IN BRIEF

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Seeing the light through the trees

Andrew Francis explains why trees cannot & should not be ignored in right of light claims

It is May, and as Thomas Hardy said 'the May month flaps its glad green leaves like wings'*. In the cloistered world of rights of light the main concern will usually be the effect of proposed new buildings upon the light enjoyed by its neighbours. But in some cases, particularly as between residential properties, the effect of trees and large bushes on light can cause a dispute to arise. In such cases the High Hedges legislation (Part 8 of the Anti-Social Behaviour Act 2003) may assist. This article is not about that remedy. This article is about whether trees and large shrubs etc. (referred to generically here as "trees") on the land over which a right of light is claimed (the servient land) should be taken into account when determining whether a proposed building, or structure on the servient land will reduce the light received by the building on the dominant land actionably. Should such trees be taken into account in that determination? If so, why and if not, why not? What evidence should be treated as relevant to answer those questions?

An example

The owner of Tall Trees has planning consent for a development which may interfere with the light received by The Cottage. On the Tall Trees' land and adjacent to the boundary with The Cottage is a line of large beech trees, interspersed with conifers, all about 50 ft. or more high. Under those trees are some shrubs, about 5-6 ft. high, being mixed deciduous and evergreen. They will be referred to as "the Trees". They have been in place and at about the same heights for at least 50 -100 years back. The relevant windows ("the Windows") in the Cottage serve the main habitable rooms on the ground and first floors; "the Rooms". The Trees are all visible from the Windows. They are about 50 ft. away from the elevation of The Cottage containing the Windows. There are no covenants, or any other material entries on the title to each property. No complaint about the Trees has ever been made by the owners for the time being of the Cottage back 40 years. The present owners have been there for about 10 years. It is clear that the relevant windows in The Cottage have a prescriptive right of light over and against Tall Trees. It is also clear that the Trees affect the amount of light coming into the Rooms, especially in the summer when the deciduous trees and shrubs are in leaf. Should the Trees be taken into account in assessing the extent of the loss of light to the Rooms?

What is the answer? General matters

This is not a case where the planting of large trees, sometimes as a matter of "spite" (especially *Leylandii*) may be actionable, as, for example, a private nuisance. This is a case where the Trees have (literally) been part of the landscape for 40 years. Nor is this a case where the Trees cause the loss of light by virtue of their size, location, or growth. In such cases the question will usually be whether those trees cause an actionable loss of light. The answer to that question invariably turns on whether the trees are deciduous, or evergreen, and how far their rate of growth etc. can affect the interference with light. The common sense answer to such problems is to try to agree a pruning, or lopping regime with the owner of the trees, assuming no TPOs apply. There is no doubt that trees can potentially cause an actionable loss of light; see *Paddington Corporation v A.-G.* [1906] AC 1, at. p 7, per Lord Lindley.

The question here is whether the technical study carried out in the conventional manner, using the 1 lumen, 0.2% sky factor test, should take account of the Trees when assessing the likely effect of the new buildings at Tall Trees upon the Rooms. The conventional approach (eg. as set out in Anstey Rights of Light, 4th Edn., pp. 52 – 56) is that trees are not usually taken into account. But is this not an anomaly? If the boundary had a fence on it, or there was some other structure, or building on Tall Trees which affected the light received by the Rooms, which had been there for at least 20 years, those features would be taken into account in assessing the current amount of light enjoyed by the Rooms. It is also the case that in a claim to a right of light under s. 3 Prescription Act 1832, the period of enjoyment relates back from the date when the right is brought into question (eg. by issue of a Claim Form by either party) and also that any interference with light during that period which has been submitted to, or acquiesced in for a year during the period of enjoyment claimed, will be an "interruption" within s. 3. That will prevent the right from arising under that section; see s. 4 of the 1832 Act. So in many cases the presence of trees and other features must be taken into account, as their presence will be an interruption to the extent that

the amount of light is reduced. So in this case, as the Trees have been present for 40 years without objection, the only claim to a right of light under s. 3 is to that amount of light which is received by the Rooms now. This rather indicates that the measurement should take the Trees into account. In cases where the alternative claim to light can be based on Lost Modern Grant ("LMG") and any period of 20 years of enjoyment of light can be taken, whilst the effect of trees during that period can be taken into account, it may be difficult to assess their size at any time during that period.

Practical issues

But there are five main problems with a general approach requiring trees to be taken into account in some way.

- First the difference between deciduous and evergreen trees must be brought into account.
- Second, the gaps between the trees need to be brought into account.
- Third, what is the size of the trunks of the trees, especially the deciduous ones; here they are the beech trees, probably with large straight trunks.
- Fourth, what is the history of the growth of the trees and how far can expert evidence assist in determining that. (This is also an issue in a LMG claim referred to above).
- Fifth, what is the state of the trees in terms of current health and longevity? An arborologist will need to produce that evidence. The Cottage may have an argument that the Trees should not be taken into account in reducing the likely extent of interference with light caused by the new buildings, as the Trees will not be there for much longer. It is, of course, the case that unless a very strict covenant regime applies to the Trees, there is no obligation on Tall Trees to maintain, or replant them.

Technical answers

It is usually possible for rights of light surveyors to model trees, in assessing the current area of visible sky in a Waldram diagram, at least if the trees are close together and evergreen. They can be treated as if there was a wall there. If the trees are deciduous, or more spaced out (and in this case they are mixed with evergreen trees) computer modelling can in theory plot each bough, or the evergreen trees, to a fine level of detail if required. But this would be very expensive to do. In addition a winter model would not reflect the summer conditions and *vice versa*. The same difficulty and expense can arise when trying to model glazing bars and mullions in the windows which receive the light. Unless those features are very substantial, or a significant feature of the fenestration, they are better left out.

The solution. What would a judge do?

In this case and others like it, the outcome turns on the proper remedy. In an injunction claim, where for example, the owner of The Cottage seeks to restrain Tall Trees from building the new houses which cause the actionable loss of light to the Rooms, it seems impossible to argue that the Trees are not a relevant factor. Whatever the expert evidence from the rights of light surveyors of either party, may say, as H.H.J. Cooke said in *Deakins v Hookings* [1994] 1 EGLR 190, "it is not merely a matter of statistics". If the owner of The Cottage has "suffered" the loss of light caused by the trees for 10 years, unless the effect of the new buildings on the enjoyment of that light will be severe (a right of light surveyor – now happily retired – used to call this "murdering light") it seems hard to see how that would be a case for an injunction. For over 5 years we have been counselled by the Supreme Court in *Lawrence v Fen Tigers* [2014] 1 AC 822 to ensure that in determining what is the proper remedy (injunction, or damages) *all* relevant factors are brought into account. That must include the Trees in this case. The evidence of their effect, at all times of the year, is surely a relevant factor (coupled with the passive conduct of the owner of The Cottage for the past 10 years) which means that an injunction to restrain the new buildings would be disproportionate and not the just remedy on such facts. However, one can see that in a claim where the facts were otherwise (eg. a prolonged campaign to try to get the trees cut back) and where the effect of the new building was going to "murder" such light that remained, with the correct timing, an injunction might be granted; even if to require a modified scheme of development.

Conclusion

It is curious that the relevance of existing trees in right of light claims has not reached the courts and received attention in modern times, at least on a reported basis. The author had one case at the Brighton County Court about 20 years ago where the servient owner compounded the felony of refusing to cut back a large evergreen bush, which obstructed the light to the author's clients' Hotel bedrooms, by nailing fence panels to those windows. The latter act was the *casus belli*. But the bush was relevant as a possible interruption under s. 4. An expert witness from the RHS was called to give evidence as to the identity of the bush and its growing habits. In the end it was the fence panels which led the Judge not only to order their removal, but also to require the bush to be kept cut back on pain of committal. The moral of that story and on a wider basis is that trees cannot and should not be ignored in right of light claims. **NLJ**

Andrew Francis, barrister, Serle Court (www.serlecourt.co.uk).* From Afterwards, published in Hardy's 1917 volume Moments of Vision.