

PROSPECT INSTRUCTED IN IMPORTANT COURT OF APPEAL CASE AFFECTING DEVELOPERS

Introduction

Prospect Law's Edmund Robb recently represented the Royal Borough of Windsor and Maidenhead in an important Court of Appeal planning case affecting the scope of developers' actions to clear fell trees situated in woodland covered by a Tree Preservation Order (TPO): (see *Distinctive Properties (Ascot) Ltd v Secretary of State for Communities and Local Government and the Royal Borough of Windsor and Maidenhead* [2015] EWCA Civ 1250).

The Facts:

The appellant is a developer and the freehold owner of land in Berkshire. Much of the land was covered by a woodland TPO which had been issued by the Local Planning Authority under section 198 of the Town and Country Planning Act 1990 (the 1990 Act). Woodland TPOs are intended to prevent the cutting down of any trees without the consent of the local planning inspector.

In the Spring of 2012, the developer instructed contractors to clear fell some of the protected woodland. This action was contrary to the TPO then in force. A Tree Replacement Notice (TRN) was issued by the Local Planning Authority according to the provisions of sections 206 and 207 of the 1990 Act. The TRN required the replanting of some 1280 trees, in order to compensate for those which had been cut down or otherwise destroyed.

Appeal to the Secretary of State:

The developer submitted an appeal to the Secretary of State under the provisions of section 208 of the 1990 Act. Expert evidence from arboriculturalists was heard on behalf of both the developer and the Local Planning Authority. The developer, citing the mere 27 tree stumps which could be evidenced photographically as having been cut down in the felling operation, argued that the number of trees required by the Authority to be replanted under the terms of the TRN was clearly excessive.

The Council argued that the TRN fairly sought the replacement not only of the woodland's more mature trees, but also of young and small trees which, although not evidenced by the presence of stumps or other physical material, would clearly have been present as seedlings or saplings within the TPO protected woodland site. The Council relied on *Cranston J's* 2010 judgment in the High Court in *Palm Developments Limited v Secretary of State for Communities and Local Government* [2009] EWHC 220 (Admin), to argue that, for the purposes of a woodland TPO, no limitations exist to the proper definition of what constitutes a "tree".

The Secretary of State sided with the Local Authority, upholding the TRN on the grounds that the provisions of the 1990 Act are intended to preserve woodland and, therefore, the calculation of the number of replacement trees used by the Authority when compiling the TRN was not unreasonable.

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Court of Appeal:

In the High Court, Holgate J had sided with the Secretary of State and the Local Planning Authority and had upheld the Inspector's Decision Letter which dismissed the developer's appeal against the TRN. An appeal was subsequently lodged at the Court of Appeal. There were three central questions:

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

It was argued on behalf of the developer that the section 206 duty to replant trees according to a TRN mandated the replacement of any trees that had been destroyed only with "the same number" of trees. In the leading judgment, Sir David Keene accepted, as had the Secretary of State and the Council, that a Local Planning Authority must, in serving a TRN, provide an estimate of the number of trees which had been cut down. It was not lawful to insist through a TRN on the replacement of large numbers of trees that could not have been present in the TPO protected woodland before the clearance works took place.

- Did the Inspector approach the question of how many trees previously existed in a legally acceptable way?

The developer criticised the inclusion of "saplings" in Holgate J's reasoning in support of the Decision Letter upholding the TRN, arguing that a sapling should not properly be counted as a tree, but rather as a "potential tree" as it had been in paragraph 9 of the Inspector's Decision Letter. There was also criticism of the Inspector's use of the term 'reinstating woodland'. It was argued that this term exposed the Inspector's failure to understand a TRN's true purpose which is to replace trees that had been unlawfully destroyed.

Keene J rejected this argument, stating that although the Inspector had considered the standard planting density of trees which the Council had used when it had compiled the TRN in the first place, this was not to say that he had failed to consider the number of trees that had actually existed prior to the removal works. It was held that the Inspector had heard and clearly commented on some of the evidence which had been deployed by the Authority's arboriculturalist to (conservatively) calculate the number of trees that may have been present on the site before the clearance works took place and thus the number of trees that needed replanting.

- The meaning of 'trees':

The final issue was the 1990 Act's interpretation of what properly constitutes a "tree" and "trees". The 1990 Act does not offer a definition, and the developer argued that the Inspector's willingness to count "seedlings" and "saplings" when estimating the number of trees that had been present on the land prior to the clear felling was an error of law.

In reaching his decision, Keene endorsed the judgment of Cranston J in the Palm Developments, case. Cranston J had concluded that, in general, a tree should be regarded as a tree for the purposes of a TPO throughout all the stages of its life cycle. Counting seedlings, saplings and young trees in general as "trees" that benefited from the protection afforded by a woodland TPO (and thus which could be required to be replanted through the

service of a TRN), would assist in upholding a woodland TPO's purpose which was, not least, the natural growth and regeneration of protected woodland over long periods of time.

Conclusion:

The Court of Appeal dismissed the developer's appeal.

The case has obvious implications for Local Planning Authorities when considering the number of trees to require developers to replant through the service of a TRN.

The case is important for developers because it demonstrates that the Courts are likely to take a robust approach to the requirements of TRNs and, provided an estimate is given by the Local Planning Authority when the TRN is compiled of the number of trees that may have been present within a TPO protected woodland site, these can fairly be said to have included young trees. Since these are generally present in considerable numbers throughout, developers are likely to end up being required to replant large numbers of young trees that (they may feel) may never have been physically "felled", but which may have been removed in other ways.

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