RESOLVING CONFLICT: TREES, HEDGES AND NEIGHBOURS

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Introduction

- Boundary trees and hedges
- Ownership
- Encroaching branches and roots: nuisance
- Dangerous roots and branches
- Japanese knotweed
- Access to neighbouring land; dispute resolution
- Boundary hedges, hedgerows
- TPOs: need for consent
- Unauthorised works

Trees on boundaries

- Trees frequently found on property boundaries
- Generally land used for an activity that will be in middle of site, planting (inc trees) round the edge
- Taller elements in landscape at edge of property, for visual reasons
- Hedges, shrubberies used to mark ownership boundaries
- Edges of property often less-well maintained (sometimes deliberately, to improve security)

Boundary trees: ownership

- Tree is owned by owner of soil surrounding the base
- That includes leasehold, sub-leasehold etc
- Terms of lease will be critical
- Branches and roots that encroach onto neighbouring land still owned by owner of trunk – but neighbour may cut back to boundary.
- Tree straddling boundary probably owned by neighbours in common, so each will need other's consent to carry out works.
- Generally, owners can do whatever they like with trees, but may be subject to consent where tree subject to TPO.

Encroaching roots and branches

- “Trespass” is when A goes onto B’s land and causes damage
- “Nuisance” is when A does something on A’s land that harms B

- Encroaching tree roots and branches: could be dealt with either way, but law has created special category of nuisance caused by encroachment
- Neighbours – leaves, berries, subsidence
- Encroaching trees (esp. roots) may cause harm, but even “mere” encroachment is sufficient to amount to nuisance

Harm caused by roots

- Trees need more water during summer, and roots absorb water from soil, leading to drop in ground level (subsidence). Soil regains moisture during rainfall (esp in winter).
- Result is annual cycle of rising and falling ground level, leading to damage to structures resting on the soil.
- May cause damage to buildings or, more often, ground surfaces (paving etc)

Nuisance: what must be proved

- Causation
- “a factual connection between an act and a consequence that in some way follows from that act”
- Just because there are tree roots/branches – doesn’t mean causation is proved! Need evidence.
- Local authorities – insurance

- Foreseeability
- the claimant must prove the damage was ‘reasonably foreseeable’. If not, the damage is said to be too ‘remote’

Damages for nuisance

- Where encroachment leads to harm (typically to buildings, pavements etc), action for will result in claim for damages – to rectify past harm, and to take steps to prevent future harm
- (1) Past harm – cost of sorting out property, including redecoration
- (2) Avoiding future harm – may be to underpin property, if tree is to be retained, or to fell tree (and deal with resulting heave)
- (3) incidental loss – eg temporary re-housing
- (2) and (3), but not (1) may be relevant to claim for compensation if tree protected by TPO

Tree roots and branches

Tree roots in the Court of Appeal:

- *Elliott v Islington LBC* [2012] EWCA
  - Tree, whose roots had caused damage, was to be removed; injunction not necessary
- *Berent v Family Mosaic Housing* [2012] EWCA
  - Failure to establish liability for damage caused by roots of tree on neighbouring property – not reasonably foreseeable
- *Robbins v Bexley LBC* [2013] EWCA
  - Subsidence damage caused by the LA's failure to take steps reasonably required to prevent damage – reasonably foreseeable

Abatement of a nuisance

- Mere encroachment by roots or branches does not usually give right to damages.
- But abatement – cutting back roots or branches to boundary – is self-help remedy.
- Branches etc belong to tree owner.
- Cost of abatement strictly down to tree-owner.

- Explored in ***Lemmon v Webb*** (1894)

Hazardous trees: the problem

- Trees may fall over or lose branches
- May be due to age, deat, or disease – or, exceptionally, damage
- Generally not a problem on boundaries – defective tree spotted before it becomes a problem
- But may be – eg damage to greenhouse etc
- However, trees on front boundary, overhanging highway land, may be major problem – users of highway, esp drivers, not aware of trees on neighbouring land

Hazardous trees

- Duty of occupier of land
  - to those on the land under the **Occupiers' Liability Acts** 1957 (visitors) and 1984 (trespassers), and
  - to those elsewhere, in **Negligence**

  to take "reasonable" care to ensure that people are "reasonably" safe from harm
- Action to avoid litigation:
  - Assess risk; inspect, with appropriate care; prioritise;
  - Take action as required; keep records and photos (if possible)
  - Have a programme – decide intervals
  - Keep records.

Exclusion of liability

- Exclusion of liability
  - Notice – must enable visitor to be reasonably safe
  - Children – must expect children to be less careful than adults

Litigation: what must be proved

- To bring a successful claim several things must be proved:
  - Harm – personal injury/damage to property
  - Duty of care – common law duty not to cause harm
  - Breach – did/didn't do something – acts/omissions
  - Causation – that breach caused the harm
  - Foreseeability

- Any legal defences?
- Contributory negligence?

Hazardous trees in the courts

- *Stagecoach South Western Trains v Hind* [2014] EWHC
  - Tree fell onto railway; landowner not required to do more than carry out periodic informal inspection, absent any trigger sign.
- *Witley Parish Council v Cavanagh* [2018] EWCA
  - Large tree next to road, fell onto bus in a storm; owner (parish council) should have inspected every two years, in line with expert opinion and FC guidance.
- *Parker v National Trust* [2021] EWHC
  - Trust had properly implemented sensible tree management policy; not liable for falling branch injuring visitor
- *Hoyle v Hampshire CC* [2022] EWHC:
  - Cherry tree fell, killing driver. Council not in breach

Remedies

Remedies – what can the court give?

- Action for damages - ££
- Claim for an injunction – stop the ongoing nuisance or damage
- Statutory nuisance – injurious to health
- Access to neighbouring land – go on the land to complete works

Japanese knotweed

- *Network Rail Infrastructure v Williams* [2018] EWCA
  - Summary of problems caused by Japanese knotweed
  - Knotweed growing on NR's land for 50 years; encroached onto W's land
  - Mere presence of knotweed harmed amenity of affected land sufficient to give rise to claim for damages in nuisance and a right to an injunction.

<u>Cannot be compensated for reduction in value of land = economic loss</u>

Access to Neighbouring Land

- Access to Neighbouring Land Act 1992 allows access to neighbouring land for tree pruning
- Rare – but possible still

- Court will only grant an order considering net benefit of proposed works
  - *BPT v Patterson* (2016, County Court), upheld in *Prime London Holdings 11 Ltd v Thurloe Lodge Ltd* [2022] EWHC

Usually, parties can agree access to the neighbouring land for the works!

Litigation – a health warning…!

- Litigation costs can be extremely high
- Sometimes they may be wholly disproportionate to the issues

Example

- Cost of remedial works - £5,000
- Damage claimed - £25,000
- Cost to bring claim to trial Claimant - £35,000
- Costs to bring claim to trial Defendant - £28,000
  (experts reports, site visits, solicitors, counsel fees)

- Winner pays loosers costs – and their own (!)…
- If lose as Claimant = £65,000

Litigation – a health warning…!

- Like a very tough household cleaner
- Tough
- Removes all trace of the problem
- Expensive
- Can leave a nasty smell for some time after…

Mediation – the new alternative…?

- Like a multi-purpose household cleaner
- Flexible – available in a variety of fragrances
- Any solution possible - parties
- Cheaper – costs shared
- Leaves and very nice fragrance after!

Arbitration

- A dispute settled via ***arbitration***
- An arbitrator – or a panel make the decision
- Contracts/forestry
- Arbitration clause in the contract
- ‘Seat’ of arbitration
- ‘Rules’
- Arbitrator’s decision final
- Quicker than going to court
- Parties control the process – private judging

Trees and highways

- Street trees a major problem
- Highway trees owned by highway authority – regardless of when planted
- Duty of highway authority to prevent obstruction of highway

- S 149/S 154 Highways Act – removal of ‘things’ deposited and notice to remove encroachment/ ‘overhang’ on the highway.

Trees and highways

- Encroachment of highway trees onto neighbouring land

- Encroachment of neighbouring trees onto highway land
  - *Yetkin v Newham LBC* [2010] EWCA : highway authority has duty to pedestrians (even negligent ones) to avoid danger caused by encroaching vegetation; also *Morrison v Sheffield Corporation* [1917], CA

Boundary hedges

- Gardens getting smaller, houses getting closer to one another?

- Anti-social Behaviour Act 2003 now almost 25 years old; very little litigation
  - Guidance on procedure in *R (Pelling) v Newham LBC* [2011] EWHC and *R (Rungay) v Secretary of State* [2014] EWHC
  - Trees are not a hedge – *R (Castelli) v Merton LBC* [2013] EWHC

Reducing problem?

- Local authorities may request parties deal as a private matter
- Neighbours often focussed on land/boundary disputes

Important hedgerows

- Hedgerows Regulations 1997 still in force
- Need consent to remove important hedgerows (criteria in Regulations)
- No changes to Regulations
- No litigation
- No problem?

Protection of special trees

- Planning policy now in NPPF (periodically updated)
  - gives some protection for ancient woodlands and veteran trees
  - felling veteran trees needs wholly exceptional reasons ***and*** compensation strategy: *Juden v Tower Hamlets LBC* [2021] EWHC
  - but see *R (Hudson) v Windsor & Maidenhead RBC)* [2021] EWCA
- Historic parks, gardens and landscapes – limited protection
- Trees in conservation areas
  - general duty to consider effect on CA (not just 6-week notice): *R* (*McClellan) v Lambeth LBC* [2014] EWHC
- Trees in churchyards (new Faculty Jurisdiction Rules)

Protection of special trees

- Tree preservation orders – TCPA, amended by Planning Act 2008 (came into force in 2012 in England; coming into force in 2027 in Wales)
- Exemptions from need for consent almost all in 2012 Regulations
  - largely as in 1999 Model Order
- Applications and appeals procedures streamlined
- Article 5 certificates gone
- *Blue Book* replaced by online Planning Practice Guidance in England – new guidance will be issued in Wales in summer 2027

Works to prevent or abate a nuisance

- TPO consent not needed for works “necessary to prevent or abate a nuisance”.
- This means that, if A’s tree (subject to TPO) is encroaching onto B’s land, B does not need consent to remove branches or roots back to the boundary – but that may only apply where the tree is causing actual damage (*Perrin v Northampton*) – law not clear.
- Exemption will not apply in Wales from October 2027.

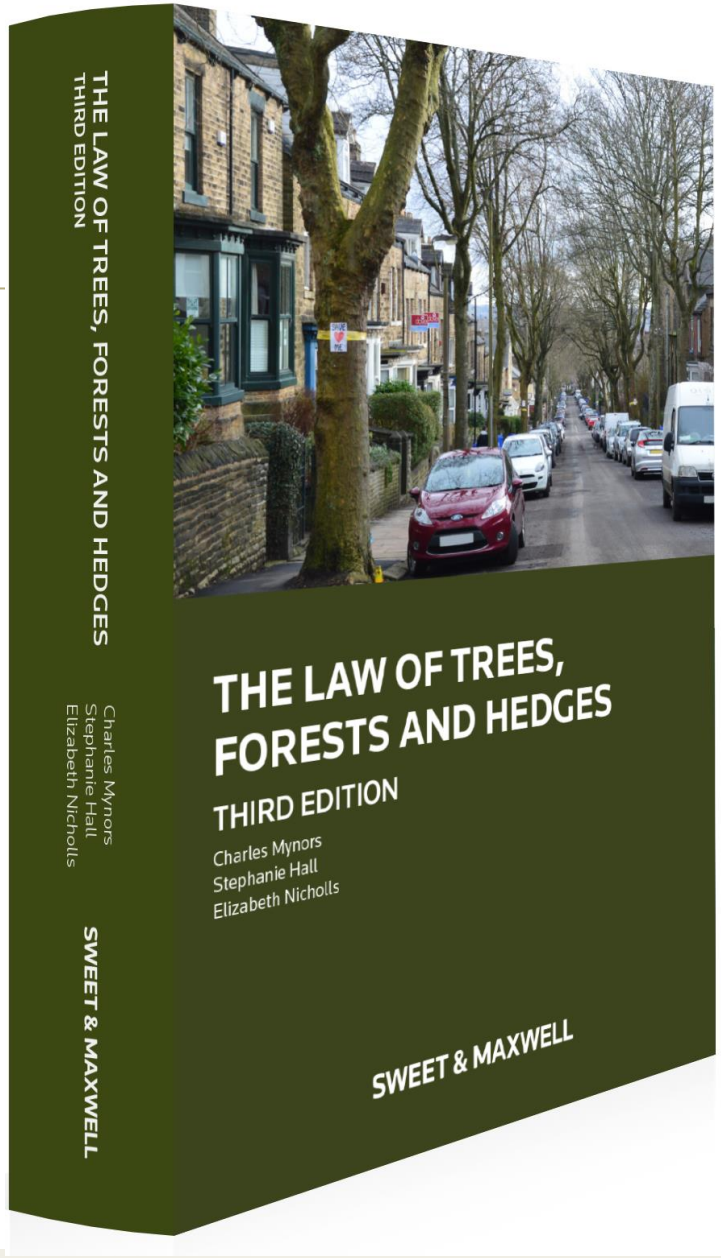
Unauthorised works to protected trees

Three cases in Court of Appeal

- *R v Davey* [2013] EWCA
  - appeal dismissed against fine of £75k plus confiscation order of £50k for felling of TPO pine
- *Natural England v Day* [2014] EWCA
  - appeal dismissed against fine of £450k for felling of trees in SSSI by "enormously wealthy" owner who had intimidated locals – significantly greater fine would have been amply justified
- *R v King* [2015] EWCA
  - appeal dismissed against conviction and fine of £2,500 for felling of TPO trees in AONB by elderly, impoverished defendant

And for further information…

New edition coming soon!

Thank you!

Diolch yn fawr !