

# **Legal Controls for the Protection of Oak Trees in England and Wales**

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**O**ak trees form a substantial part of the woodland areas in England and Wales; they are also significant as individual trees in agricultural and other areas. Legal protection for these trees is found in the provisions of both private and public law. These provisions provide useful models or points of comparison with systems in other countries.

## **Protection Through the Tenurial System**

The landlord/tenant system, as an arrangement for the ownership, occupation and use of land, has a long history in England and Wales. Even today a high percentage of land is tenanted in rural areas, although the percentage was much higher a century ago. Where rural land is tenanted, the almost universal arrangement is for land to be held by agricultural tenants under an agreement by which the tenant holds the land from year to year (annually) at a rent. The introduction of statutory protection for agricultural tenants by 1923, which inhibits the termination of tenancies by landlords, probably assisted the continuance of the agricultural tenurial system.

Trees were, and continue to be, almost invariably reserved, by the terms of a tenancy agreement, to the landlord. Accordingly, save for certain exceptions, tenants have not been entitled to cut trees. A tenant might be entitled to cut "estovers", that is, timber necessary for certain purposes such as for firewood and for fencing. The timber required for such purposes was normally cut from underwood, such as coppiced hazel, chestnut and some oak. The presence of large standard oak trees within a field enclosure remains a good indication that the land is, or has until recently been, tenanted.

Through much of the 17<sup>th</sup> to early 20<sup>th</sup> centuries, landlords were trustees or tenants for life under family settlements. Settlements were designed to retain land within a family and to protect and give effect to the principles of primogeniture. Where the person holding the land was a tenant for life, he

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was subject to the doctrine of waste that prevented, with some exceptions, the cutting of timber, including oak. Because a landlord had a longer-term interest in the land than the tenant, he was not concerned with any interference a large tree might have on agricultural operations. If permitted by the doctrine of waste, or his trustees, he would fell trees only when they were sufficiently mature and was likely to replant trees for future generations.

Associated with the tenurial system were the parks. These were areas of land, usually immediately surrounding the principal house of an estate that provided landscaping, on a rather grand scale, to the house and provision for deer. These arrangements encouraged the planting and retention of large trees, including oak.

In England the Normans created a number of Royal forests. These were primarily for the preservation and pursuit of deer by or for the king. Where they remain, they have had the incidental advantage of preserving trees, such as oaks, from agricultural colonisation.

Until the introduction of modern public law controls, considered below, the incidental consequences of private law ownership arrangements were significant in providing protection for trees until the middle of the 20<sup>th</sup> century.

### Tree Preservation Orders

Tree Preservation Orders ("TPOs") may be made for the protection of individual trees, groups of trees, or woodlands. TPOs are made by local planning authorities where "it is expedient in the interests of amenity to make provision for the preservation of trees or woodlands in their area".

A TPO will normally prohibit the cutting down, topping, lopping, uprooting, wilful dam-

age or wilful destruction of the affected trees, except with the consent of the local planning authority. The TPO may also make provision for securing the replanting of any part of a woodland area which is felled in the course of forestry operations permitted by or under the order.

It is an offence if any person, in contravention of a TPO, cuts down, uproots or wilfully destroys a tree or wilfully damages, tops or lops a tree in such a manner as to be likely to destroy it. The offence is one of strict liability. A tree is regarded as having been destroyed where it suffers some injury and, as a result, ceases to have any further use as an "amenity".

The statutory provisions allow certain exemptions from the consent requirement. Consent is not required for operations that are necessary where trees are dying, dead, or in a dangerous condition.

If consent is given on an application to carry out proscribed operations, the consent may be subject to conditions, such as a condition to replant. There is a right of appeal to the appropriate Minister, the Secretary of State for the Environment, Transport and the Regions, against any adverse decision of the local planning authority. A TPO may make provision for the payment of compensation where consent is refused for certain matters prohibited by the TPO. Compensation is then payable for any loss or damage as a result of the refusal, or a grant of consent subject to conditions. Thus, in *Buckle v Holderness Borough Council*, where the claimant had been refused consent to fell a tree, compensation was payable in respect of the damage to his property caused by the tree's roots.

### Tree Felling Licences

Under the Forestry Act 1967, a felling licence is required for the felling of growing trees, subject to certain exceptions. A licence is not required for the following: felling trees with a diameter not exceeding 8 centimetres, or in the case of coppice or underwood, with a diameter not exceeding 15 centimetres; felling fruit trees or trees standing or growing on land comprised in an orchard, garden, churchyard or public open space; or the topping or lopping of trees or the trimming or laying of hedges.

Further, a licence is not required for the felling of trees by any person on land in his occupation, or occupied by a tenant of his where the trees have a diameter not exceeding 10 centimetres and the felling is carried out in order to improve the growth of other trees, or where certain conditions are satisfied. These conditions are that the aggregate cubic content of the trees that are felled by that person without a licence does not exceed 5 cubic metres in any quarter, and the aggregate cubic content of the trees so felled that are sold by that person, whether before or after the felling, does not exceed 2 cubic metres

in any quarter, or such larger quantity as the Forestry Commission may in a particular case allow.

A licence is not required where felling takes place for the prevention of danger or the prevention or abatement of a nuisance, and for certain other limited purposes. The current policy of the Government in the granting or withholding of felling licences is directed to the sustainable management of forests, in the light of the *Statement of Forest Principles* agreed at the Rio Summit in 1992, and of the Helsinki Guidelines of 1993. The



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United Kingdom Government's policies are set out in *Sustainable Forestry: The UK Programme*, published in 1994. It follows that questions of amenity are not really addressed when an application for a felling licence is being considered.

### Sites of Special Scientific Interest

Section 28 of the Wildlife and Countryside Act 1981 makes provision for protection of sites

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of special scientific interest ("SSSIs"). The identification and notification of SSSIs is made by a Government body, the Nature Conservancy Council (otherwise known as English Nature). An area of land may be notified as of special interest "by reason of any of its flora, fauna, or geological or physiographical features". Whilst such an area is unlikely to concern an individual oak tree, it may concern old woodlands containing oak trees. Old woodlands are sometimes referred to as "ancient woodlands". In very rare cases these may be relics of the original post-ice age tree cover. More usually they are woodlands that have been in continuous management as such for many centuries.

Under the notification procedure, English Nature must specify the flora, fauna or geological or physiographical features by reason of which the land is of special interest and any operations that are likely to damage that flora or fauna or those features (the proscribed operations).

The effect of the designation of an area as an SSSI is as follows. It is a criminal offence to carry out any of the proscribed operations unless written notice of an intention to carry out an operation is first served on English Nature and one or other of the following events occurs: (1) English Nature gives consent to the operation (that might arise where English Nature agrees to a plan of operations that is consistent with the protection of the scientific interests); (2) A management agreement is entered into. Under such an agreement payments may be made to an owner to manage an SSSI in a particular way. The purpose of the payments is to compensate for the diminished profitability of the land; or (3) A period of four months expires from the giving of the written notifica-

tion of an intention to carry out any of the proscribed operations.

It follows that the SSSI protection is not very effective. If, for example, an owner wants to carry out any of the proscribed operations, and felling or coppicing might be proscribed, all he has to do is to give written notification of an intention to carry out such an operation, refuse to enter into any agreements, and merely wait until the expiration of the four-month period. He is then free to carry out the intended operation. To meet this difficulty, section 29 of the 1981 Act contains additional provisions for the special protection of SSSIs. The appropriate government minister designates an SSSI through what is called a "Nature Conservation Order". There is a fairly elaborate procedure for the making of such an order under which affected owners may make objections and representations which must be considered at a local inquiry or hearing. Where an order is made, compensation is payable.

Nature Conservation Orders are made for sites of particular importance, where there is a need to secure the survival of any kind of animal or plant, or from the need to comply with an international obligation. An order may also be made where a site is regarded as being of national importance.

The additional protection provided by the designation of an SSSI as a Nature Conservation Order area is as follows. If a written notification of an intention by an owner to carry out any of the proscribed operations is made, English Nature can offer an agreement, the effect of which is to extend the period of protection to 12 months, or three months from the rejection or withdrawal of the offer, whichever last expires. During the period of protection English

Nature can make an order for the compulsory acquisition of the interest; this continues the prohibition on the carrying out of proscribed operations pending the outcome of the compulsory purchase order proceedings.

### **General Planning Controls**

The Town and Country Planning Act 1990 contains provisions for the control of development of land. Development includes the carrying out of operations, such as building, engineering or mining, and the making of a material change in the use of land or buildings. The effect of this control is that planning permission must be obtained for any matter that constitutes such development. The felling of trees is not development, nor is the use of land for forestry purposes. But local planning authorities may have regard to trees when considering applications for planning permission for development. Indeed, under this provision it is the duty of a local planning authority to make adequate provision for the preservation or planting of trees in granting planning permission for any development. Provision may be made by the imposition of conditions to a planning permission.

Thus, in connection with the grant of planning permission for, say, the development of land for housing or other purposes, a condition may be imposed that prohibits the felling of specified trees and, additionally, requires planting or replanting to take place. The enforcement of such conditions is not entirely satisfactory. The breach of such a condition is not, as such, a criminal offence. Where a local planning authority believes that there has been a breach of a condition, it must first serve a breach of condition notice requiring the breach to be remedied. That is not much good if the condition breached was a condition against the felling of trees. Accordingly, it is more usual for trees to be protected by tree preservation orders. However non-compliance with a breach of condition notice is a criminal offence.

### **Conservation Areas**

Under the Planning (Listed Buildings and Conservation Areas) Act 1990, areas may be identified and designated as conservation areas. Conservation areas are selected for their comprehensive interest, and may include a whole



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*A hedgerow must have a continuous length of, or exceeding, 20 metres, or if less, at each end it meets with another hedgerow.*

town or part of one, a village, or perhaps only a street or square. Such areas are therefore not necessarily rural areas, although they may well contain a number of trees that contribute to their respective comprehensive interests.

One consequence of conservation-area designation is that trees within the area are afforded the same degree of protection that would be available under a tree preservation order. In effect, trees may not be felled, or other opera-

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tions carried out to them, without the grant of permission.

### Trees and Hedgerows

The Hedgerow Regulations 1997 were made under the Environment Act 1995. Many hedgerows contain mature trees, especially oaks, and may be the relics of old woodlands after clearance for agricultural purposes. The Regulations apply to any hedgerow growing in, or adjacent to, any common land, protected land, or land used for agriculture, forestry or the breeding or keeping of horses, etc. A hedgerow must have a continuous length of, or exceeding, 20 metres, or if less, at each end it meets with another hedgerow. The Regulations do not apply to hedgerows within the curtilage, or marking a boundary, of a dwelling house.

The removal of a hedgerow to which the Regulations apply is prohibited unless a prescribed procedure is followed. The person proposing to remove the hedgerow (this would include any tree within it) must serve a hedgerow removal notice on the local planning authority. The local planning authority may approve the proposal, or serve a hedgerow retention notice prohibiting the carrying out of such work as they may specify. However a hedgerow retention notice may only be served in respect of an "important" hedgerow. A hedgerow is "important" if it has existed for 30 years or more and satisfies certain criteria. A hedgerow that contains certain specified species will satisfy the criteria, such as the inclusion of certain trees specified in Schedule 1. Oak is not one of these.

### European Union Directives

The Council of the European Union has made directives on habitats and wild birds. Under the

first of these directives a duty is placed on member states to designate Special Areas for Conservation ("SACs"). In the United Kingdom the Conservation (Natural Habitats, etc.) Regulations 1994, and made under the European Communities Act 1972, gives effect to both directives.

The Directives and the Regulations make provision for the selection of sites eligible for identification as of community importance. Once identified, the areas are given appropriate SACs designation. These and certain other special areas are defined in the Regulations as "European sites". The Regulations prohibit the carrying out of operations specified in a notification in force in relation to any such site. They also contain powers for the compulsory acquisition of any interest in land within a European Site where an agreement cannot be made with the owner for its management, or a breach of an agreement prevents or impairs the satisfactory management of the site.

Although the Directives and the Regulation do not specifically address the protection of trees, trees in European Sites enjoy indirect protection.

### Conclusions

There are a wide range of legal controls that protect, *inter alia*, oak trees in England and Wales. Even where the controls are not specifically directed to the protection of trees, trees are often incidentally protected. Some of the controls are probably only relevant to the particular legal and other arrangements in England and Wales. However the system of tree preservation orders does provide a possible model for the protection of individual trees, groups of trees, or woodlands in other jurisdictions.