

# High hedges

Charles Mynors considers the new procedures for resolving disputes under Part 8 of the Anti-social Behaviour Act 2003

## HEDGES ARE GENERALLY FOUND ON, OR AT

least along, property boundaries, not least between residential properties in built-up areas. It is hardly surprising, therefore, that they are the focus of much litigation.

Such litigation may arise from a dispute that has (or at least originally had) nothing to do with the hedge itself – neighbours, after all, not uncommonly fall out over any of a wide variety of issues – and the hedge may thus be merely a convenient focus for the final confrontation after a long war of attrition. But not all disputes arise from warring neighbours. Sometimes there may be a genuine disagreement as to the correct way in which to maintain a hedge, or as to the size to which it should be allowed to grow. And some property owners, particularly those who are older, allow hedges to get out of hand, not out of malice, but merely because they cannot cope with the work involved; this can lead to resentment on the part of neighbours, which may give rise to a dispute in spite of previously amicable relations.

Where a hedge is planted wholly on A's land, it will belong to A; and where its branches protrude onto the airspace over B's land, B can abate the resulting nuisance by lopping them back to the boundary. But no further. Until now, this has meant that where A's hedge has kept on growing, so as to become taller and taller, and eventually a barrier that completely overshadows B's garden, there has been no way that B could do anything about it.

## Legislation

This was causing major problems – not least for MPs, whose postbags were full of complaints on the issue. A series of private members' Bills followed in the late 1990s, including one from the appropriately named Baroness Gardner of Parkes. The government merely produced guidance, which achieved little.

Eventually, however, it was persuaded to do something, and the High Hedges Bill, a private member's Bill introduced by John M Taylor MP in 2001, accordingly had govern-

ment support – as did the next attempt, from Stephen Pound MP in 2003. In the end, somewhat to everyone's surprise, the text of those Bills was incorporated almost word-for-word into the Anti-social Behaviour Bill then going through Parliament. On reflection, however, that in fact seems sensible, as the problems with hedges are indeed, in principle, a form of anti-social behaviour.

The new arrangements became law as Part 8 of the Anti-social Behaviour Act 2003. This came into force in Wales on 31 December 2004, and in England on 1 June 2005. There is as yet no equivalent legislation in Scotland or Northern Ireland, but consultation papers are expected there later this year.

In addition to the legislation, new guidance on its operation has been issued by the ODPM, entitled *High Hedges Complaints: Prevention and Cure*, as well as a simple guide entitled *High Hedges: Complaining to the Council*. A third publication, *Over the Garden Hedge*, provides advice on the choice of a suitable type of boundary hedge, and on how to go about trying to resolve disputes amicably. All are available at <http://www.odpm.gov.uk/treesandhedges>, as is guidance produced by the Building Research Establishment (BRE) in December 2001 entitled *Hedge Height and Light Loss*.

## When does the new law apply?

Section 65 of the Act states that it applies in the first instance where a complaint is made by an owner or occupier of domestic property who alleges that his or her reasonable enjoyment of that property is being affected by an unreasonable obstruction of light caused by a high hedge situated on land owned or occupied by someone else.

The definition of 'unreasonable obstruction of light' was the subject of the 2001 BRE guidance:

"The aim of this document is to provide an objective method for assessing whether high hedges block too much daylight and sunlight to adjoining properties, and to provide guidance on hedge heights to alleviate these problems. The document

introduces the concept of 'action hedge height' above which a hedge is likely to block too much light. It then gives a procedure to calculate this height both for windows to main rooms in a dwelling, and for a garden. The minimum action hedge height is two metres. The procedure is intended to be simple enough for householders to use. It involves multiplying the distance from a window to the hedge, or the depth of a garden, by a factor; for gardens this factor depends on hedge orientation. Corrections can be made for site slope or where the hedge is set back from a garden boundary."

(Two metres is the height of walls and fences that may generally be erected without specific planning permission.)

The Secretary of State has been given power to amend s 65 by regulations, so as to extend the scope of the new procedures beyond just domestic property, and to include situations where the enjoyment of the property is being affected by more than just obstructions of light. That would enable the procedures in the Act to be used to deal with other categories of properties, such as nursing homes, and situations such as where a hedge was causing psychological distress. No such regulations have yet been made.

By s 66 of the Act, a 'high hedge' is defined as meaning two or more adjacent evergreens trees or shrubs which together form all or part of a barrier, and whose height exceeds two metres. There is no requirement for the hedge to be of any particular species – although *Cypressus leylandii* is the most common offender. This definition too could in future be amended by regulations made by the Secretary of State, if it seems appropriate in the light of experience – eg, to include broadleaved hedges.

## Complaints procedure

The broad principles of the complaints procedure are set out at ss 68 to 73 of the Act, with (as might be expected) powers for the Secretary of State and the Welsh Assembly to prescribe details in regulations.

Before making a formal complaint under the new system, the person affected by the high hedge must take all reasonable alternative steps to resolve the matters complained of. This would doubtless include informal negotiations with the owner of the hedge and, if appropriate, mediation. The ODPM guidance suggests that it would be appropriate for prospective complainants at least to make two written requests to the owner of the hedge, asking him or her to cut it back by a specified deadline. And of course, now that the legislation has actually come into force, a complainant is negotiating from a position of strength rather than, as hitherto, weakness. The BRE guide would clearly be relevant in determining what sort of action it would be reasonable to suggest.

If all such approaches have failed, the complainant can then make a complaint in writing to the appropriate local authority (the district council in areas with two tiers of authorities). A fee (of an amount to be determined by the Council) is required along with the initial complaint, but an authority could refund it in an appropriate case – for example, where the complainant is of limited means. In Wales, the Assembly has prescribed that no authority is to charge more than £320. There is no equivalent maximum in England; and a survey of around one-third of the 353 English authorities indicates that the fee charged varies from £100 to £650, with an average of £367; around 20 per cent offer a concession or a refund in certain circumstances.

On receipt of a complaint, the authority must satisfy itself that sufficient efforts have been made to resolve the matter informally, and that the complaint is not frivolous or vexatious. The authority should then consider all relevant factors, including:

- the extent to which the hedge in question affords privacy or shelter to those on either side;
- the extent to which it restricts sunlight or daylight to nearby gardens and buildings or causes damage to plants;
- the contribution it makes to the amenity of the properties on either side and the neighbourhood in general; and
- any relevant legal obligations (such as covenants) relating to it.

These are elaborated in more detail in the ODPM guidance.

As to the third question, this is probably equivalent to the exercise carried out by authorities when considering whether to

grant consent for works to a tree protected by a tree preservation order.

In the light of these considerations, the authority is then to decide whether there is indeed a justified cause for complaint, and what (if anything) should be done about it. Having made that decision, it must be communicated to the complainant and, more importantly, to the owner of the tree, in the form of a remedial notice, together with the reasons for it. If, however, the authority decides that nothing needs to be done, either because informal negotiations have not yet been exhausted, or because the hedge is not in fact a problem, that decision too should be notified as appropriate.

A remedial notice is to specify what action must be taken in relation to the hedge, and by when – but the action is not to involve the removal of the offending hedge, or a reduction in its height to less than two metres. The guidance notes that 3.5 to 4 metres will be necessary to prevent overlooking from a first floor vantage point; that may therefore in some cases be a more appropriate height to be specified in a notice. The notice can also require continuing action to be taken indefinitely into the future, so as to prevent the problem recurring.

The notice is obviously a local land charge, and binding on the owner or occupier of the land for the time being. A remedial notice can be varied or withdrawn by the authority on the joint application of the owner of the hedge and the complainant, or where circumstances change.

## Appeals

There is a right of appeal against a decision of the local authority either to issue a remedial notice, or to vary or withdraw one, or not to pursue a complaint (see ss 71 to 73 of the Act). The grounds of appeal against the issue of a notice include:

- (on the part of the hedge owner) that the height of the hedge is not harming the complainant's reasonable enjoyment of his or her property; or that the remedial steps specified in the notice are excessive, or the period for taking them is too short; and
- (on the part of the complainant) that the specified steps are insufficient to solve the problem.

The grounds of appeal by a complainant against a decision by an authority not to issue a notice include that it could not reasonably conclude that the hedge was not causing harm to the complainant or that, if it was, no notice should be served.

Appeals are to be made to the Planning Inspectorate, on the official form provided. There is no right to either an inquiry or an informal hearing – the matter is thus to be dealt with by an inspector entirely on the basis of written representations, plus a site visit. Details of procedure are prescribed in the High Hedges (Appeals) Regulations 2004 (SI no 3240) (Wales) and SI 2005/711 (England); note that, as seems to be increasingly the case in other areas of law, the rules as to procedure on either side of the border are similar, but not quite the same.

## Enforcement

As to the enforcement of all this, the Act essentially adapts the provisions relating to the enforcement of planning control.

Section 75 thus provides that, where a remedial notice has been served, and has come into force (possibly following an unsuccessful appeal), it is an offence for the person responsible to fail to comply with its requirements. Such an offence is punishable on summary conviction with a fine of up to level 3. In addition, the court is able to order the owner of the hedge to carry out the specified works – with a further fine in the event of continuing non-compliance.

Alternatively, or in addition to mounting a prosecution, an authority is entitled under s 77, after giving due notice, to enter the relevant land and carry out the required works itself, and reclaim the cost from the person responsible.

There is no statutory appeal against the decision of an inspector, but judicial review would be possible in an appropriate case.

## Conclusion

The new procedure represents a sensible mechanism to encourage neighbours to try to reach agreement over high hedges; it provides an independent assessment of the situation (first by the local authority and then by an inspector) where this proves impossible; and an enforceable way to ensure that remedial action is actually taken and that the problem does not recur.

It will be very interesting to see how the new system works out in practice; it may well be that its very existence will persuade parties to settle their disputes rather than allow an outsider to do so for them.

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