

NORTHERN IRELAND VALUATION TRIBUNAL
THE HIGH HEDGES ACT (NORTHERN IRELAND) 2011 AND THE VALUATION
TRIBUNAL RULES (NORTHERN IRELAND) 2007 (AS AMENDED)

CASE REFERENCE NUMBER: 36/15

LESLEY HERBERT – APPELLANT

AND

BELFAST CITY COUNCIL – RESPONDENT

Northern Ireland Valuation Tribunal

Chairman: Mr Charles O'Neill

Member: Mr Hugh McCormick MRICS

Belfast: 2 June 2017

DECISION

The unanimous decision of the tribunal, for the reasons noted below, is that the appellant's appeal against the issue of a remedial notice dated 2 November 2015 is not upheld and that the remedial notice attached to this decision issue as corrected and varied by the terms contained therein.

REASONS

Introduction

1. This is an appeal under section 7 of the High Hedges Act (Northern Ireland) 2011 (the 2011 Act) against a remedial notice issued by Belfast City Council on 2 November 2015.

The background and the complaint

2. This appeal arises from a complaint about what is stated to be a high hedge situated upon property at 250 Tudor Hill, Malone Road, Belfast, BT9 5PA, (the subject property). The owner of the hedge is Lesley Herbert (the appellant). A neighbour of the appellant, Mr Arthur Goan (the complainant) resides at 33 Malone Valley Park, Belfast, BT9 5PZ.

3. The background is that the appellant, after various dealings with the owner, made a complaint to the Respondent to this appeal, Belfast City Council, (the Council) under the 2011 Act. The complaint was made on the Council's high hedges complaint form.
4. The substance of the complaint to the council is that the row of trees completely blocks sunlight from noon approximately and many of the trees are in a dangerous condition. Reference was made in the complaint to a tree surgeon report dated March 2005.
5. In this decision it is not necessary to rehearse the detail of the efforts by the complainant to seek to address the issues of concern with the hedge owner as the council accepted that the complainant had taken all reasonable steps to resolve the matters with the hedge owners before the formal complaint being made to the council. Agreement was not reached between the parties and the complainant made the complaint to the council.

The action of the Council

6. Upon receipt of the complaint the council investigated the matter and attended the site to conduct a survey.
7. The council took measurements and made calculations in accordance with the High Hedges Act (NI) Technical Guidance (the Technical Guidance) issued by the then Department of Environment to establish the action hedge height. Measurements were taken and an initial assessment was made both in respect of loss of light to the garden and loss of light to the window. Reference to these calculations will be made later in this decision.
8. On foot of its calculations the council found the action hedge height to be 4.15 metres and the council found that the height of the hedge in question was adversely affecting the complainant's reasonable enjoyment of their property and issued a remedial notice dated 2 November 2015 in which it required the appellant to reduce the hedge to a height of no more than 6.5 metres above

ground level and required a further reduction of 0.5 metres allowing a growing margin to forestall other problems in the short term. The notice was dated 2 November 2015 and was stated to take effect on December 2015. The time for compliance with the remedial notice was stated to be 1st January 2016.

The Appeal and submissions

9. The appellant issued a notice of appeal to the Valuation Tribunal dated 18 November 2015 and received in the tribunal office on 20 November 2015. The grounds of appeal are:

“That contrary to the decision of the Council the hedge is not in question adversely effecting the property, that the remedial notice exceeds what is reasonably necessary. That the trees form a natural habitat for wildlife in the location. That the trees existed prior to the construction of the house and where in situ when the Complainant purchased the house. That the enclosed photographs do not suggest any inhibition of the light. The severe pruning of the trees may well cause irreparable damage particularly at this time of year.”

10. By letter dated 7 December 2015 the Council in answer to the issues raised by the appellant stated that following the technical guidance the hedge in question by virtue of its height, form and proximity is causing a significant impact on the complainant's property. The Council agreed that the trees form a natural habitat for wildlife and is complemented by its proximity to Clement Wilson Park. The Council also agreed that the hedge existed prior to the construction of the property. However it stated that there is nothing in the legislation or guidance to indicate that these are an adequate defence to any claim that a hedge should not be trimmed, lopped or removed. It indicated that to ensure that there would be minimal impact on nesting birds the works should be carried out outside the nesting period between the months of April to August. The council further submitted that the photographs submitted were not wholly representative of the effects of the hedge. The evidence of the council goes on to state:

“The High Hedges Act (Northern Ireland) 2011 Technical Guidance for calculating the height a hedge recommends that the height of the hedge needs to

be reduced to 4.15 metres to completely remedy the problems identified. However, having considered the size of the hedge and percentage of reduction required the Council have lessened amount that the hedge needs to be reduced. The remedial notice specifies that the hedge is reduced to a height of 6.5 metres above ground level with a further reduction of 0.5 metres to allow the hedge to grow between more frequent trimming. A number of the trees contained within the hedge are currently in a poor condition and one of the Monterey cypress (*Cupressus macrocarpa*) trees is in fact dead. The trees are also covered in ivy which does not facilitate their health or condition. It is the Council's opinion that the pruning/reduction of the trees would improve the condition of the trees and the safety of the site."

11. In response to the appeal the complainant stated that he considered that no care had been taken of the hedge in that broken limbs had remained in place for years. Also there were levels of ivy which had been allowed to smother the main trunks of all trees.

The law

12. The legislation relating to high hedges is set out in the 2011 Act which includes a definition of a high hedge as follows:

2—(1) In this Act "high hedge" means so much of a barrier to light as—

(a) is formed wholly or predominantly by a line of two or more evergreens; and

(b) rises to a height of more than two metres above ground level.

(2) For the purposes of subsection (1) a line of evergreens is not to be regarded as forming a barrier to light if the existence of gaps significantly affects its overall effect as such a barrier at heights of more than two metres above ground level.

(3) In this section "evergreen" means an evergreen tree or shrub or a semi-evergreen tree or shrub.

(4) But nothing in this Act applies to trees which are growing on land of 0.2 hectares or more in area which is forest or woodland.

5 —(1) For the purposes of this Act a remedial notice is a notice—

(a) issued by the council in respect of a complaint to which this Act applies; and

(b) stating the matters mentioned in subsection (2).

(2) Those matters are—

- (a) that a complaint has been made to the council under this Act about a high hedge specified in the notice which is situated on land so specified;
- (b) that the council has decided that the height of that hedge is adversely affecting the complainant's reasonable enjoyment of the domestic property specified in the notice;
- (c) the initial action that must be taken in relation to that hedge before the end of the compliance period;
- (d) any preventative action that the council considers must be taken in relation to that hedge at times following the end of that period while the hedge remains on the land; and
- (e) the consequences under sections 10 and 12 of a failure to comply with the notice.

(3) The action specified in a remedial notice is not to require or involve—

- (a) a reduction in the height of the hedge to less than two metres above ground level; or
- (b) the removal of the hedge.

(4) A remedial notice shall take effect on its operative date.

(5) “The operative date” of a remedial notice is such date (falling at least 28 days after that on which the notice is issued) as is specified in the notice as the date on which it is to take effect.

(6) “The compliance period” in the case of a remedial notice is such reasonable period as is specified in the notice for the purposes of subsection (2)(c) as the period within which the action so specified is to be taken; and that period shall begin with the operative date of the notice.

(7) Subsections (4) to (6) have effect in relation to a remedial notice subject to—

- (a) the exercise of any power of the council under section 6; and
- (b) the operation of sections 7 to 8 in relation to the notice.

(8) While a remedial notice has effect, the notice—

- (a) shall be a statutory charge; and

(b) shall be binding on every person who is for the time being an owner or occupier of the land specified in the notice as the land where the hedge in question is situated.

(9) In this Act—

“initial action” means remedial action or preventative action, or both;

“remedial action” means action to remedy the adverse effect of the height of the hedge on the complainant's reasonable enjoyment of the domestic property in respect of which the complaint was made; and

“preventative action” means action to prevent the recurrence of the adverse effect.

13. The Valuation Tribunal Rules (NI) 2007 ('the Rules'), as amended by the Valuation Tribunal (Amendment) Rules (NI) 2012 provide rules for the determination of appeals under the 2011 Act. Rule 5B states that an appeal against the issue of a remedial notice may be made on one of the following grounds:

- (a) That the height of the high hedge specified in the remedial notice is not adversely affecting the complainant's reasonable enjoyment of the domestic property so specified;
- (b) That the initial action specified in the remedial notice is insufficient to remedy the adverse effect;
- (c) That the initial action specified in the remedial notice exceeds what is necessary or appropriate to remedy the adverse effect;
- (d) That the period specified in the remedial notice for taking the initial action so specified is not what should reasonably be allowed.

14. As is prescribed in the legislation the matter was based on the written representations.

The tribunal's decision in relation to the appellant's submissions

15. The valuation member of the tribunal carried out a site visit on 20 January 2017 and took various measurements.

16. The matter came for hearing on 13 March 2017 and it became apparent that there were queries in respect of the calculations made by the council. In the data sheet used to calculate the action hedge height in respect of the loss of light to the garden it was unclear as to whether the council had assessed the area of the garden as rectangular or not.
17. Furthermore in respect of the calculation for loss of light to windows an allowance for slope in the garden the council had indicated an allowance of 1.4m as the height that a point in the garden boundary is above the base of the hedge.
18. In the light of this, as per the Technical Guidance the council determined that the action hedge height is the lower of these two action hedge heights and therefore the action hedge height established by the council is 4.15m. The actual hedge height referred to in the decision letter of the council was stated to be 12m high.
19. The tribunal adjourned the matter and sought clarification from the Council as to why the garden was assessed as rectangular, the calculation in respect of the action hedge height of the hedge given that the base of the hedge is higher than the obstructed garden.
20. By letter dated 3 April 2017 the Council clarified its calculations as set out in the table below.

Loss of light to garden		Loss of light to window (kitchen)	
Effective garden area	235m ²	Factor for hedge location reference the window	2
Length of hedge	17.8m	Distance from window to hedge	12.4m
Effective garden depth	13.20		
Orientation	South (0.25)	Allowance for slope	-2.2
Allowance for slope	-1.4m		
Action hedge height for garden	1.9m	Action hedge height for window	5m

21. In accordance with the technical guidance the Council issued revised calculations in respect of the loss of light to the garden- the effective garden depth was 13.20. The orientation was South (0.25) and the uncorrected hedge height was therefore 3.30. The correction for the slope was stated to be (-1.4) as the hedge is higher than the garden. Therefore the action hedge height was found to be 1.9m. In accordance with the technical guidance this was rounded to 2 metres.
22. In respect of the calculation of the loss of light to windows the distance from the hedge to the centre of the window was stated to be 12.4m. The factor for the location of the hedge was 2 and therefore the uncorrected hedge height for windows was found to be $(12.4 \div 2)+1$ i.e. 7.20m. The correction for the action hedge height given that the hedge is sloping was assessed at -2.2 and thus the corrected action hedge height was found to be $(7.20 - 2.2)$ i.e. 5.00 metres.
23. Therefore in accordance with the technical guidance the council found the action hedge height as per the guidance to be 2 metres. The council also indicated that the action hedge height in the remedial notice was increased to 6 metres to take into account the future health of the hedge.
24. The other parties were given an opportunity to respond to the Council's revised calculations: the appellant stated that the calculations were not accurate, the typography of the site has not been properly assessed bearing in mind the fact that the trees form a natural tree line close to the Barnett Demense and that this is in an area of conservation and as the trees were presently constituted do not provide for a continuous buyer [sic] to light in any event.
25. The complainant stated that he was content with a final height of the hedge of 6.5 metres as long as the owner maintains the hedge at this height.
26. The matter was listed for hearing on 2 June 2017.

27. The Valuation member of the tribunal attended the property and made the following observations in respect of calculating the action hedge height.

Loss of light to garden		Loss of light to window (kitchen)	
Effective garden depth	12m	Hedge is parallel to window wall	
		Distance from window to hedge	12.4m
Orientation	0.25	Allowance for slope	-2.3
Allowance for slope	-1.0		
Action hedge height for garden	2m	Action hedge height for window	4.9m

28. The uncorrected action hedge height in respect of the loss of light to the garden was calculated to be (12×0.25) i.e. 3.0m and the corrected hedge height as $(3 - 1)$ i.e. 2 metres.

29. The calculation of loss of light to the windows was found to be $(12.4 \div 2) + 1$ i.e. 7.2 metres and the corrected action hedge height allowing for the slope was found to be $(7.2 - 2.3)$ i.e. 4.9m.

30. Therefore as per the technical guidance the action hedge height was found to be 2 metres.

31. The question the tribunal has to consider next is whether to take into account the recommendations of the Council that the remedial action should be as stated in the Council notice due to the condition of the hedge itself. If this is accepted by the tribunal it would mean that the initial action would be to that the hedge should be reduced to 6.5 metres.

32. The Council states that given the condition of the hedge it is considered that the remedial action as stated in the Council's notice would improve its condition. The complainant has stated that he would accept the action as stated in the remedial notice.

33. In this case the Tribunal has taken careful note of the submissions of all the parties.
34. The appellant appeals on the grounds that the hedge is not adversely affecting the property and that the remedial notice exceeds what is necessary. The tribunal finds that the hedge is adversely affecting the complainants reasonable enjoyment of the property. Furthermore the initial action specified in the remedial notice does not exceed what is necessary to remedy the adverse effect. Given the state and condition of the hedge in question, the tribunal upholds the decision of the council as to the measures to be taken to remedy the situation. Therefore the tribunal upholds the decision of the Council to require the appellant to take initial action to reduce the height of the hedge to no more than 6.5 metres above ground level and to further reduce the height of the hedge by 0.5 metres to allow a growing margin in the short term.
35. It is appreciated that the hedge forms a natural habitat for wildlife and that this is complemented by the proximity to Clement Wilson Park. To ensure that there is minimal disruption to wildlife the works referred to in the remedial notice appended hereto and referred to herein should be carried out outside the nesting period between the months of April and August.
36. The tribunal has reviewed the content of the remedial notice itself. The 2011 Act states in section 5(4) that a remedial notice shall take effect on its operative date. This is amplified in section 5(5) in that the 'operative date' is specified to be such date (falling at least 28 days after that on which the notice is issued) as is specified in the notice as the date on which it is to take effect. The period within which a remedial notice has to be complied with is stated to be the period beginning with the operative date of the notice.
37. In this case the Remedial Notice is dated 2 November 2015. It is stated that the notice takes effect on December 2015. Therefore as the operative date of the notice is not clearly at least 28 days after the date of issue of the notice it is not correct in this respect.

38. There is power in section 8 of the 2011 Act that on an appeal the Valuation Tribunal may also correct any defect, error or misdescription in the notice if the Tribunal is satisfied that the correction will not cause injustice to any person referred to in section 7(2) of the 2011 Act.
39. It is important to note that in this case the appellant appealed the Remedial Notice dated 2 November 2015. Section 7(6) of the 2011 Act states that where an appeal is made the notice shall not have effect pending the final determination or withdrawal of the appeal. Therefore it is the view of the tribunal that injustice will not be caused to any person referred to in section 7(2) in this instance and the tribunal will correct the notice. The tribunal makes no comment as to whether any injustice may be caused in any other circumstance or in any other case.
40. Section 8(5) of the 2011 Act states: “Where, in consequence of the decision on appeal, a remedial notice is upheld, varied or corrected, the operative date of the notice shall be – (a) the date of the decision; or (b) such later date as may be specified in the decision.” The compliance period for the Remedial Notice shall run from the operative date (disregarding any period which may have started to run from a date preceding that on which an appeal was made).
41. The tribunal therefore hereby orders that the Remedial Notice issued on 2 November 2015 by the respondent be corrected and varied so that the date of the Remedial Notice shall be the date that this decision is recorded in Register and issued to the parties. The Remedial Notice shall take effect on 5 July 2017 (the operative date). The compliance period shall be 3 months from the operative date.

Mr Charles O’Neill
Northern Ireland Valuation Tribunal

Date decision recorded in register and issued to the parties: 5 July 2017