Neutral Citation Number: [2015] EWCA Civ 1250

Case No: C1/2015/1102

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT (PLANNING COURT)
The Hon. Mr Justice Holgate
[2015] EWHC 729 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/12/2015

Before :

LORD JUSTICE JACKSON
LADY JUSTICE GLOSTER
and
SIR DAVID KEENE

- -

Between :

Distinctive Properties (Ascot) Limited	**Appellant**
- and -	
(1) Secretary of State for Communities and Local Government **(2) Royal Borough of Windsor and Maidenhead**	**Respondents**

Christopher Boyle QC and Andrew Parkinson (instructed by **Blandy and Blandy LLP**) for the **Appellant**
Richard Kimblin (instructed by **Government Legal Department**) for the **First Respondent**
Edmund Robb (instructed by **Royal Borough of Windsor and Maidenhead Shared Legal Services**) for the **Second Respondent**

Hearing date: 17 November 2015

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Approved Judgment

Sir David Keene :

1. "The woods decay, the woods decay and fall", wrote Lord Tennyson, but this appeal is concerned with the consequences of human intervention in the life of woodlands. In particular, this case is concerned with a Tree Replacement Notice ("TRN") served by the Council of the Royal Borough of Windsor and Maidenhead as the local planning authority under section 207 of the Town and Country Planning Act 1990 ("the Act").

2. The TRN was challenged on appeal by the present appellant to the Secretary of State for Communities and Local Government, who appointed an inspector to decide the appeal. The inspector rejected the appeal, save in a limited respect which need not concern us, and he upheld the TRN with a slight variation. That decision was in turn challenged by the appellant by way of an appeal to the High Court under section 289(2) of the Act. The appeal was dismissed by Holgate J on 19 March 2015. The appellant now appeals to this court against that decision.

The facts

3. The appellant is the freehold owner of land known as Blacknest Park in Berkshire. It is some 6.4 hectares in area (just under 16 acres) and lies close to Virginia Water. The appellant bought the land in 2010. There was already in existence a Tree Preservation Order ("TPO"), dated 24 June 2004, made under section 198 of the Act. It provided by Article 4 that, with certain exceptions of no relevance for present purposes,

> "no person shall–
>
> (a) cut down, top, lop, uproot, wilfully damage or wilfully destroy; or
>
> (b) cause or permit the cutting down, topping, lopping, uprooting, wilful damage or wilful destruction of,
>
> any tree specified in Schedule 1 to this Order or comprised in a group of trees or in a woodland so specified, except with the consent of the authority. …"

4. Schedule 1 to the Order specified no individual trees or group of trees. It specified two areas of woodland, marked by a continuous black line on the plan annexed and referred to as W1 and W2. No challenge to the validity of the TPO under section 288 of the Act appears to have been made, and it was therefore still in force when the appellant bought Blacknest Park in 2010 and remained in force at all material times.

5. In about April and May 2012, an area of about 0.8 hectares (about 2 acres) of land within woodland W2 was clear-felled by contractors acting for the appellant. This gave rise to a TRN issued by the Council on 15 January 2014 under section 207. The TRN alleged that between April 2012 and May 2012 an area of woodland approximately 8000m2 protected by the TPO was removed in contravention of that Order. It referred to the duty of the landowner under section 206 of the Act to plant another tree for each tree removed. It stated that, given that the land was wooded, a conventional planting scheme for the establishment of woodland was necessary.

6. Under the heading "What You Are Required to Do", the TRN specified the planting of trees at a uniform spacing of 2.5m x 2.5m, amounting to 1,280 trees in total. It described the required species (common alder, white willow, crack willow, English oak and common beech) and the percentages of each. As Holgate J subsequently observed, the TRN only required the replacement trees at time of planting to be 60 – 90 centimetres (approximately 2 to 3 feet) in height, which he described as saplings or "whips". It then dealt with the time for compliance.

7. The appellant exercised its right to appeal to the Secretary of State and a hearing and site visit took place on 3 June 2014. Various grounds of appeal were advanced, but only one is of relevance to these proceedings. It was alleged that the number of trees removed, as computed from the presence of visible tree stumps, was only 27, 6 of which were beyond the scope of enforced replacement. Consequently it was said that the TRN went well beyond the number of trees to which the power to require replacement related. Evidence to that effect was given on behalf of the appellant by Mr Forbes-Laird, an arboricultural consultant, who also acted as the appellant's representative.

8. There was also arboricultural expert evidence given on behalf of the Council by Ms Leonard. She pointed to the difficulty of assessing how many trees, including seedlings and saplings, had been present because the woodland had been clear felled with much material having been burnt or disposed of. After referring to the words of Cranston J in Palm Development Ltd v Secretary of State [2009] EWHC 220 (Admin) that in TPOs "there are no limitations in terms of size for what is to the treated as a tree", she went on to say at paragraph 4.7 of her witness statement:

> "It is quite possible and indeed probable that the numbers of trees removed were in excess of the number of replacement trees required in the TRN, as there may have been plenty of seedlings/saplings on site prior to the clearance works. No evidence has been provided to the contrary. There are a number of willows and other seed bearing trees in the vicinity. Willow and Alder can seed prolifically: these seeds are dispersed by the wind and can also be carried downstream in watercourses. The seeds from Beech and Oak are heavier and can be distributed by animals/birds otherwise these seeds are likely to germinate where they fall onto the ground."

She emphasised the reasonableness, as she saw it, of using an estimate of the number of trees likely to have been present when dealing with a TPO woodland which had been "comprehensively destroyed": paragraph 4.8.

9. Mr Forbes-Laird produced rebuttal witness evidence on behalf of the appellant. In it he dealt with a number of matters put forward in evidence by Ms Leonard. It is to be observed, as Holgate J did (judgment, [46]), that in his rebuttal Mr Forbes-Laird made reference to Ms Leonard's statement about "seedlings/saplings" on site before the clearance works and made no criticism of her inclusion of seedlings. Thus no such issue was put before the inspector as is now raised as to whether such entities fell within the meaning of the term "trees" in the Act.

The decision letter

10. The inspector in a decision letter dated 15 August 2014 concluded that there had been woodland in 2004 in the area covered by the TRN, and that there was currently no woodland in place, it being agreed that the area had been cleared in April/May 2012. He too referred to the Palm Developments decision, to the effect that with woodland TPOs there are no limitations in terms of size for what is to be treated as a tree. "In other words, saplings are trees, and on top of that, a woodland TPO extends to all trees in a woodland, even if not in existence at the time the Order is made" (paragraph 8).

11. He then went on in the crucial paragraph to say this:

> "In that context, the appellant is wrong to concentrate on the stumps identified because that fails to have regard to any saplings or other potential trees that might well have been removed as part of the clearance works too. The purpose of the TRN is to secure the reinstatement of woodland in the area concerned. It is difficult to see how that could be achieved other than through the use of standard planting densities and in that context, the number of trees set out in the TRN is not unreasonable. The appeal on ground (aa) fails, therefore."

12. Subject to a change in the time for compliance with the notice, he then upheld the TRN.

13. The grounds on which that decision was challenged in the High Court were based upon the contention that a TRN cannot require the replanting of a greater number of trees than had been removed. It was and is then said, in brief, that the inspector was wrong in law to find that a "seedling" or "potential tree" counted as a "tree" for the purposes of a TPO or TRN. Finally, it was and is contended that, even if only an estimate of the number of trees removed is possible, the inspector failed to make any such estimate.

The statutory regime

14. Before coming to the detailed terms of the relevant provisions of the Act, it is helpful to set out briefly the structure of that part of the Act which deals with TPOs and TRNs. All are contained in Part VIII of the Act. The power to make TPOs "in the interests of amenity" is to be found in section 198. One can then pass to section 206, which imposes a duty on the owner of the land where a tree protected by a TPO has been removed, uprooted or destroyed to replant a tree of the appropriate size and species. The next section, section 207, enables the local planning authority to enforce that duty, where not complied with, by serving a notice (a TRN) on him, requiring planting within a specified time. There is a right of appeal against a TRN provided by section 208. If a TRN is not complied with, the local planning authority can enter the land, plant the trees and recover the reasonable expenses from the landowner: section 209. Finally, section 210 makes it a criminal offence to cut down or carry out other certain acts in respect of a tree protected by a TPO.

15. There are various provisions in Part VIII dealing with trees in conservation areas, but those are not directly relevant in the present appeal. The most important provisions for present purposes are sections 198, 206 and 207. Section 198(1) and (2) is as follows:

"**Power to make tree preservation orders**

198.– (1) If it appears to a local planning authority that it is expedient in the interests of amenity to make provision for the preservation of trees or woodlands in their area, they may for that purpose make an order with respect to such trees, groups of trees or woodlands as may be specified in the order.

(2) An order under subsection (1) is in this Act referred to as a 'tree preservation order'."

Section 198(3) deals with the contents of a TPO, including the obtaining of consent for carrying out otherwise prohibited works. As Holgate J noted, the Act does not contain a definition of "tree".

16. Section 206 provides:

"**Replacement of trees**

(1) If any tree in respect of which a tree preservation order is for the time being in force–

(a) is removed, uprooted or destroyed in contravention of the tree preservation regulations, or

(b) except in the case of a tree to which the order applies as part of a woodland, is removed, uprooted or destroyed or dies at a prescribed time

it shall be the duty of the owner to plant another tree of an appropriate size and species at the same place as soon as he reasonably can.

(2) The duty imposed by subsection (1) does not apply to an owner if on application by him the local planning authority dispense with it.

(3) In respect of trees in a woodland it shall be sufficient for the purposes of this section to replace the trees removed, uprooted or destroyed by planting the same number of trees–

(a) on or near the land on which the trees removed, uprooted or destroyed stood, or

(b) on such other land as may be agreed between the local planning authority and the owner of the land,

and in such places as may be designated by the local planning authority.

(4) In relation to any tree planted pursuant to this section, the relevant tree preservation order shall apply as it applied to the original tree.

> (5) The duty imposed by subsection (1) on the owner of any land shall attach to the person who is from time to time the owner of the land."

It will be noted that section 206(3) treats trees in a woodland protected by a TPO somewhat differently from other trees in a TPO, in that the replanting obligation does not necessarily require the planting to be carried out "at the same place" as that where the original tree or trees stood. Instead, it suffices to plant "on or near the land" on which the originals stood or on agreed land. This is undoubtedly intended to provide a degree of flexibility in the management of woodlands. That same approach to woodland management is shown by section 206(1)(b), the practical effect of which is to exclude the replanting duty in respect of a tree protected as part of a woodland when that tree has been removed, uprooted or destroyed because it is dead or dangerous. That conforms with the finding by this court in Evans v Waverley Borough Council (1995) 3 PLR 80 that a woodland TPO is or can be "a different animal" from a TPO which specifies individual trees (page 93). Hutchison LJ there referred to woodland TPOs as ensuring that "existing trees should be preserved and allowed to regenerate" (emphasis added).

17. Section 207 is entitled "Enforcement of duties as to replacement of trees." It reads:

> "(1) If it appears to the local planning authority that–
>
> (a) the provisions of section 206, or
>
> (b) any conditions of a consent given under tree preservation regulations which require the replacement of trees,
>
> are not complied with in the case of any tree or trees, that authority may serve on the owner of the land a notice requiring him, within such period as may be specified in the notice to plant a tree or trees of such a size and species as may be so specified.
>
> (2) A notice under subsection (1) may only be served within four years from the date of the alleged failure to comply with those provisions or conditions.
>
> (3) A notice under subsection (1) shall specify a period at the end of which it is to take effect.
>
> (4) The specified period shall be a period of not less than twenty-eight days beginning with the date of service of the notice.
>
> (5) The duty imposed by section 206(1) may only be enforced as provided by this section and not otherwise."

Section 207(5) makes it clear that enforcement action under that section is the only method of enforcing the section 206(1) replanting duty. It does not appear to be a criminal offence to breach that duty: only the contravention of a TPO by cutting

down, uprooting or other forms of wilful destruction or wilful damage likely to destroy a tree constitutes such an offence (see section 210(1)).

18. The right to appeal to the Secretary of State against a TRN is provided by section 208(1). That sets out a number of possible grounds of appeal. Those include ground (a), that "the provisions of section 206 … are not applicable or have been complied with", and ground (aa), that "in the circumstances of the case the duty imposed by section 206(1) should be dispensed with in relation to any tree." It is also to be observed that it is possible to appeal on the basis that the requirements of the TRN are unreasonable in various respects, including the size of the trees specified in it. In the present case there was no appeal advanced on the basis that the requirement to plant trees of 60 – 90 cms height was flawed.

19. The right of appeal to the courts against an inspector's decision is to be found in section 289(2). Such an appeal may only be brought "on a point of law", though that expression would encompass the established public law grounds of challenge to a decision.

The High Court decision

20. Holgate J summarised the well-known principles on which the courts will approach the task of interpreting a planning decision by the Secretary of State or one of his inspectors, bearing in mind that the decision is addressed to the parties who are well aware of the issues involved and arguments deployed at the hearing: see South Bucks District Council v Porter (No. 2) [2004] 1 WLR 1953. He could also have added, and it is convenient to do so now, that such decision letters are to be read without excessive legalism and without the kind of scrutiny appropriate to the construction of a statute or contract: Clarke Homes v Secretary of State (1993) 66 P&CR 263, 272; Seddon v Secretary of State (1981) 42 P&CR 26, 28.

21. On the issue of the meaning of the word "tree" in the statute, the judge recorded that the appellant accepted that the term included "saplings", which covered trees as small at 0.6 – 0.9m in height ([25] and [39]) but contended that it did not include seeds or seedlings. Holgate J cited extensively from Cranston J's judgment in the Palm Developments case (*ante*), but he decided this issue principally upon the basis that the appellant at the hearing before the inspector had not challenged the Council's use of the term "seedlings/saplings". Consequently, the inspector had been entitled to rely on that "uncontroversial position": [48].

22. The judge proceeded on the footing that the appellant was correct in arguing that the scope of the local planning authority's power under section 207 to require the replacement of trees was limited by the scope of the obligation in section 206 to replace the same number of trees as had been removed or destroyed. However, the judge took the view that he did not need to decide that issue. He emphasised that the burden of proof in a section 208 appeal lay on the appellant in respect of his grounds of appeal, a point accepted before him by the appellant. Therefore it was for the appellant on such an appeal to show that the number of trees removed or destroyed, or the estimated number of such trees, was less than the replacement number specified in the TRN: [55] – [59]. His judgment continued:

> "60. It is common ground in the present case that where trees are removed from a TPO woodland which would have contained young trees and saplings, it will usually be impossible to produce evidence as to the precise number of trees which have been removed, even to the civil standard of proof. Instead, the best evidence which a party will be able to supply will normally only be an estimate of that number. I agree with these points.
>
> 61. Mr. Boyle Q.C. went on to accept that if in the present case the Council had relied upon planting densities for the species specified in the tree replacement notice as an *estimate* of the trees requiring to be replaced then there would have been no error of law in the notice appealed. In this case that would refer to the 1280 whips required to be planted. However, he drew a distinction between an authority's reliance upon planting densities for the purposes of giving an estimate of the number of trees lost in order to enforce the duty under section 206(1), as opposed to an authority's use of such material in order to achieve a replacement "woodland" or a desired arboricultural objective."

The judge, however, concluded that on a fair reading of the Council's evidence it was plain that they had relied on standard planting densities as a reasonable estimate of the number of trees lost ([62]). That approach had not been challenged at the hearing by the appellant. That method was indeed the best evidence available to the inspector, and the judge concluded that the inspector had accepted the Council's estimate. The appeal to the High Court was dismissed.

The issues

23. The issues before this court are essentially the same as those raised below. I have summarised them at [11] of this judgment. I shall deal with them in a different order, one which seems more logical.

Issue 1: Can a woodland TRN require the planting of a greater number of trees than the number removed or otherwise destroyed?

24. The appellant contends that the answer to that question must be: No. Mr Boyle QC, on its behalf, points to the wording of section 206(3), which deals specifically with trees in a woodland. While relaxing that part of the duty which deals with the location of replanted trees, it makes express reference to it being sufficient to replace the trees removed, uprooted or destroyed "by planting the same number of trees." When one comes to the power under section 207 to enforce the section 206 duty by means of a TRN, it must follow, argues the appellant, that the same restriction applies. It must be a one-for-one replacement of the number of trees in the lost woodland. One cannot treat the woodland as a single entity which is to be replaced by whatever number of trees the authority believes is reasonable.

25. That interpretation is reinforced, says Mr Boyle, by the provisions of section 208(1), which sets out the potential grounds of appeal against a TRN and, in so doing, brings

in the provisions of section 206 and the duty there set out (see [16], *ante*). It is clear that a TRN under section 207 and the duty under section 206 are closely linked and consequently, it is submitted, section 206 has the effect of confining the scope of a TRN to the same number of trees as have been lost.

26. I can see the force of those arguments, and indeed the matter is not in contention. In the course of oral argument, Mr Kimblin on behalf of the Secretary of State accepted that one had to read sections 206 and 207 together and that therefore a TRN could not require more trees to be replaced than had been removed or destroyed. Mr Robb on behalf of the Council adopted Mr Kimblin's arguments, and it must follow that the appellant's approach on this issue is to be accepted.

27. None of that is to minimise the problems which there may well be in arriving at a figure for the number of trees lost in the situation where protected woodland has been cleared. The appellant accepts that it will often be necessary simply to arrive at an estimate for the number lost, rather than an accurate count. Mr Kimblin also emphasised that because a woodland TPO is seeking to protect the woodland in the interests of amenity and does not specify individual trees, it will often by impossible or nearly impossible to determine precisely how many trees exist within the woodland even at the time of the making of the order. Such uncertainty increases over time because the number of trees in the woodland will vary from year to year and from season to season. All parties, I should add, accept that a woodland TPO protects not only the trees existing at the time when the TPO is made but also those which come into existence subsequently: see Palm Developments, [1]. It follows, in my judgment, that any estimate of number will often have to be a crude one.

28. A further point linked to that, and rightly stressed by Holgate J, is that it is the landowner who is in the best position to provide reliable evidence to assist in making such an estimate. The burden of proof of establishing that the number of trees in a TRN exceeds the number of trees lost is on him. That proposition was readily accepted in argument by Mr Boyle for the appellant. It accords with the approach adopted in enforcement notice appeals under what is now section 172 of the Act in the case of Nelsovil v Minister of Housing and Local Government [1962] 1 WLR 404. If, therefore, a landowner who has cleared woodland protected as such by a TPO fails to produce sufficient evidence as to what existed before the clearance works began, by (for example) a survey, it will be open to the decision-maker to treat the case as one where that burden of proof has not been discharged and the challenge to the number of trees in the TRN requirement may be rejected. It is in that context that the inspector's decision letter in the present case must be approached.

Issue 2: Did the inspector approach the question of how many trees previously existed in a legally acceptable way?

29. The appellant's case is that the inspector erred in his decision letter in three ways, all of which can be discerned in paragraph 9 of the letter (see [9] of this judgment). The first criticism advanced by Mr Boyle focuses on the reference by the inspector to "saplings or other potential trees" which may well have been removed. It is argued that a potential tree is not a tree, because as a matter of language if it were a tree the adjective "potential" would not be there.

30. I find this unpersuasive in the factual circumstances of this case. As I have already noted in [18], it is well established in law that such decision letters are to be read in a straightforward way "without excessive legalism or exegetical sophistication": *per* Sir Thomas Bingham MR in Clarke Homes (*ante*). They are addressed to the parties, who are familiar with the issues and with the evidence given, and are not to be construed by the courts as if the author had been drafting a contract or statute. Bearing those principles in mind, it seems to me, as it did to Holgate J (his [48]), that the inspector here was using the expression "saplings and other potential trees" simply to reflect in slightly different language the Council's evidence about "seedlings/saplings". Whether that latter phrase is to be seen as including plants of a tree species which fall outside the meaning of the word "tree" is the subject of the third and final issue, but the inspector's use of the phrase "other potential trees" does not give rise to any additional issue.

31. The next point advanced by the appellant is that the inspector in his paragraph 9 seemed to believe that the purpose of a TRN in a woodland TPO case is to replace woodland, whereas its purpose is to replace the lost trees. Mr Boyle submits that the inspector went wrong in law because he treated the lost woodland as a single entity and not as a number of trees. He relies on the sentence in paragraph 9 of the decision letter: "The purpose of the TRN is to secure the reinstatement of woodland in the area concerned."

32. I do not see any legal flaw in the inspector's statement. Certainly the TRN seeks, and can only seek, the replanting of trees. It cannot require shrubs, fungi or wild flowers to be replaced, even though they may have previously existed. Moreover, it can only require the same number of trees to be replanted. But when a TRN is made in the context of a woodland TPO, as in this case, the ultimate objective may properly be described as the "preservation … of woodlands" in the interests of amenity: see the wording of section 198(1). That is the purpose of a woodland TPO. The TRN can only seek to do that by the method of requiring the replacing of those trees which have been lost, but a planning inspector does not err in law if he refers to reinstating the woodland. That may properly be read as implying that the method by which the objective will be achieved is by replacing the lost trees. The appellant's approach does indeed involve excessive legalism.

33. The remaining argument advanced in criticism of the decision letter is that the inspector failed to make an estimate of the number of trees which had been lost. The appellant submits that, when the inspector refers to the use of standard planting densities and to the number of trees set out in the TRN as being "not unreasonable", he is only looking at the number of trees required to be replanted and not at the number lost as he should have done. He has asked himself, contends Mr Boyle, the wrong question.

34. I find that interpretation of paragraph 9 impossible to accept. The inspector in the previous paragraph has just been discussing what constituted a tree, making the point that saplings are trees and referring to Palm Developments as holding that there are no limitations in terms of size for what is to be treated as a tree. That discussion could only have been directed towards a consideration of how many trees had previously existed on site. Then, at the start of paragraph 9 the inspector rejects the appellant's reliance just on the identifiable tree stumps. That too is going to the issue of the number of pre-existing trees. It is true that he does not set out in express terms a

number of such trees, but his reference to the number of trees required by the TRN as being not unreasonable is, on a fair reading, to be seen as a reference to the evidence before him from the Council's witness, namely that it was probable that the number of trees removed was in excess of the number of replacement trees required by the TRN: see [7], *ante*. That is the context in which the inspector's decision must be read. He was in effect accepting that evidence. No doubt it could only be seen as a rough estimate, but in the circumstances that was the best that could be done. As Mr Kimblin put it in argument, the inspector was accepting the standard planting density as an estimate or proxy for the number of trees lost. Given the Council's evidence, he was entitled to do so. I agree with Holgate J that there is no force in these criticisms of the wording of the decision letter. Subject to issue 3, the decision was lawful.

Issue 3: the meaning of "trees"

35. The final issue concerns what is meant in the Act by the words "tree" and "trees". It arises because of the reference by the inspector in paragraph 9 of his decision letter to "saplings or other potential trees" which might well have been removed, and because of the use of the term "seedlings/saplings" by the Council's witness Ms Leonard in paragraph 4.7 of her evidence, which I have held was being paraphrased by the inspector.

36. The case for the appellant is that the term "tree" includes saplings, but not shrubs, bushes or scrub, and not seedlings. Therefore the Council and the inspector proceeded on a legally false basis. Mr Boyle refers to the decision by Phillips J in Bullock v Secretary of State for the Environment (1980) 40 P&CR 246, where it was said by the judge that "anything that ordinarily one would call a tree is a 'tree' within this group of sections" (p.251). The judge differentiated such a "tree" from shrubs, but also from "bushes, scrub or saplings" (ibid). That attempt to distinguish trees from those other categories meets an immediate difficulty, in that saplings are accepted by the appellant as trees, and indeed that accords with the judgment of Cranston J in Palm Developments. Moreover, Mr Boyle feels constrained to accept, as he did below, that the TRN in the present case was entitled to refer in its replanting requirement sections to "trees" of 60 – 90 cms (2 to 3 feet, in other words) in height. Nonetheless, he submits that seedlings of a tree species are not "trees" for the purpose of the Act.

37. The problem arises because of the absence of any definition of "tree" in the Act. No case appears to have followed Lord Denning MR's suggestion in Kent County Council v Batchelor (1976) 33 P&CR 185 that in woodland a tree "ought to be something over seven or eight inches in diameter" (page 189), some 178 – 203 mm, and the appellant does not seek to rely on it. It was clearly an *obiter* comment and was departed from, rightly in my view, in both Bullock and Palm Developments. It is also inconsistent with regulations made under the Act, whereby actions in respect of trees in conservation areas which would otherwise be prohibited are exempt if the "trees" in question are no more than 75mm (about 3 inches) in diameter: see Town and Country Planning (Tree Preservation) (England) Regulations 2012, regulation 15. Clearly, therefore, one can have trees with a diameter below 75mm.

38. In the Palm Developments case, Cranston J in a careful and comprehensive judgment examined this issue in some detail. He looked at a number of dictionary definitions of "tree" and other entities, including the definition of "sapling" in the New Oxford Dictionary of English: "a young tree, especially one with a slender trunk" ([23]). He

emphasised that where in other legislation, such as the Forestry Act 1967, Parliament had intended a minimum size to apply to trees, it has done so expressly, and in addition had done so in the regulations about trees in conservation areas. He attached weight to the fact that such provisions were absent in the case of TPOs. As a result, he concluded that "saplings of whatever size are protected by a woodland tree preservation order": [40].

39. Cranston J noted that the inspector in that case had adopted the approach that in a woodland context a tree at all stages of its life was capable of being protected. He went on:

> "She based this conclusion in part on the need for a 'common sense commitment to regeneration', so as to safeguard the longer term health of the woodland. In my view, she was correct in this as a matter of law" ([50]).

The judge returned to that point a little later in his judgment: "the inspector rightly considered that in a woodland situation a tree may include a tree at all stages of its life": [54].

40. It is of course right that Cranston J was not being asked to consider in express terms whether a seedling was a "tree", which enables Mr Boyle to adopt the position that he does not quarrel with the judge's conclusions about saplings. He argues that there must be a point where a seedling has not become a sapling, even though biologically the two are of the same species. Not everything that is of a tree species is a tree. A sprouting acorn, he submits, could not be considered a tree, nor could a mere seed. It is contended that a seedling of a tree species "needs a chance to demonstrate that it is going to be a tree", as opposed to a bush or scrub, and that that is only achieved when the plant (to use a neutral term) can be regarded as a sapling. He accepts, however, that there are no minimum size requirements.

41. The Secretary of State emphasises that a woodland TPO is seeking to capture the natural turnover in trees. Consequently a scheme of protection which disregarded a part of the woodland would ultimately fail in its protective purpose. Mr Kimblin accepts that one could not include a mere seed, but submits that Cranston J in Palm Developments was right to include all stages of a tree's life within the statutory term "tree".

42. Like Holgate J, I am not at all sure that this court is required to make a definitive pronouncement as to whether a seedling is a tree. It is not in dispute that a seed is not but that a sapling is. But the inspector was never asked to decide whether a seedling is a tree, because the Council's inclusion of "seedlings/saplings" was not put in issue before him by the appellant. Of course, the word "tree" is to be found in the Act and thus its meaning must be, at least in part, a matter of law. Insofar as it is necessary to determine the meaning, I would accept the approach adopted by Cranston J in Palm Developments, namely that a tree is to be so regarded at all stages of its life, subject to the exclusion of a mere seed. A seedling would therefore fall within the statutory term, certainly once it was capable of being identified as of a species which normally takes the form of a tree. This would accord with the purpose of a woodland TPO in seeking to protect a woodland over a period of time as trees come and go, as they die and as they are regenerated. Mr Boyle's submission that a seedling is not a tree was,

in my view, more of a bare assertion rather than an argument based upon any coherent principle. If a sapling, whatever its size, is to count as a tree, as the appellant accepts, what reason is there for excluding a seedling of the same species? If a young oak plant some 0.6m/2 feet in height is within the meaning of the word "tree", as the appellant again accepts, why is not an even younger oak plant of, say, 0.3m/1 foot height? The definition of "seedling" in the Concise Oxford Dictionary is "plant raised from seed and not from cutting, etc." If the "plant" is of a tree species, I can see no reason why it should be excluded from the meaning of the word "tree". Indeed, in the context of a woodland TPO, a purposive construction of the statutory language would include such a plant, because one is seeking to preserve the woodland which means preserving the trees "at all stages" of their lives, as Cranston J put it, so that natural regeneration could take place.

43. It must, of course, be the case that the word "tree" in Part VIII of the Act has the same meaning, whether one is dealing with a woodland TPO or a TPO which identifies individual trees. In theory, therefore, it might seem that it would be open to a local planning authority, if the above conclusion is right, to seek to impose a TPO on an individual seedling "in the interests of amenity". That, however, is not an argument of any validity. Any attempt to do so would fail, not because the seedling fell outside the legal concept of a tree but because it would be perverse of the authority to seek to use its power in that way. Moreover, the same argument could be applied with as much (or in reality as little) force to a small sapling. Yet the appellant accepts that a small sapling is within the meaning of "tree" and so in theory could be potentially subject to an individual form of TPO. In the same way, Cranston J rightly rejected arguments in Palm Developments about potential offences of trampling on shoots or snapping the branch of a young sapling. As he said, in practice any difficulty would be met by the exercise of prosecutorial discretion ([41]).

44. Therefore, insofar as the Council and then the inspector relied upon the inclusion of "seedlings/saplings" when arriving at an estimate of the number of trees on site before the clearance, I am not persuaded that they erred in law. On the assumption that it is necessary to decide this issue, I would decide it against the appellant.

Conclusion

45. None of the points raised by way of challenge to the inspector's decision letter seem to me to have merit. I would therefore dismiss this appeal.

Lady Justice Gloster:

46. I agree.

Lord Justice Jackson:

47. I also agree.