Protected trees and nuisance

Elizabeth Nicholls

Since the launch of the third edition of *The Law of Trees, Forests and Hedges* at the beginning of this year, Charles Mynors, Stephanie Hall and I have been travelling around the UK.

A number of interesting questions have arisen. As with anything involving the law, the answer is often highly dependent on the facts. Law is not always 'black and white'. If it was, you wouldn't need lawyers!

Several people have been keen to know what the legal situation is when the owner of one property wants to cut branches or roots of a 'protected tree' – one that is protected by a tree preservation order (TPO) or is in a conservation area – encroaching from neighbouring land.

Trees as a nuisance

I will not cover the fascinating area of 'nuisance' – covered in some detail in Chapters 4 and 5 of the book, along with encroachment and abatement. The Supreme Court has also recently published its decision in *Fearn v Tate Gallery*[1] – a 97-page judgment detailing the principles and cases relating to the law of private nuisance.

A tree may cause a nuisance by way of roots and branches encroaching into the neighbours' land or airspace. The roots may dry out the soil, causing potentially expensive problems to buildings and paved areas; and overhanging branches shed leaves in the autumn and may cause shading of a lawn or a house during the summer. Roots, branches and leaves may thus cause harm to lawns, sheds, greenhouses and other property. The branches may provide a happy roosting perch for birds, who deposit droppings on summerhouses, children's playgrounds or on cars below. The neighbours may quickly become unhappy with the situation, as it interferes with the enjoyment of their property.

Informal discussions may take place, possibly followed by more formal letters between solicitors. The tree owner (A) may have informed the neighbour (B) that the tree is 'protected', so that works to the tree may only be carried out after the relevant planning authority has approved an application for works.

The tree grows bigger every year, and the perceived problem may also be over-growing in the mind of the neighbours. They may feel invaded and unable to do anything, fearing prosecution by the authority should they take matters into their own hands and carry out some 'trimming' to stop the nuisance.

What does the law say?

Section 210 of the Town and Country Planning Act 1990 (TCPA) provides that it is an offence to cut down, top, lop, uproot, wilfully damage or wilfully destroy any tree that is the subject of a TPO without obtaining the consent of the authority. And section 211 says that 6 weeks' notice must be given if such works are proposed to a non-TPO tree in a conservation area.

There are a number of exceptions to these requirements, set out in the 2012 Regulations in England (and in the relevant order itself, or in the 1999 Regulations, in Wales). One of these is where works are '**necessary to prevent or abate a nuisance**'.[2] But what does that exemption actually mean?

And in a Church of England churchyard, a Faculty will also be required, in addition to any approval needed from the authority.

Can the neighbours simply cut the tree to abate the nuisance?

Charles Mynors covered the subject in considerable detail in the first edition of his book, arguing that the exemption means that you did not need consent to cut back to the boundary any encroaching roots or branches – regardless of whether they were causing any actual harm.

His arguments were considered by the High Court in the case of *Perrin v Northampton Borough Council*,[3] then later in the Court of Appeal. At first instance the Court held: 1) that the exemption applied only where the tree was causing an 'actionable nuisance', causing (or likely to cause) actual damage, and not in cases of mere encroachment; and 2) the possibility of other means of curing the problem (such as engineering solutions) was irrelevant to the question of whether the proposed works to the tree were 'necessary'. Charles's book was considered to be 'helpful', but 'incorrect' ...

The second point was subject to a successful appeal. The Court of Appeal accepted that other means of curing the problem were relevant when determining whether proposed works were 'necessary'.[4] The first point (whether the tree had to be causing an actionable nuisance) was unfortunately not the subject of appeal; however, the Court had some doubt that it was possible to draw a distinction between an 'actionable nuisance' and 'pure encroachment'[5] – so Charles was (probably) right ...!

So the legislation is not clear; nor has there been a relevant decision of the higher courts since *Perrin*. In practical terms, it is likely that minor trimming of overhanging branches to abate a nuisance (not causing lasting damage to the tree) is likely to be considered 'pruning', not 'lopping', so would not require consent. And even lopping is unlikely to result in a prosecution, for fear that the magistrates might follow the Court of Appeal decision in *Perrin*.

The Law Commission has recommended that the 'nuisance' exemption be scrapped in Wales, which may only occur in 2025; and England might follow in due course. Meanwhile, since the law is not clear, those intending to abate any nuisance would be best advised to notify the relevant authority of any works – even though that may not result in consent being granted.

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1. Available, like most court decisions, at www.bailii.org.
2. TCO (Tree Preservation) (England) Regulations 2012, regulation 14(1)(a)(ii).
3. [2007] 1 All E.R 929
4. [2008] 1 W.L.R. 1307, paras 22–45 and 22–46.
5. [2008] 1 W.L.R. 1307 at [27], [29].