

# **JOINT MITIGATION PROTOCOL**

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Version	Comment	Author
Version 1 - 8 May 2008	Initial version of combined document	JAP
Version 2 -12 May 2008	Summary evidence amended to include comment on further engineering information. Engineer report deleted	JAP

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## **Preamble**

**The Protocol is intended to reflect the spirit of the Civil Procedure Rules and aims to ensure that before the commencement of any proceedings:**

- Pre action contact and exchange of information are encouraged
- Improved quality evidence and information is presented in support of the claim
- Both parties have provided sufficient clear evidence and information regarding their position on the matter
- Each party has had the opportunity to consider the evidence and information
- Each party can accept or reject the claim or each other's position at the earliest possible stage
- Each party can modify its own position at the earliest possible stage
- The time period between notification and completion of co-operation or rejection of the claim is reduced
- The issue of tree removal / reduction / replanting is completed on a non-adversarial and ecologically friendly basis
- There is an opportunity for both parties to meet informally without prejudice to liability and resolve disputed cases

# **Protocol**

## **First Notification**

When the Insurer first becomes aware of a potential claim for subsidence damage resulting from tree root encroachment, they will, within 7 days of identifying the tree controller, notify the tree controller of the situation by letter providing detail of the address of the damaged property and general identification of the subject tree(s).

The letter requests the following information from the tree controller within 14 days:

- a) Contact details of the individual / department responsible for the control of the tree, along with any reference, to assist communication regarding tree management and liability.
- b) Contact details of their liability Insurer if appropriate.
- c) The value of the tree (low, medium or high) as determined by the CAVAT System.

## **Evidence**

Within 60 days of giving notice to the tree controller the insurer (or their adjusters on their behalf) will submit either:

- a) A letter confirming withdrawal of the case and that the file should be closed.
- b) A "Submission of Evidence" per Appendix A.

The "Submission of Evidence" should normally present full "Summary Evidence" and thus be conclusive with regard to causation, damage, and mitigation requested. It is appreciated that occasionally specific evidence such as tree root identification or soil analysis may be delayed and in such cases the submission should clearly identify its "Interim Evidence" status and the date of expected submission of the "Summary Evidence" report.

The levels of evidence will relate to the value of the tree as calculated by the CAVAT system and are detailed on the flow chart Appendix B Any subsequent "Summary Evidence" submission will be fully inclusive, not supplementary, per Appendix A.

*(Submissions of Evidence to be copied to Property Insurer)*

## **Consideration**

If the tree controller does not accept the full scope of the mitigation request set out in the "Summary Evidence" then the protocol encourages immediate 'without prejudice discussion' between the tree controller and the insurer (or their appointed handler/advisor) with the aim to achieve agreement to the scope of mitigation works.

## **Rejection**

If agreement to the full scope of the mitigation request set out in the "Summary Evidence" or any revised scope as may have been proposed under 'Consideration' above is not achieved within 28 days of submission of the "Summary Evidence" then the case then falls outside this protocol.  
*(It is expected that Insurers will set SLAs for their adjusters to achieve % recovery cases managed within the Protocol)*

## **Mitigation**

Having been provided with the “Summary Evidence” under the terms of the protocol, mitigation should be carried out and completed within 13 weeks of the date of submission of the “Summary Evidence”.

The mitigation will be undertaken on a “without prejudice” basis to avoid any delay created by debate over liability.

## **Liability and Quantum**

Following completion of mitigation on the agreed basis, liability and quantum may be reviewed:

- Any claim will be based on the principles of law and indemnity applicable to England & Wales acknowledging insurer’s rights and duties of contribution and subrogation.
- Without prejudice to subrogation rights the tree controller should be given notice of the start date, scope and estimated costs, before works start. All substantial variations in repair costs compared to the initial estimate must be explained by the Insurer / Adjuster.
- Without prejudice to rights at law Insurers may waive rights of recovery if the tree is removed within the protocol period. This will be negotiated on a claim by claim basis.
- Failure to complete the requested or agreed mitigation works within the protocol period will result in appropriate remedial works including stabilization being carried out to the property without further delay.
- Building Insurers will proceed in the spirit of the Civil Procedure Rules and Part 36 offers may be made in an effort to settle.
- Agreement as to the scope of mitigation does not affect responsibility at law regarding liability for ongoing Nuisance. Any future claim in respect of further damage due to continuing or repeated Nuisance will not be reduced by any suggestion of contributory negligence in having agreed a scheme of mitigation. The duty of abatement remains with the tree controller.
- Neither party will recover costs regarding the appointment of solicitors with regard to progressing mitigation on cases conducted under this protocol
- For the purposes of trialing this protocol this protocol will only apply to Local Authority owned trees

# Submission of Evidence Appendix A

<b>Date of Submission</b>	31-03-2008	Interim	Summary
<b>Statutory Authority</b>	Any Town Council		
<b>Property Owner</b>	A.N.Other		
<b>Damage Address</b>	Address: 2 The Avenue Any Town SX1 5PH		
<b>Area of Damage</b>	Stepped cracking to front lounge, entrance hall stairs, plus front two bedrooms.	<b>Category per BRE 251</b> 3	
<b>Site Plan</b>  To include all relevant vegetation and significant drain layout. Plan to indicate position of rooms	Attached. Drainage to rear not detailed as remote beyond any potential significance.		
<b>Photographs</b>  These are indicative and are not a complete record of the full extent of the damage	Attached – showing general situation, policyholder's hedge and Local Authority street tree		
<b>Arboricultural report</b>	Not obtained		
<b>Details of Statutory Authority Third Party Vegetation</b>	One - Street tree within pavement to front right of house		
<b>Details of Policyholder Vegetation</b>	Beech hedge 2m high 3m from corner of house		
<b>Details of Other Third Party Vegetation</b>	None		
<b>Root Analysis</b>	Plane (confirms subject tree) 1.5m below fdn		
<b>Foundation depth</b>	750mm below ground level		
<b>Subsoil</b>	Clay - see attached analysis		
<b>Factors indicating clay shrinkage</b>	Pattern of damage shows rotation towards the street tree Timing of damage - started late summer, not now progressive Attached site investigation data indicates desiccation to 3.00M as shown by the soil suction profile, compares with root profile to 2.70M		
<b>Date damage discovered</b>	September 2007		
<b>Monitoring</b>	Not obtained. All evidence obtained clearly demonstrates influence of the street tree		
<b>Drains</b>	None to front of property		
<b>Estimated cost of repairs</b>	<b>Protocol Mitigation</b>	<b>Delayed / Rejected Mitigation</b>	
Investigation	£ 800	£ 1,400	
Substructure	Not anticipated	£ 8,300	
Superstructure	£ 6,800	£ 7,400	
Alt Accn	Not anticipated	Not anticipated	
Fees & Expenses	£ 1,900	£ 2,100	
Total	£ 9,500	£19,200	
<b>Mitigation Request</b>	Immediate removal of street tree		
<b>Comments (use this box to add further engineering comments if required or advise if engineering report attached)</b>	Customer's beech hedge not considered relevant and all roots sampled were Plane		

## Appendix B : Joint Mitigation Protocol Evidential Requirements For Council Owned Trees

<b>Max. Timeline in</b>	Building Insurer (or their representative) visits the property & assesses if cause of damage is subsidence and if council tree or other factors are likely to be implicated. If the tree, then the Tree Controller/Risk Manager is identified.
<b>7 days</b>	Building Insurer (or their rep.) writes to Tree Controller within 7 calendar days of identifying Tree Controller seeking: <ol style="list-style-type: none"> <li>1. Contact details of the individual/department responsible for control of the tree, along with any reference, to assist communication regarding tree management and liability.</li> <li>2. Contact details of their liability Insurer if appropriate.</li> <li>3. The value of the tree (low, medium or high) as determined by the Tree Officer.</li> </ol>
<b>21 days</b>	Within 14 calendar days of receiving the correspondence referred to above, the Tree Controller/Tree Officer will respond to the Building Insurer (or their rep.) giving responses to questions 1, 2 & 3 above.
<b>81 days</b>	<p>Within 60 calendar days of receiving the value of the council tree, the Building Insurer (or their rep.) will submit either:</p> <p>a) A letter confirming withdrawal of the case, on the basis that the site investigation has not implicated the council tree in the damage, and that the file should be closed.</p> <p>b) A “<b>Submission of Evidence</b>” based on the tree’s CAVAT value with the requested mitigation (pruning/felling).</p> <p>Low Value Trees - may be removed &amp; replaced.  Medium Value Trees - make an important contribution to the area.  High Value Trees - make an extremely important contribution to the area.</p> <p><b>Low Value Trees:</b></p> <ol style="list-style-type: none"> <li>1. Report on damage to building.</li> <li>2. Plan &amp; profile of foundations.</li> <li>3. Plan of site showing location of building in relation to all trees and significant vegetation in vicinity of site.</li> <li>4. Trial pit cross section to underside of foundation depth plus borehole through base of trial pit to a minimum depth of 3m (explanation to be provided if borehole unable to reach 3m depth). Borehole log to be provided.</li> <li>5. Root ID from beneath underside of foundation.</li> </ol> <p><b>Medium Value Trees:</b>  All of the above plus:</p> <ol style="list-style-type: none"> <li>6. Soil moisture content readings at 0.5m centres, starting at the underside of the foundation, down to 3m depth of B/H.</li> <li>7. Liquid limit test results at underside of foundation and approx 2m depth</li> <li>8. Plastic limit test results at underside of foundation and approx 2m depth.</li> <li>9. Soil plasticity calculated from LL – PL.</li> <li>10. Control borehole to 3m depth with log, with same tests as above, if it is possible to locate such a borehole on the site and remote from the influence of any vegetation. If impossible then explanation needed.</li> <li>11. Oedometer or suction test results at underside of foundation &amp; 1.0m centres down depth of 3m borehole <b>ONLY</b> when there is <b>NO</b> control borehole. If there is a control borehole then other tests listed are sufficient.</li> <li>12. Shear vane test results at 0.5m centres, starting at the underside of the foundation, down to 3m depth of borehole(s).</li> <li>13. CCTV &amp; hydraulic testing to drains (excluding Water Board owned) located within 3m distance of area of subsidence damage. If unable to water test due to no access/blind entries/etc then give reason.</li> <li>14. Crack monitoring is required on a maximum of 2 month frequency and is to be set up ideally at time of first visit by building insurer representative or within 7 days of 1<sup>st</sup> visit. Send all available readings with Submission of Evidence.</li> </ol> <p><b>High Value Trees:</b>  All of the above <b>EXCEPT crack width monitoring</b>, plus:</p> <ol style="list-style-type: none"> <li>15. Control borehole (if possible) &amp; point of subsidence borehole, each to 5m depth (not 3m as for medium value).</li> <li>16. Level monitoring commencing at outset of claim for a relevant period (max. 12 months) using a deep datum (if possible) to 8m depth, otherwise use deep manhole.</li> <li>17. Particle Size Distribution Analysis to BS 1377 Part 2 test 9.0 on a single soil sample taken from a 1m zone below the underside of foundation (Only if drains are present within 3m of the site of damage).</li> </ol>

	Joint Mitigation Protocol Evidential Requirements For Council Owned Trees (Continued)
<p><b>109 days</b></p> <p><b>172 days</b></p> <p><b>1 year</b></p>	<p>A. Unless mutually agreed to the contrary, if the requested mitigation scope is not accepted within 28 calendar days of submission of the "Evidence" then the case falls outside this Joint Mitigation Protocol.</p> <p>B. Mitigation is to be completed within a maximum of 13 weeks of the date of the Submission of Evidence. If tree removal cannot be agreed without longer term, crack or level monitoring evidence, then the Tree Controller will arrange for pruning to be completed as soon as is practicable but no later than 13 weeks from date of Submission of Evidence.</p> <p>C. In cases other than single trees owned by the local authority, e.g. where there are multiple trees/vegetation and/or multiple ownerships an arboricultural report may be required at the discretion and expense of the building insurer. This report should identify &amp; detail the physical attributes of ALL trees &amp; significant woody vegetation in the area of damage. It should also state proposed mitigation which should include the option of pruning/on going maintenance if thought to stand a reasonable chance of bringing about stability.</p> <p>D. The Building Insurer will want to proceed with repairs within 1 year from outset of claim.</p> <p>E. By mutual agreement all the above timescales may be varied.</p> <p>F. Protocol to be reviewed after 12 months in operation.</p>

# Appendix C

Contact details and subscribers to the protocol

To be completed