

## TREE PRESERVATION ORDERS & COMPENSATION

### Tree Preservation Orders ("TPO")

A TPO is an Order made by a local authority in respect of a tree or trees because the tree is considered to bring amenity value to the surrounding area. The Order makes it an offence to cut down, uproot, prune, lop or damage the tree in question without first obtaining the Local Authority's ("LA's") consent. A TPO can apply to a single tree, a group of trees or woodland: section 198 Town and Country Planning Act 1990 ("TCP" or "the 1990 Act").

The TPO itself may make exceptions to these prohibitions, and by section 198(6) there are general exceptions if (a) the tree is dying, dead or has become dangerous, or (b) "so far as may be necessary for the prevention or abatement of a nuisance."

*can cut down*

By section 199(2)(a), TPOs must comply with the form specified by Regulations made under the Act. There are two main types of TPO:

- Those served before 2<sup>nd</sup> August 1999. These are in the form prescribed by the TCP (Tree Preservation Order) Regulations 1969 ("the 1969 Regulations"). The prescribed form of TPO under the 1969 Regulations includes "Article 5", which provides that where the LA refuses consent to cut down, etc. the tree, it may certify that it had an outstanding or special amenity value. If the LA has issued such a certificate, then the right to compensation is excluded.
- Those served on or after that date. These are in the form prescribed by the TCP (Trees) Regulations 1999, which contains no equivalent to Article 5, but the matters for which compensation is payable are more limited.

### Tree Preservation/Replacement Appeals

If an application for consent to carry out work on a tree subject to a TPO is refused, or allowed but subject to conditions, the applicant has a right of appeal to the Secretary of State. The procedure is now governed by the TCP (Trees)(Amendment)(England) Regulations 2008. In essence, the appeal is usually decided on the documents and without a hearing, although the inspector appointed by the Secretary of State will normally make a site visit, depending on what type of TPO has been made.

Similarly, if someone removes, uproots or destroys a protected tree in contravention of a TPO, then it is the duty of the landowner to plant another tree of an appropriate size and species, at the same place, asap. If this is not done, then under section 207 of the 1990 Act, the LA can serve a tree replacement notice ("TRN") on the owner of the land. That person then has a right of appeal to the Secretary of State.

There is no right for a third party to challenge a TPO or TRN by way of administrative appeal, so neighbours cannot challenge a decision by an LA to allow the retention or cutting down of a tree. Their only option would be to seek judicial review in the High Court, which would be an expensive and uncertain procedure.

## Compensation

By section 203 of the 1990 Act, a TPO may make provision for the payment of compensation by the LA "in respect of loss or damage caused or incurred in consequence (a) of the refusal of any consent ... or (b) the grant of any such consent subject to conditions."

As noted above, the TPO will itself set out the entitlement to compensation. Under a pre 2.8.99 TPO, the entitlement is for "any person who has suffered loss or damage in consequence of any refusal ... of consent under this Order or of any grant of any such consent subject to conditions" to recover compensation from the LA. Under post 2.8.99 TPOs, the prescribed wording is "if ... a person establishes that loss or damage has been caused or incurred in consequence of [such refusal or the imposition of such conditions]." Thus under both kinds of TPO, neighbours as well as the owner of the land on which the tree is situated may in principle recover compensation.

The limits on the matters for which compensation may be awarded and the amount of such compensation may be governed by the terms of the TPO itself, and are subject to prior decisions of the Courts and the Lands Tribunal (to which disputes as to compensation are referred).

The Lands Tribunal has made it clear that compensation is only awardable in respect of loss or damage caused in consequence of a *refusal* of consent under the TPO, and not in respect of the making of the TPO per se. Thus in *Casey v. Canterbury CC* (17.11.95) HH Judge Marder QC held that a claim for "damages for loss incurred as a result of two TPOs being registered against land" should be struck out, even though the TPO itself would have been capable of giving rise to a claim for compensation had an application for consent been made under it.

- must apply for consent. then can apply for compensation.

Other decisions of the Lands Tribunal indicate the following general principles:

- The matter claimed must be the natural or probable consequence of the relevant decision, and something which was within the reasonable contemplation of the LA or Secretary of State at the time of making that decision;
- It must be quantifiable in money terms, the amount generally being equal to the loss having regard to any previous compensation claimed.
- It must not be too remote.

See *Factorset v. Selby DC* [1995] 2 EGLR 190. It is not sufficient that it is possible that the tree roots could cause damage to the applicant's property: see *Woodhams v. Chichester DC* (Lands Tribunal 14.3.08).

Under pre 2.8.99 TPOs (of which there are still a large number), the following are examples of compensation awarded by the Lands Tribunal:

- The costs of the appeal to the Secretary of State from the LA: *Buckle v. Holderness DC* [1996] 2 EGLR 133
- The cost of engaging consultants: *Fletcher v. Chelmsford BC* [1991] 2 EGLR 133
- The loss of land value, e.g. to forestry or development land.
- The loss of value of trees as timber.

- The additional costs of carrying out permitted works (e.g. being required to use an Arboricultural Association approved tree contractor).
- Damage to buildings, in particular subsidence claims. But no claim can be made for damage which occurred before the LA's decision was issued (since the need for the remedial work in question does not arise as a result of the decision). In calculating an award, allowance must be made for the cost of the work which would have had to be carried out in any event if the tree works had been allowed. See *Duncan v. Epping Forest DC* (Lands Tribunal 19.1.04 & 20.9.04).

Under post 2.8.99 TPOs, there are important restrictions on the matters for which compensation is recoverable: see Article 9(4) of the prescribed form of TPO. This excludes compensation for:

- (a) Loss of development value or other diminution in value of the land.
- (b) Loss or damage which was not reasonably foreseeable when consent was refused or was granted subject to conditions.
- (c) Loss or damage which was foreseeable to the applicant and attributable to his failure to take reasonable steps to avert or mitigate his loss.
- (d) Costs incurred in appealing to the Secretary of State against the refusal of consent or imposition of conditions.

By Article 9(2)(b), claims for less than £500 are also excluded.

The procedure for taking the claim for compensation to the Lands Tribunal is to complete a Notice of Reference in the standard form. Practice Directions setting out the procedure thereafter were made by the President of the Lands Tribunal on 11.5.06. A right of appeal from the Lands Tribunal lies to the Court of Appeal on a point of law only, provided the Court of Appeal has given permission to appeal.

### **The Perrin case**

In *Perrin v. Northampton BC* [2008] 1 WLR 1307, the claimants believed that an oak tree in their neighbour's garden was causing subsidence by root encroachment into their land. The tree was subject to a TPO. The claimants sought the LA's consent to chop it down, even though they could simply have relied on section 198(6)(b) and done so without consent. The LA refused consent and for good measure issued an Article 5 Certificate in respect of the tree. The claimants appealed to the Secretary of State, who refused their appeal. The claimants therefore commenced proceedings in the TCC seeking a declaration that the tree was causing subsidence and that it was necessary to cut down the tree to prevent and/or abate that nuisance.

At first instance, it was held by HH Judge Coulson QC that even though there were – besides felling or lopping the tree – other ways to prevent or abate the nuisance, these were irrelevant for the proper operation of section 198(6)(b).

In the Court of Appeal, it was held (see per Chadwick LJ at para 47) that this reasoning was flawed. It was held that section 198(6)(b) referred to what was *necessary* for the prevention or abatement of a nuisance, and that it is not enough that whatever was proposed to be done (in this case felling the tree) was *sufficient*. Blackburne J also expressed doubts about the judge's view that "nuisance" in the

section meant "actionable nuisance" and not simply "the pure encroachment of the branches or roots over or into the adjoining land", although it does not appear that the Court of Appeal came to any firm conclusion on this.

Thus the claimants were left with the worst of outcomes: they could not fell the tree, they were not entitled to compensation under section 203 because of the Article 5 Certificate, and in order to prevent any further damage, they would have to engage in expensive root barrier works or some other engineering solution.

The neighbours were joined as defendants to the action, but any claim against them would have been pointless because they shared common insurers with the Claimants (and the proceedings were in reality brought by those insurers). In any event it would seem likely that a defence of statutory authority would have been available to the neighbours.

*effected ABI agreement?*

### **Forthcoming changes**

Under the existing TPO regime, the provisions in relation to any given protected tree are divided between the 1990 Act, various statutory instruments, and the TPO applying to it. The Planning Act 2008 ("the 2008 Act") introduces significant changes: Sections 198(6) and 203 (amongst many others) are to be deleted, and the Secretary of State is given power to make Regulations dealing with the whole subject of TPOs including their form, prohibited activities, consent and compensation. While section 193 of the 2008 Act preserves existing TPOs in force, it strips them of all their content and subjects them to the new regime.

While much of the 2008 Act comes into force on 6<sup>th</sup> April 2009, the TPO provisions do not – they will be brought into force on a date to be appointed.

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Formerly a City-trained solicitor (admitted with Honours in 1978), John has extensive experience of construction claims and property-related matters. He has appeared in arbitrations in Egypt and Tunisia as well as in Europe. His property-related experience includes acting for insurers in subsidence and similar cases, including *Hall & Richards v. Merthyr Tydfil BC* (2007, TCC Cardiff), *Offer-Hoar v. Larkstore & Technotrade* (2006, TCC), and in the leading tree-roots case of *Hurst v. Hampshire CC* [1997] 2 EGLR 164 (Court of Appeal).



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Andrew joined 2 Temple Gardens' in February 2009. Prior to joining chambers Andrew was a pupil at Essex Court Chambers, having previously read law and modern languages at Cambridge University where he won several prizes and scholarships as well as gaining the highest mark in the University in land law. He is also a Lord Denning and Lord Eastham scholar of Lincoln's Inn.

Andrew has experience of property damage and flooding claims, most notably having been closely involved in the recent TCC case of *Corbin v Newport City Council* decided earlier in 2009 with Andrew Miller FCI Arb (against Neil Moody, also of 2 Temple Gardens).