

Our Ref : 13304/JGC
Your Ref : 22122100493
Date :

Zurich Municipal
Farnborough Casualty Claims Unit
PO Box 107
2 Gladiator Way
Farnborough
Hants GU14 6GB

PRELIMINARY REPORT
PUBLIC LIABILITY

POLICY NUMBER : Not advised

NAME AND ADDRESS : One Housing Group
OF INSURED : 100 Chalk Farm Road
London
NW1 8EH

THIRD PARTY CLAIMANT : Punch Taverns

via Pyle Consulting
48 Church Street, Reigate, Surrey RH2 0SN

TIME, DAY AND : Notification by letter in December 2009,
DATE OF LOSS from Pyle Consulting

SUPPOSED CAUSE : Supposed damage to boundary wall as a result of tree
root encroachment

LOCATION OF DAMAGE : The Albert Public House (11 Princess Road), 13
Princess Road, and
Auden Place London NW1 8JR

LIABILITY : Under consideration

RESERVE : £26,000.00 (precautionary)

We refer to your email instructions of 6 March 2012. We confirm having made immediate contact with your insured, One Housing Group, and carried out an unaccompanied preliminary inspection of the properties involved on 7 March 2012. We reported our initial findings back to the Senior Surveyor at One Housing Group, with a copy to you, on 8 March 2012. Our intention is to make a further joint inspection with the third party engineers at some point in the near future once the issue of the ownership of the wall has been satisfactorily resolved. As you will be aware, the ownership of the boundary/retaining wall in question is fundamental as to whether this continues to be a liability claim or a property claim, possibly under the subsidence peril. Although the claim has been ongoing since 2009, the question of ownership of the wall is still unclear.

BACKGROUND

From our discussions with Patrick Sabwe and James Johnson of One Housing Group (OHG) and from our review of the papers which you have forwarded, the history regarding damage to the boundary/retaining wall between the The Albert, 11 Princess Road (owned by the claimants, Punch Taverns) and Auden Place (owned and managed by OHG) is as follows:-

Civil and structural engineers, Pyle Consulting, were first made aware of the structural problems to the boundary wall sometime during the course of 2009. In December 2009, they wrote to OHG regarding the matter. On 20 April 2010, a site meeting was held between the Director of Pyle Consulting, Brett Champion, and Mr Ukheleigbe of OHG, to discuss options for repairs to the wall. A number of repair schemes were considered by Pyle Consulting, one of which was to face the entire wall with a new building material, "Criblock" (Criblock is a reinforced concrete retaining wall system, a gravity type wall that uses the mass of the concrete and materials, compacted within cells, for structural stability), and another to completely demolish and reconstruct the wall on piled foundations. Details of these schemes were forwarded to OHG on 8 September 2010. In October 2010, repair quotations were obtained from Underpin & Makegood for these two options, with prices coming in at £37,000.00 and £55,000.00 respectively.

In November 2010, the insured instructed Brittain Hadley Associates, Chartered Building Surveyors, to act on their behalf. On 20 December 2010, Mr Rickard of Brittain Hadley Group met Mr Champion of Pyle Consulting on site and a package of information, including the above costings, were later forwarded to Mr Rickard. It was agreed that Mr Rickard was to look into the issue of ownership of the wall. Regrettably this issue has still not been resolved.

Between February 2011 and February 2012, Pyle Consulting have apparently continued to chase Mr Rickard but have not received any response. In desperation, therefore, on 16 February 2012, Pyle Consulting wrote to the Chairman of One Housing Group, registering their complaint that the matter was not being dealt with expeditiously. The letter confirmed that should the parties involved agree that the wall in question belongs to Punch Taverns, they and their insurers would be seeking recovery of damage and costs in respect of those works on the assumption that the damage has been caused by tree root encroachment. The letter suggests that the matter be referred to OHG's public liability insurers. We presume that reference to insurers has prompted your insured to make contact with yourselves.

The wall in question was sufficiently cracked and had a sufficient lean to warrant temporary

shoring and propping in 2010 and we can confirm that for the last two years the damaged section of wall has remained protected behind plywood hoardings which incorporate a temporary door into the stepped rear garden of no.13 Princess Road.

DESCRIPTION OF BUILDING

The claim concerns a one brick thick boundary wall between the rear garden and courtyard of The Albert pub and the flowerbeds and public thoroughfare which links Kingstown Road to Calvert Street and runs parallel to a three storey block of flats known as Auden Court.

The wall, which is approximately 25m long, varies in height between 1m and 1.5m progressively getting higher towards the Calvert Street end. The wall incorporates brick piers along its length at 1.5m intervals with steel open fencing between the piers. The wall has a felt damp proof course, 810mm above ground level. At its eastern end, the wall runs at right angles along a curved boundary between The Albert pub and what we believe to be no.13 Princess Road. It is this section of curved walling, which is approximately 2m in height, that is damaged and is the subject of this claim although there is a suggestion that the lower section of wall between the flowerbeds of Auden Court and the raised rear courtyard of The Albert pub is also damaged, but this is much less obvious. The wall appears to be approximately 20 years old. The exchange of correspondence seems to indicate that the wall was built at the same time as Auden Place in the late 1970's despite the wall being of completely different brickwork to Auden Place.

At a point where the wall changes direction, there is a 16m tall unidentified (*pomoideae*?) tree which is growing within 500mm of the face of the wall from a flowerbed which runs parallel to the wall and a section of concrete paving which forms the main part of the thoroughfare adjacent to Auden Court. There is another tree of a similar height within 1m distance of the boundary/retaining wall further along towards the western end. There is also a cherry tree, 12m in height, situated 3m from the wall within the large rectangular raised flowerbed towards the Kingstown end of the thoroughfare adjacent to the steps leading down to Auden Place. Within the courtyard of the pub itself there is a 4m tall cherry tree growing within 500mm of where the boundary wall turns at 90 degrees along the Kingstown Road boundary.

The location of the trees and the wall is best illustrated by way of the attached sketch plan and photographs.

Where the retaining boundary wall forms the boundary between the pub garden and the rear garden of no.11 Princess Street, there are large sections of an original brick wall up to a height of some 1.5m above the level of the stepped rear garden to no.11. The new wall appears to have been built into and on top of an original yellow stock brick wall which probably dates from the early 20th century. This is clearly visible in the photographs contained within the Pyle Consulting report, dated 4 December 2009.

SITE INVESTIGATIONS

Site investigations were undertaken in December 2009. Pyle Consulting, acting for Punch Taverns, instructed Bowbuild to dig a trial pit and borehole adjacent to the boundary wall. The pit was dug from within the flowerbed adjacent to the largest of the two trees on the Auden Court

side. The foundations of the boundary retaining wall were found to comprise 350mm deep brickwork with a 60mm spread and 80mm deep footing. The foundations of the relatively new boundary retaining wall were found to be resting upon older brickwork, assumed to be the footings of an older wall which extended to 1.3m below ground level. The trial pit was extended by hand augured borehole to 4m depth. The ground within the trial pit was made ground and the borehole revealed a slightly gravelly clay to 2m with virgin brown clay to 4m depth. Some rootlets were noted above the depth of the borehole to 4m. Roots retrieved at 1.7m depth and 2.6m depth were identified as *pomoideae*, which corresponds with what we believe to be the species of both of the two principal trees belonging to your insured. The soil sampling indicates a moisture deficit between 2-3.5m depth. This corresponds with the apparent desiccation of the clay subsoil using the filter paper suction test method. We have been unable to calculate desiccation using the Driscoll method because the site investigation results do not include any Atterberg limits.

Although there may well be drains in the vicinity of the wall towards the Princess Road properties, this could not be determined from our initial inspection. Drains have not been mentioned in any of the paperwork.

No monitoring of the cracks appears to have been undertaken although this would be somewhat academic given that the wall is reportedly being propped up with timber shoring behind the plywood hoarding. We can confirm that the section of the wall closest to the temporary hoarding is braced with timber shoring between the tree and the wall.

EXTENT OF DAMAGE

As stated above, our preliminary inspection of the wall was limited to what we could see from the Auden Place public thoroughfare. We had no access to either the pub rear garden or the rear garden of Princess Street. The damage that we have seen is only to the Auden Place boundary. There are a series of 5-6mm wide diagonal cracks in the boundary retaining wall behind the largest of the two trees running down from approximately 1.5m above ground level to dpc height. Further along the wall, approximately half way between the two trees, there is a 2mm diagonal crack below damp proof course level. The brickwork to the lower section of this wall below the approximate level of the pub patio is in relatively poor condition and needs repointing and is clearly suffering from efflorescence and salts leached out from the retained ground behind beneath the pub patio. There is a slight outward lean on the wall but nothing that would give rise to concern.

We were unable to see the damage to the wall behind the hoardings and plywood screen. However, from the photographs in Pyle Consulting's report, dated 4 December 2009, there would appear to be a series of stepped diagonal fractures in the original brickwork on the curve of the wall. The cracking also continues upwards into the modern section of brickwork, again on the curve of the wall. A spirit level held against the wall suggests that there is an outward bulge of approximately 30mm at 1m above stepped ground level within the rear garden of 13 Princess Road.

In summary, it would appear that the damage is primarily to the curved section of 2m tall retaining wall which divides the pub courtyard area from the rear garden of no.13 Princess Road. There is further damage on the wall at the corner where it turns at 90 degrees to Auden Place and

along the Auden Place boundary itself.

We would suggest that the boundary retaining wall between the pub courtyard and the rear garden of no.13 Princess Road is a party wall and we would hope that the claimants have also involved the owners of no.13 Princess Road in their discussions regarding repairs. However, from paperwork we have seen so far, this does not seem to be the case.

It is possible that the cracking is linked to subsidence of the wall, possibly as a result of clay shrinkage due to the dehydrating effect of the two nearby trees which are under the control and ownership of your insured. However, the outward bulging of the wall suggests a problem associated with defective design and construction, although both have contributed to the damage since the wall was constructed.

CLAIM

The insured were first notified of a potential claim in December 2009. We do not have a copy of the letter from Pyle Consulting to OHG. As we described above, two meetings were held in 2010 to discuss the ownership and repairs to the wall. More recently the letter, dated 16 February 2012, from Pyle Consulting to OHG, indicates a degree of desperation that the third party claimants have in trying to resolve this issue and confirms that a recovery action will be taken against your insured in respect of tree root nuisance should the wall legally belong to Punch Taverns.

LIABILITY

Liability in Tort

The legal position is that an action for nuisance for root encroachment lies against the *controller* of the trees (*L E Jones (Insurance Brokers) Ltd -v- Portsmouth City Council (2002)*).

The organisation responsible for the control and maintenance of the trees must be reasonably able to foresee that damage would result from the action of roots from their trees. A Local Authority, Public Body or Housing Association is deemed to have such knowledge for foreseeability not generally to be an issue. (*Solloway -v- Hampshire County Council (1981)*; *Paterson -v- Humberside County Council (1995)*; and *Kirk -v- London Borough of Brent (2005)*).

Tree root encroachment is a continuing nuisance, and limitation is not a defence, except from the date upon which the nuisance is abated (this does not mean pruning, only underpinning or tree removal generally abate root encroachment). The person suffering damage must, however, give notice to allow the controller of the vegetation reasonable time to take action (around 4 months (*Jones -v- Portsmouth*)) to abate the nuisance, otherwise the cost of any subsequent underpinning is irrecoverable. If notice is given, underpinning of a structure to negate the effect of roots from vegetation within Local Authority control is recoverable (*Delaware Mansions -v- Westminster City Council (2002)*).

In *Loftus-Brigham -v- London Borough of Ealing (2003)*, the Court of Appeal held that the only

question for the Court was whether the defendant's tree roots materially contributed to the damage, and awarded full damages without any reductions to the claimant homeowner. Contribution could only be sought from a *negligent* party. A material contribution was anything other than de minimus. However, in *Gerard-Reynolds -v- London Borough of Brent* (2005), the court decided that the Local Authority was only responsible for that proportion of the damage that was as a direct result of the nuisance from their tree. It followed the Court of Appeal decision in *Holtby -v- Brigham & Cowan (Hull) Limited* (2000). Negligence is not a pre-requisite on the part of the other contributors to the damage.

Inadequacy of foundations is no defence against a claim in nuisance (*Bunclark -v- Hertfordshire County Council* 1977)), nor is the fact that trees were present prior to the construction (*McCombe -v- Read* 1955)). However, these older decisions may not be upheld for a modern property whose foundations did not comply with the standards in force *at the time of construction*, and where vegetation was already present. "Modern standards of construction can be expected to take account of obvious hazards in the vicinity of the structure to be built" (*Siddiqui -v- London Borough of Hillingdon* (2003)).

The site investigations have revealed the soil beneath the retaining boundary wall to be shrinkable clay. They have also found that the new wall was built upon the footings of a much older wall. The soil testing indicates desiccation of the clay to 4m depth with roots from the insured's trees being present to 3.5m.

Whilst the site investigations would seem to implicate the trees, we would very much question the original design and construction of the wall and whether this was adequate to retain the ground beneath the pub's courtyard. The pattern of cracking is not clear at this stage. Clearly on the curved section of wall, adjacent to no.13 Princess Road, the wall is retaining some 1.5m of ground and there are no signs of any piers or buttresses and so it is hardly surprising perhaps that the wall has developed an outward bulge. Your insured's trees would not be responsible for this outward bulging unless it could be shown that the outer edge of the footing had subsided causing the upper section of wall to move laterally.

Ownership of Wall

Despite the matter having been raised with the insured back in December 2009, there does not appear to have been any progress made in determining who owns the wall in question.

The discussion appears to have been whether the wall was constructed by OHG or its predecessors at the same time as the block of flats in Auden Place was being built. As we pointed out earlier, the brickwork of the boundary retaining wall is totally different to Auden Place although this may not be relevant. There is mention that at the time of development of Auden Place, part of the rear garden to The Albert pub was compulsory purchased. Pyle Consulting also state that the deeds to The Albert pub have been reviewed and there is no mention that the wall forms part of the demised premises. This would suggest that the boundary retaining wall fronting the Auden Place thoroughfare, i.e. the main length of wall, is indeed under the ownership of your insured. However, we are much less certain regarding the most damaged section of curved wall which forms the party dividing wall between the pub courtyard and 13 Princess Road. We doubt very much whether this section of wall has anything whatsoever to do with your insured. It is this section of wall which appears to have been partially demolished as part of the temporary works although we have yet to confirm this. It is

our thinking that this section of wall is a joint responsibility between the owners of 13 Princess Road and the pub.

Overview

If the longest section of wall is agreed as being under the insured's ownership, then there is clearly no liability issue to consider and the claim may have to be changed to a property claim. If, however, the wall is found to belong to the pub, then your insured may have a liability in respect of the growth of the trees which have contributed to the damage although, in our opinion, are not solely responsible for the damage. This liability would be the same if the wall is found to belong to the owners of 13 Princess Road or the pub, or both. It would be open to the building insurers of no.13 Princess Road to make a claim against your insured if the pub established that the cost of repairs could be shared with that other owner, either on an agreed basis or under the provisions of the Party Wall Act.

QUANTUM AND RESERVE

We are uncertain as to the full extent of damage to the wall which is hidden by the hoarding. The cracking that we have seen is moderate - no more than 10mm in width, suggesting Category 2 or possibly 3 of the BRE Digest 251. Whilst the wall is apparently leaning outwards, we are doubtful whether it needs to be completely rebuilt. There may already be a section which has been partly taken down. The design of the repaired wall using "Criblock" suggests substantial betterment. Complete demolition and reconstruction of the entire wall seems completely unnecessary. It is possible that a section of wall will need to be reconstructed but other parts which are cracked can, in our opinion, be robustly repaired using crack stitch bars and resin bonding.

The quotations received from Underpin & Makegood are £37,000.00 for re-facing the wall with "Criblock" and £55,000.00 for demolition and reconstruction on new piled foundations, assuming the trees are not removed.

If ownership of the wall suggests that a successful liability claim can be made by the third party, then we would be hopeful that we would be able to steer that third party towards a more realistic and less expensive repair option. However, for the time being we recommend that you create a precautionary reserve based upon the lower of the two repair costs. We would suggest that you create a reserve of £26,000.00 in this regard.

RECOMMENDATIONS

We have sent a copy of this report to your insured. We suggest that strenuous renewed efforts be made to establish the ownership of the wall before we have a further site meeting with Pyle Consulting to discuss liability and repair options. There seems little point in having any further meetings if the ownership of the wall is still in question, as this is fundamental to the claim. In the meantime, it might be appropriate for the insured to consider reducing the two trees in question purely without prejudice to liability. It might also be worthwhile considering removing the closest of the two trees (subject to checks being undertaken to ensure that it is not protected

by the Council) an action that might persuade the third party to reduce the extent of works they deem necessary to the wall.

UFTON ASSOCIATES LTD

JGC/pmc

Encl: Photographs
Site plan