

TYNWALD COMMISSIONER FOR ADMINISTRATION
REFUSAL TO INVESTIGATE A COMPLAINT
STATEMENT OF REASONS
TCA 1901

Introduction

1. In November 2018, my predecessor laid before Tynwald a statement, pursuant to section 14 of the Tynwald Commissioner for Administration Act 2011, a statement of his reasons for refusing to investigate a complaint made by Mr R, which had challenged the legal validity of actions by the Department of Environment, Food and Agriculture (DEFA) in respect of planning applications and controls. He accepted a third complaint in respect of the refusal to grant Mr R Interested Party Status, on which I have now reported, rejecting the complaint.
2. In early 2019, Mr R made a further complaint, which he asked be put on hold, initially pending my appointment and subsequently whilst he engaged in correspondence on procedural concerns. This statement is only concerned with that complaint. It relates to the same development of 45 houses in the town where Mr R resides, which has been the subject of his previous complaints, but raises the interesting question of the interaction between the Tree Preservation Act 1993 and the operation of its planning procedures.

Relevant legislation

3. Section 3¹ of the Tree Preservation Act 1993 provides:

3 Restriction on cutting down trees etc

- (1) If any person –
 - (a) cuts down, uproots or intentionally or recklessly destroys a tree; or
 - (b) tops, lops or intentionally or recklessly damages a tree in such a manner as to be likely to destroy it; or
 - (c) tops or lops a registered tree, or
 - (d) causes or permits another to do anything falling within paragraph (a), (b) or (c),he or she is guilty of an offence.

Section 3 also provides:

- (2A) Subsection (1) does not prevent the cutting down, uprooting, destruction, topping, lopping or damaging of a tree in accordance with a licence granted by the Department under this Act.

¹ As amended by the Tree Preservation (Amendment) Act 2009.

The complainant's argument

4. Mr R relies on these provisions to support his argument that a developer must obtain a permit(s) before he can clear trees from the development site. Mr R identified 43 trees which were removed without a permit. The trees in question are *Leylandii* which originally formed a hedge separating the site, which was at the time scrubland, from a new development on its perimeters. The hedge was not maintained leading to the growth of separate trees. The arboriculturist assures me that there were in fact only 32 trees, using the root system as the better measurement. *Leylandii* have a habit of splitting, creating multiple-stemmed trees.

Legislative history and previous practices of the Department

5. Over the years, there have been changes to the planning procedures. These are to be found in various Town and Country Planning (Development) Orders, Town and Country Planning (Development Procedure) Orders and Amendment Orders. There is also discussion between the Planning Directorate, the developer and other parts of DEFA which might have an interest, and other Departments, much of which may occur before a formal application for planning consent is made. It is clear from the Report prepared for the Planning Committee that there had been extensive discussions in this case. Both DEFA's Senior Biodiversity Officer and the arboriculturist had provided comments. The latter had commented that the *Leylandii* trees were poor specimens of little amenity value to the wider public and that he would have no objections to their removal. The planning officer comments, "whilst a felling licence is required for this, it is generally adopted practice for trees which are to be removed to facilitate a development, or are in conjunction with it, to be first the subject of scrutiny through the planning application process before being the subject of a felling licence". She goes on to point out that, "it can be a defence in any subsequent prosecution for the felling of trees without the appropriate licence, that planning approval was granted which would have resulted in the removal of the trees."
6. This is the crux of Mr R's complaint. Section 4 of the Tree Preservation Act 1993 (as amended) provides:
 - 4(4) In proceedings for an offence under section 3 it is a defence to prove that at the time of the action in question —
 - (a) development operations were being, or about to be, carried out on the land on which the tree in question stood; and
 - (b) planning approval had been granted for those operations and was still in force; and
 - (c) either -
 - (i) the planning authority or the Department had previously consented in writing to the action; or
 - (ii) it was a condition of the planning approval that the prior consent of the Department be obtained to the action, and that consent had been obtained.

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7. This is a strangely worded provision. The tree felling is still, on the face of it, an offence but there is an absolute defence where the Department has already agreed to the removal of the trees. In such cases, the prospect of a successful prosecution is nil, so there is no prospect of a prosecution being brought. In this case, the Planning Committee unanimously accepted the Planning Officer's recommendations and approved the application subject to certain conditions. These included provisions that the planting seeding and turfing in the approved details of landscaping were to be carried out in the first planting and seeding seasons following the completion of the development or the occupation of the dwellings, whichever was the sooner. This was because "the landscaping of the site is an integral part of the scheme and must be implemented as approved". This, by necessary implication, involved the removal of 32 *Leylandii* trees.
8. In its response to my enquiries, the Department accepted that the situation was unsatisfactory, and the amendments made by SD No.2015/0150 (the Transfer of Planning and Building Control Functions Order 2015) had created further problems. This did make some amendments to the Tree Preservation Act 1993, including at 7(3): "In section 4(4)(c)(i) after 'the planning authority' insert 'or the Department'". Other amendments to the Town and Country Planning Act 1999 were intended to make a clearer distinction between what was a development order and what was a development procedure order for the purpose of the Act, but there was a failure to make consequential amendments to the Tree Preservation Act 1993. The Department indicated that it intended to address this but were unable to do so "until the tsunami of Brexit legislation was completed". I note in passing that the Transfer of Function Order was signed on 13 April 2015 and thus pre-dates the Brexit referendum. Nevertheless, I am convinced that a court would, despite the lacuna, take the view that the Department had authority to sanction planning which involved the removal of trees in the manner that it did.
9. In March 2018, the Department issued version 1.3 of its Tree Protection Policy. This was the policy in force at the time of consideration of the planning application. Paragraph 10.5 states that: "The defence listed under section 4(4) of the TPA allows work to be undertaken on trees without a licence where it is required to facilitate approved development operations. The Department interprets the existence of this defence to mean that a planning approval which permits the removal of a tree (or trees) has the same effect as a licence granted by the Department to that effect. If the Department is satisfied that approval of the Planning Committee in a given instance constitutes "written consent" to the tree work, taking account of the wording of the approval and of the planning application and its accompanying documents, then it will not require the person concerned to submit a separate application under section 5 of the TPA."

Evaluation of the complaint

10. Mr R states that "he has been shouting from the rooftops" that the Department's approach is wrong and that a departmental policy cannot override a statutory provision. It seemed to me that this was a complaint requiring further investigation, particularly as the Department, in indicating its intention to amend the legislation when opportunity

arose, appeared to be accepting that its vires for waiving the requirements of section 5 of the Tree Preservation Act were suspect.

11. However, in order to investigate the complaint, Mr R had to bring it within section 10(1) of the Tynwald Commissioner for Administration Act 2011. I can only investigate if:

“(a) a member of the public claims to have sustained injustice or hardship in consequence of –

- (i) maladministration in connection with an action ...;
- (b) that member of the public has objected about the actions ... in writing to the listed authority whom the complainant alleges is responsible for it;
- (c) the listed authority ... has in its view taken all reasonable steps to deal with the matter to which the allegation relates; and
- (d) the member of the public has complained to the Commissioner within the time limit.”.

12. There is no doubt that paragraphs (b), (c) and (d) are satisfied. Mr R certainly complained to the Department and the Department responded confirming their long-held position, so Mr R has now complained to me. My concern has been whether subsection (a) is satisfied.

13. It is correct that Mr R “claims” to have sustained injustice because the trees were felled without a permit. I have endeavoured, in correspondence, to find out how this caused Mr R personal injustice. The trees did not form the boundary to his property, nor were they sufficiently proximate to it to impinge on him personally. In correspondence with the Chief Executive of DEFA, Mr R explained that he was claiming injustice because of –

“the Department’s failure to act with fairness and reasonableness in its administration of the Trees Act provisions and in particular its failure in not ensuring that the provisions of the Trees Act with regard to licensing were imposed at the planning stage, its failure to support my contentions during the planning stage that a licence was required to cut down the 43 trees referred to in the planning application and its failure to take action against the developer having cut down the 43 trees without a licence authorising it to do so. In this regard, I am aware that the Department prosecutes people who cut down trees without having first obtained a licence to do so, so its refusal to take action against the developer for cutting down the 43 trees without a licence means, in my opinion, that it has not acted fairly and reasonably.

....

“The Department’s decision, through you, not to enforce the Trees Act provisions against the developer for cutting down the trees referred to without a licence authorising it do, is an act of maladministration by the Department by not administering the provisions of the Trees Act in accordance with the law and having objected to the cutting down of the trees during the planning process, I claim that I have suffered injustice.....”.

Conclusion

14. I have concluded that the legislation must have been intended to require some personal connection between the injustice and the complainant. It is not sufficient to identify what the complainant considers to be maladministration and then claim to have sustained injustice: in the present case the complainant is not sufficiently affected to be entitled to complain. For that reason, I have decided not to investigate this complaint and to make this statement.
15. I should add, for the avoidance of doubt, that if another complainant were to bring himself within section 10(1)(a)(i) of the Tynwald Commissioner for Administration Act 2011 in making a complaint of tree felling without obtaining a permit, perhaps as the representative of a charity or organisation whose object is tree preservation, I would be prepared to investigate that complaint.

Angela Main Thompson OBE
Tynwald Commissioner for Administration
1 May 2020