way forward.

Confirmation of the order

22. The Order will have effect by virtue of section 201 of the Act until it has been confirmed; but it must be confirmed within six months, that is, by 9 September 2012, if it is not to lapse (Town and Country Planning (Tree Preservation) (England) Regulations 2012, reg 26(2)(b)).

23. The considerations to be taken into account by a planning authority when deciding whether or not to confirm a tree preservation order are presumably the same as those that apply when it is considering whether to make an order in the first place under section 198(1), namely:

    - whether the preservation of the trees is desirable in the interests of amenity; and
    - whether it is expedient to achieve that by the making of a tree preservation order.

24. In the present case, there seems to be an almost universal consensus that the preservation of the trees is intrinsically desirable. Even the owners (in a letter of 15 March 2012) speak of their "desperation" to keep the trees as a beautiful feature of their garden. And clearly the local people are all equally desperate to keep them.

25. However, whilst the preservation of the trees is thus clearly desirable, that does not of itself necessarily mean that it is expedient for the Council to make (or confirm) a tree preservation order.

26. I agree that it seems highly likely that, if the tree preservation order is confirmed, an application will be made for consent under regulation 16 of the 2012 Regulations for the felling of the cedar and, possibly, the wellingtonia.

27. If consent were to be granted for the felling of either or both of the two trees, it would be possible for a condition to be imposed requiring a replacement to be planted (as suggested by Dr Biddle). That would be a legitimate reason for confirming the order; although, if that were to be the sole reason, it would be sensible for the Council to indicate that to the owners of the house at the time the order is made, so that they know where they are. On the other hand, the Council may feel that the owner of a property such as this is likely to want to create and maintain an attractive garden with suitable trees, and it may be unnecessarily heavy-handed to impose a condition solely for that reason, and thus equally heavy-handed to confirm the order solely in order to have the opportunity to impose such a condition.

28. If on the other hand the application for consent is refused, the owners – or possibly their successors in title if the house has by then been sold – will almost certainly submit a claim for compensation. And if the Council refuses to pay compensation, the

owners will then presumably pursue their claim in the Lands Chamber of the Upper Tribunal (the successor to the Lands Tribunal).

Relevance of liability to pay compensation

29. If it seems likely that such a claim would succeed, it would be perfectly proper (and lawful) for the Council to confirm the order, and refuse consent for felling, knowing as it does so that the probable consequence would be that it would be liable to pay compensation. That would mean that the trees would remain, and continue to enhance the amenity of the neighbourhood, and the owners (and their successors in title) would not be out of pocket as a result. But the Council would have to pick up the cost of the underpinning.

30. Alternatively the Council could decide that in the abstract it would be desirable to keep the tree, but not at such a price; in which case it would simply decline to confirm the order, knowing that the probable consequence would be the loss of the tree.

31. That such a consideration is relevant has very recently been confirmed by the Supreme Court in *Health and Safety Executive v Wolverhampton City Council* [2012] UKSC 34, a case relating to the exercise of the discretionary power to revoke a planning permission. At the outset of his judgment, Lord Carnwath set out the question to be decided:

> "1. … The question, as agreed by counsel for the purposes of the appeal, is:
>
> > "In considering under section 97 of the Town and Country Planning Act 1990 whether it appears to a local planning authority to be expedient to revoke or modify a permission to develop land, is it always open to that local planning authority to have regard to the compensation that it would or might have to pay under section 107?"

32. As to the answer to that question, he started his analysis as follows:

> "24. … In simple terms, the question is whether a public authority, when deciding whether to exercise a discretionary power to achieve a public objective, is entitled to take into account the cost to the public of so doing.
>
> "25. Posed in that way, the question answers itself. As custodian of public funds, the authority not only may, but generally must, have regard to the cost to the public of its actions, at least to the extent of considering in any case whether the cost is proportionate to the aim to be achieved, and taking account of any more economic ways of achieving the same objective. Of course, the weight attributable to cost considerations will vary with the context. Where, for example, the authority is faced with an imminent threat to public security within its sphere of responsibility, cost could rarely be a valid reason for doing nothing, but could well be relevant to the choice between effective alternatives. So much is not only sound administrative practice, but common sense.

33. After considering the authorities, he concluded:

> "48. In considering these arguments, and the reasoning of the courts below, I hope I will be forgiven for going back to the "simple approach" with which I started. As I said then, and as Richards J accepted, general principles would normally dictate that a public authority should take into account the financial consequences for the public purse of its decisions. I also said that, at least at first sight, I could find nothing in section 97 which requires it to be treated as an exception to those principles. Nothing I have heard or read in this case has led me to change that view.
>
> 49. The principal argument to the opposite effect is the appeal to "consistency". I accept of course the ordinary presumption that Parliament is taken as using the same words in the same sense. I am aware also that in planning law the apparently innocent expression "material considerations" has acquired an impressive overburden of case law going back more than 40 years. However, none of the authorities before *Alnwick* were directed to the provisions related to revocation or discontinuance. Sufficient consistency is given to the expression if the word "material considerations" is treated as it is elsewhere in administrative law: that is, as meaning considerations material (or relevant) to the exercise of the particular power, in its statutory context and for the purposes for which it was granted.
>
> 50. So read, the Court of Appeal's interpretation creates no inconsistency between section 70 and section 97. The meaning is the same, but the statutory context is different. Under section 70 the planning authority has a duty to act, and it has a limited choice. It must either grant or refuse permission. Its decision must be governed by considerations material to that limited choice. Further, the decision normally has no direct cost consequences for the authority (unless

exceptionally it has a direct financial interest in the development, when other constraints come into play).

51. Under section 97, by contrast, the authority has no obligation to do anything at all; it has a discretion whether to act, and if so how. Secondly, if it does decide to act, it must bear the financial consequences, in the form of compensation. No doubt under section 70, planning permission cannot be "bought or sold". But section 97 creates a specific statutory power to buy back a permission previously granted. Cost, or value for money, is naturally relevant to the purchaser's consideration. To speak of the "self-interest" of the authority in this context is unhelpful. A public authority has no self-interest distinct from that of the public which it serves."

34. In that case, the issue was thus not how the planning authority should determine a planning application (which it has to do, one way or the other, and leads to no compensation liability) – but whether, having granted permission, it should revoke it (which is a discretionary function, but does lead to compensation liability).

35. In the present case, the question is whether the Council should make and confirm a tree preservation order – which is a discretionary function, and does, in effect, lead to compensation liability. The principles are thus the same, and it is clear from *HSE v Wolverhampton* that the existence and extent of the compensation liability is indeed a consideration that can and indeed should be taken into account in deciding whether it is "expedient" to make and confirm an order.

36. Of course, if it seems likely that such a claim for compensation would fail, the Council could confirm the order, refuse consent, and resist any claim that might arise. However, it is clearly never possible to be entirely certain as to the outcome of any litigation, and so it would still be necessary for the Council to consider what is the probability of failure – and what are the consequences.

37. The next question to consider is therefore whether such a claim would succeed.

Liability to pay compensation

38. Although the tree preservation order in this case has been made in accordance with the model order in the Schedule to the Town and Country Planning (Trees) Regulations 1999, it will have effect from 6 April 2012 with the omission of all of its provisions other than any that have effect for the purpose of identifying the order or for the purpose of identifying the trees, groups of trees or woodlands in respect of which the order is in force (Planning Act 2008, s 193(2)).

39. The liability pay compensation will therefore be determined in accordance with not under article 9 of the order itself but under regulation 24 of the 2012 Regulations – although the two provisions are in fact virtually identical. Regulation 24 thus provides, so far as relevant,

> "24 (1) If, on a claim under this regulation, any person establishes that loss or damage has been caused or incurred in consequence of
>
> (a) the refusal of any consent required under these Regulations …
>
> 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 application and the documents and particulars accompanying it, 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 that person's failure to take reasonable steps to avert the loss or damage or to mitigate its extent … "

The wording of this regulation is virtually identical to that of article 9 of the model tree preservation order in the 1999 Regulations.

40. As for what must be supplied along with an application for consent, regulation 16(1) provides:

"Subject to the following provisions of this regulation, an application for consent to the cutting down, topping, lopping or uprooting of any tree in respect of which an order is for the time being in force shall—

(a) be made in writing to the authority on a form published by the Secretary of State for the purpose of proceedings under these Regulations;

(b) include the particulars specified in the form; and

(c) be accompanied, whether electronically or otherwise, by—

(i) a plan which identifies the tree or trees to which the application relates;

(ii) such information as is necessary to specify the work for which consent is sought;

(iii) a statement of the applicant's reasons for making the application; and

(iv) appropriate evidence describing any structural damage to property or in relation to tree health or safety, as applicable."

Again, this is similar to the wording of article 6 of the 1999 model order.

Approach of the Tribunal

41. The Upper Tribunal has recently considered the entitlement to compensation for the refusal of consent under a tree preservation order, in *John Lyon Trustees v Westminster* (2012] UKUT 117 (LC), decided in relation to compensation under article 9 in a subsidence case – very similar to the position that would arise of consent were to be refused in the instant case – where a claim had been made for compensation for the cost of carrying out underpinning said to have been necessary as a result of the continuing presence of a nearby protected tree. *John Lyon* thus summarises the approach that would be adopted if the Council were to refuse to pay compensation and the owners were to refer the claim to the Tribunal; the same approach should therefore also be adopted by the Council in deciding whether or not to admit the claim in the first place.

42. At paragraphs 56 to 59, the Tribunal summarised the position as follows (paragraphs split for ease of explanation):

"56. In my judgment the correct analysis of the legal position is as follows. Compensation is payable for loss or damage caused or incurred in consequence of the refusal of consent to fell the tree (article 9(1) *[now regulation 24(1)]*). It is for the claimant to establish that

[i] such loss or damage was caused or incurred and

[ii] that it was caused or incurred in consequence of the refusal of consent.

57A. It is not suggested that any physical damage occurred after the refusal of consent. In effect, the basis of the claim is

[i] that the continued presence of the tree roots created a risk of subsidence damage occurring in future,

[ii] that in the light of such risk it was appropriate to carry out works of underpinning, and

[iii] that the claimant had such works carried out in March 2005.

57B. The relevant loss or damage is the cost of the underpinning works (not, as [counsel for the claimant] suggested in argument, the dehydration of the sub-soil and ongoing inhibition of rehydration). It is a claim for the cost of preventive works.

57C. Evidence of past damage to the building is relevant only to the question whether there was a risk of subsidence damage occurring in future.

58. The test of causation for the purposes of the present claim must be whether it was reasonable for the claimant to have had the works carried out when it did. If it was not reasonable to have had the works carried out, the cost was not caused or incurred in consequence of the refusal of consent.

59A. Whether it was reasonable to have had the works carried out must depend on

(a) the degree of risk of future subsidence occurring, and

(b) the appropriateness of underpinning as a response to that risk.

Both those matters fall to be considered as at the time the works were put in hand.

59B. Thus, for example, a relatively low risk of damage that would be hugely expensive to repair might make it reasonable to incur modest costs in carrying out preventive works. If it did, the loss suffered in incurring those costs would have been caused by the refusal of consent. While (a) above involves the consideration of foreseeability, the question is one of the degree of risk; and causation is only established on the basis of (a) and (b) together.

59C. In relation to the cost of the works, the claimant needs to establish

(c) that the works in their nature and extent were reasonable, and

(d) that the cost was reasonable. …

59E. Article 9(4)(b) *[now regulation 24(4)(b)]* provides a defence for the compensating authority where the loss or damage was not reasonably foreseeable at the time when consent was refused. … Where the claim is for the cost of preventive works the question is whether it was reasonably foreseeable that (a) and (b) would be established.

59F. With these considerations in mind I turn to consider whether, when the works of underpinning were undertaken in March 2005, there was a risk of future subsidence if the robinia was not felled, and if so the extent of such risk. For that purpose it is necessary to establish the cause of the previous damage (I consider the appropriateness of underpinning below)."

43. Assuming that analysis is correct, the first question that will fall be considered by the Tribunal or the authority (in the light of paragraph 58) is whether it was reasonable for the claimants to have had underpinning works carried out when they did. And that must depend on two further questions (see paragraph 59A), to be answered from the point of view of the claimants at the time the underpinning was carried out:

    (a) what was the risk of future subsidence occurring *as a result of the continuing presence of the tree in question*?

    (b) was the underpinning a reasonable response to that risk?

44. The words in italics are not in the decision, but they must presumably be implied – otherwise it would be possible for compensation to be claimed in a case where it was reasonable to carry out underpinning works in response to a high risk of subsidence occurring for reasons that had nothing to do with the tree in question (such as inadequate foundations on shallow soil, or the proximity of an underground stream). And this analysis is borne out by paragraph 59F, in which the member goes on to consider "whether there was a risk of future subsidence *if the robinia was not felled*".

45. Assuming that the answer to question (b) above was "yes" – so that the underpinning was indeed, from the point of view of the claimants at the time, a reasonable response to the risk of subsidence occurring in the future as a result of the continuing presence of the tree, it is then necessary (see paragraph 59E) to consider whether it was reasonably foreseeable by the planning authority at the time consent was refused that (a) and (b) would be "established". That is, presumably, an authority seeking to defeat a claim must be able show that that it could not have reasonably foreseen – at the time it made its decision on the application for consent – that the claimants would conclude that it was reasonable to have the underpinning carried out to avoid the risk of future subsidence.

Mitigation

46. The analysis by the Tribunal in *John Lyon* (at paragraph 59, quoted above) was incomplete in that it failed to deal with the need for a claimant to take reasonable steps to minimise its loss. However, at paragraph 73, the member noted:

> "I am not persuaded that the claimant has failed to mitigate its loss. There was no evidence to suggest that further subsidence would have been avoided if other vegetation had been removed. I am not satisfied that seasonal wetting and drying was a material cause of the damage to No. 147. Moreover, Ms Milne accepted in cross examination that the further information which she said should have been provided would have made no difference to the compensating authority's decision. It follows that the claimant's failure to provide a fuller picture or make a further application did not cause its loss.

47. This suggests that, in order to defeat a claim, it is not sufficient for an authority simply to show that a claimant failed to make a second application, supported by more information. The authority must be able to show that:

    (a) there was evidence to suggest that there was an alternative cause for the movement of the property – either

        (i) generalised seasonal wetting or drying of vegetation, which would continue whether or not the tree in question was removed;

        (ii) some other specific tree or shrub, the removal of which would solve the problem; or

    (b) the production of further evidence to show that there was no such alternative cause would have led to a grant of consent.

    Of course if the authority can show that there was indeed an alternative cause, that would amount to a failure by the claimant to prove causation (that there was a risk of future subsidence occurring as a result of the continuing presence of the tree in question – point (a) at paragraph 23 above) rather than a failure to mitigate.

The amount of compensation

48. Finally, in relation to the cost of the works, the claimant needs to establish (see paragraph 59C of *John Lyon*):

    (c) that the works in their nature and extent were reasonable, and

    (d) that the cost was reasonable.

Application to the present case

49. In this case, unusually, the Council has available to it a great deal of information and analysis, in particular:

- the reports supplied by the owners of the Old Rectory and their agents – either along with the section 211 notification or otherwise (see paragraph 3 above);
- the reports produced for the Parish Council and its summary of those reports (paragraphs 10 to 13);
- the reports obtained by the Council (paragraphs 15 to 19).

50. Thus, in contrast to the position that usually arises in these cases, the Council does have level monitoring results – generally agreed to be the best indicator of vegetation-related movement. And it has root identification data, to identify which of the various trees nearby is likely to be responsible for such movement. And it has analysis produced on behalf of the two rival interest groups – the owners and the local residents – and a further set of independent reports that it has itself commissioned. This means, incidentally, that I see no purpose being served by insisting on the production of further reports, as has been urged by some local people an earlier stage. That would merely postpone the inevitable.

51. Of these reports, the most helpful are perhaps those in the third category, produced for the Council. And I concur with their analysis, and agree with their conclusions. It will be recalled that these reports include the following passages, in relation to the cause of the damage:

> "All of this establishes to the balance of probabilities and indeed, in my view, beyond reasonable doubt, that the cedar is causing the damage to the structure by way of clay-related shrinkage."
>
> "… the cracking and vertical movement has been caused by seasonal changes in the moisture content of the thin layer of clay beneath the foundations, caused by the extraction of water by the cedar tree, and perhaps also by the wellingtonia tree.
>
> "The level monitoring indicates that significant movement has only occurred along the east side of the building. Seasonal structural movement will continue … if it is not underpinned."

It seems to me highly likely that these conclusions would be supported by the Tribunal in the event that an application for consent were to be submitted and refused, and a claim for compensation were to be submitted and rejected.

52. From this it follows that the answer to the first question posed by the Tribunal at paragraph 59A of the decision in *John Lyon* – what is the risk of future subsidence occurring as a result of the continuing presence of the tree in question? – is that there is a very substantial risk of subsidence damage occurring to the Old Rectory in the future as a result of the continuing presence of the cedar, and some risk as a result of the wellingtonia.

53. As to the possibility of underpinning, the reports conclude as follows:

> "it appears perfectly possible to install a relatively small amount of underpin to support the affected section of external and internal walls. … The costing of any scheme for repair would allow a comparison to be made between repairing the property and removing the tree as possible solutions."

" … Underpinning the east wall would prevent it from undergoing seasonal movement.

The answer to the Tribunal's second question – is the underpinning a reasonable response to that risk? – is clearly "yes".

54. As to the costs, the advice received so far is that the cost of underpinning is likely to be in the region of £20,000, plus professional fees of around £2,000 and building regulations fees; although, as noted, the eventual cost may be larger. However, the amount of compensation that countryside be claimed would be equal to the actual cost of the underpinning works, provided that the nature and extent of those works was reasonable (*John Lyon*, paragraph 59B, 79).

55. It may be noted that in the *John Lyon* case the cost of underpinning was initially estimated at £40,000 (see paragraphs 74-75 of the decision); in the event the cost, and thus the compensation payable, was £68,500 (paragraphs 75, 82); and the claimant's costs were £116,600 (paragraph 84 [5]). If the Council had accepted liability at the outset, it would have had to pay £68,500, or possibly less; by choosing to contest liability, it ended up having to pay £185,100, plus its own costs – a total of more than £200,000.

Conclusion

The cedar

56. In relation to the Cedar, the Council has several options open to it:

    A. It could decline to confirm the Order.

[5] Note that the addendum on costs is contained in the version of the decision available on the Tribunal website, but not in the version available on Westlaw.

B. It could confirm the Order, and in due course allow the trees to be felled, imposing a condition that suitable replacements be planted.

C. It could confirm the order, and refuse consent for the felling of the cedar, accepting as it does so that it has to pay compensation, and seeking to minimise the amount payable.

D. It could confirm the order, refuse consent for the felling of the cedar, refuse to pay compensation, and contest liability in the Upper Tribunal.

57. Of these options, A and B will in all probability lead to the loss of the cedar and possibly the wellingtonia. The replacement obtainable under Option B will not be perceived as being an adequate substitute for many years, if at all. Either of these options would in all probability upset local people, but would avoid the Council having to pay compensation – which, as has been pointed out, is a legitimate matter to take into account (see paragraph 29 to 36 above).

58. Option C would lead to the trees being retained, and thus local people being pleased, but the Council having to pay compensation in respect of the resulting underpinning. To minimise the claimants' costs, which would be borne by the Council – and the Council's own costs – it would be prudent to explain, at the same time that the Order is confirmed, that in all probability any application for consent to fell the trees would be refused but that liability to pay compensation would not be contested. As noted above, the amount actually payable could only be determined on conclusion of the works, but it might well be in excess of the provisional figure initially suggested – in the region of £22,000 plus building regulations fees. It would probably be worth setting aside a budget figure of somewhere between £25,000 and £50,000; and the Parish Council might be invited to express a view as to whether it would wish to contribute towards that sum.

59. Which of these options is to be pursued is clearly a matter for the Council, but it would be perfectly reasonable to pursue any of Options A to C.

60. Option D is almost certain to lead to the Lands Tribunal finding that compensation is payable. That would lead to the Council having to pay a total bill of perhaps between £100,000 and £200,000 – conceivably more. That option therefore has nothing to commend it.

The wellingtonia

61. Finally, it should be noted that the above analysis has largely focused on the cedar, as there seems to be little doubt that retention of the cedar would lead to continuing damage, and thus the need for underpinning. I am much less convinced as to the position in relation to the wellingtonia. If the cedar were to be felled (Options A or B), it would therefore be worth considering carefully whether it would be worth retaining the wellingtonia. If so, the Order could be confirmed only in respect of the wellingtonia (a variation of Option A), or conditional consent given to fell only the cedar (a variation of Option B); and in either case the owners could be invited to reconsider the position once the cedar had been removed.

62. In particular, it should be made clear to the owners at this stage that if the subsidence were to continue, and if for that or any other reason they wished to remove it, they should submit a new application. That approach would prevent any future liability for compensation arising without the Council having a chance to reconsider the position.

63. If on the other hand the house is to be underpinned, to enable the cedar to be retained (Option C), there is no particular point in felling the wellingtonia. Again, it should be made clear that If the owners wish to fell it for reasons unconnected with

the subsidence (as is hinted at in the reports), a further application for consent should be submitted in due course.

64. I should of course be happy to advise further if that would be of assistance.

CHARLES MYNORS

Francis Taylor Building, Temple

23 July 2012

In the matter of the Town and Country Planning Act 1990
And in the matter of the South Cambridgeshire District Council Tree Preservation Order 01/12/SC
And in the matter of the Old Rectory, Little Gransden, Bedfordshire

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23 July 2012

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