The 'edge of darkness

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In Scotland, court cases involving trees are rare and reported cases in the Court of Session (Scotland's supreme civil court) rarer still. Indeed, I can only think of one, from 1781, citing Roman Law. One might think the law is so well understood by us citizens that the courts are not needed.

Then came the High Hedges (Scotland) Act in 2013, and for just about everyone paying attention to its progress, it was apparent that it was imprecise; we knew before the ink on it was dry that the journey to the Court of Session had begun.

For the couple living in the shade of one high hedge, the hedge that had its day in court, the journey started many years before. And as we will see, the die was cast more than a decade earlier than that. This is a tale of many hedges, but persevere reader, it is indeed about trees too. It is also about people, because that is what all law is really about, but I am anonymising the names of the *dramatis personae* to save the limelight for the trees.

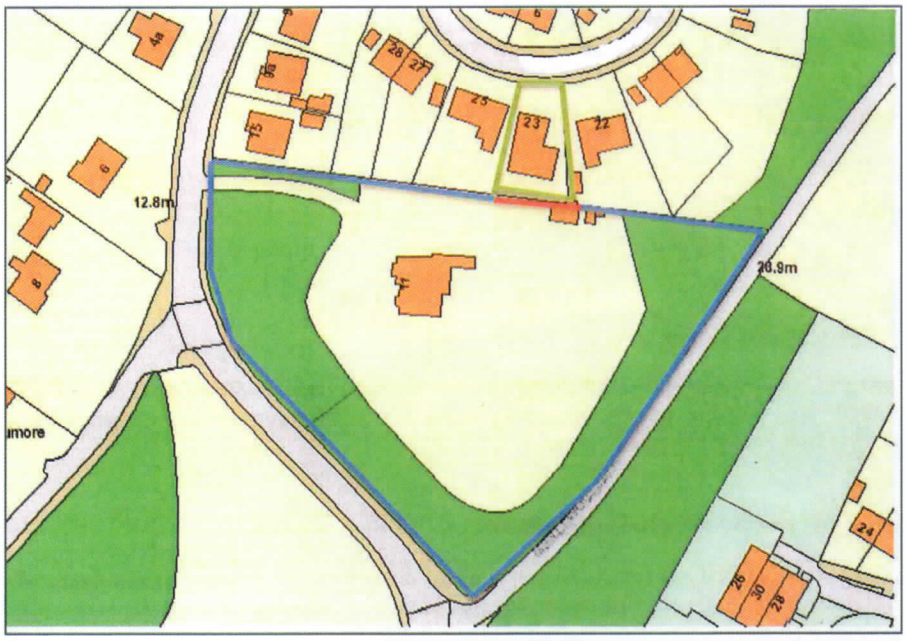
Mr and Mrs N live in an ordinary bungalow in a quiet street in Inverness. The street is a crescent, and so their plot is somewhat wedge-shaped and widest at the back, and naturally the house is set quite far back. The south-facing back garden is just 6 metres deep. And beyond that on neighbouring land was a solid mass of evergreens about 22 metres high. When I visited in 2018, I noted that the conifers overhung the boundary by 4 metres and that it was not possible to see the sky from the back kitchen or lounge windows except looking upwards with your cheek pressed to the glass.

It was not always thus. The house plot had been part of the spacious grounds of the house to the south, and had been reserved for an alternative access to the street. And when it had been sold off as a house plot the seller had planted along the new boundary for screening. Unfortunately, in the '80s the now-notorious Leyland cypress were 5 for £20.

The reader might wonder why in my chronology I next put down the marker of an unglamorous piece of legislation called the Interpretation and Legislative Reform (Scotland) Act 2010. But bear with me, it will be important.

Mr and Mrs N first asked the owner of the house to the south (whom I will call Mr R) in 1999 if the trees could be reduced in height. In 2001 they wrote to him saying that 'Since the trees that are to the south of our house have grown up, we now have no sunlight at all in our garden, and little light reaches the house' and they offered to pay for the reduction themselves. But they got no response.

One might suppose that High Hedges legislation is aimed at these very circumstances. England and Wales thought so, and legislated in 2003, and Northern Ireland and the Isle of Man followed suit. Despite Scotland being the most northern part of the UK with consequently the least available light, it took a private member's bill and the relentless lobbying of Scothedge to get a Scottish Act on the agenda almost 10 years later. Mr and Mrs N were encouraged, and in 2013 again asked Mr R again to take action to reduce the nuisance of the trees. There was no response.



The council's plan of the hedge and surrounding area.

In Parliament the Bill was hastened through without dissent. The definition of a qualifying high hedge was initially based on the robust English definition, but with some arbitrary changes in wording that diluted its clarity. At the last moment, and without consultation, wholly deciduous hedges were included. The High Hedges (Scotland) Act 2013 came into effect in April 2014.

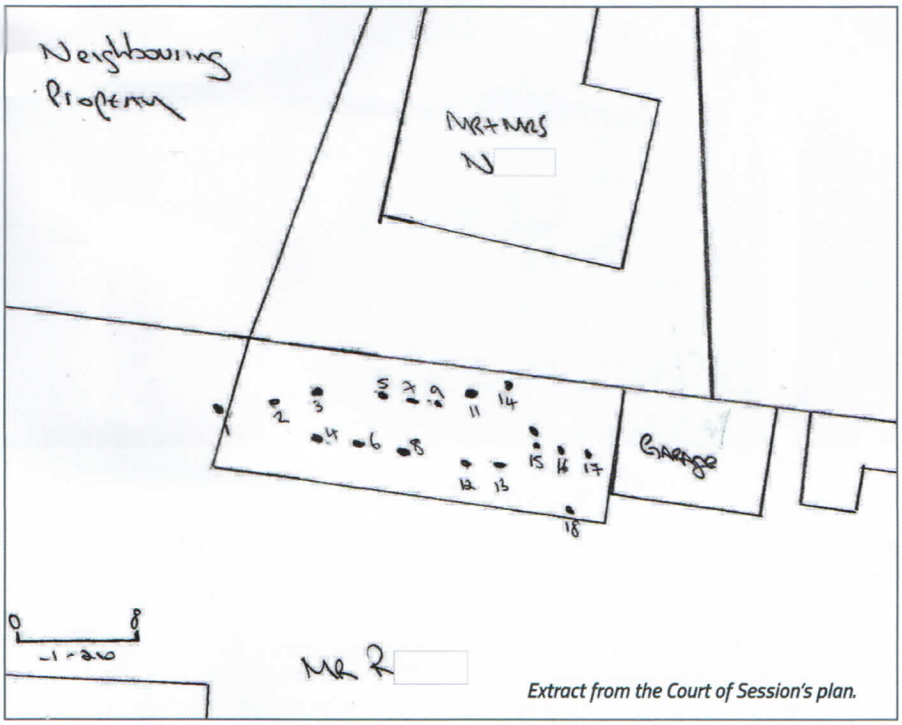
It is worth pausing for a second to make what I think is a pertinent observation. The Scottish Parliament is alone in the UK in the frequent reference to ministerial 'guidance' in its Acts, usually obliging some or other party to 'have regard to' it in exercising its functions. Guidance thus has only a vague authority, and can be changed by a minister without parliamentary scrutiny. In this way, in 2014 the government produced (without public consultation) the first of three editions of guidance for and to local authorities, that they should 'have regard to' in assessing high hedge applications. Unlike in the rest of the UK, no central guidance has ever been produced for the public. The Act says that councils 'may' (not 'should') issue guidance to the public. Hardly surprisingly, councils can only reiterate for the public the technical ministerial guidance to councils.

The 2014 Guidance, on one crucial point, was blunt: *'For trees or shrubs to be considered as a high hedge, they must* ***first be a hedge****. A hedge is defined by the Oxford English Dictionary as: "A row of bushes or low [sic.] trees (e.g. a hawthorn, or privet) planted closely to form a boundary between pieces of land or at the sides of a road."'* The guidance also added, with significance for our Inverness case, that 'Two or more trees or shrubs do not have to form a precisely straight line; as long as they are roughly in line they may be considered.'

Mr and Mrs N understandably wasted little time in applying to Highland Council for a High Hedge Notice, but by July 2014 the council had rejected the application on the basis that *'The trees in question do not appear to have been planted in a row as a hedge, nor do they take on the character of a hedge or have been maintained as a hedge. While tightly planted, they constitute woodland and form part of a wider woodland belt.'* It's worth adding for context that the said wooded area was also the subject of a Tree Preservation Order. In common with many determinations at the time, *ad hoc* criteria like these were emerging all over the country. The want of central clarity could never endure.

> **1 Meaning of "high hedge"**
>
> (1) This Act applies in relation to a hedge (referred to in this Act as a "high hedge") which—
>
> (a) is formed wholly or mainly by a row of 2 or more trees or shrubs,
>
> (b) rises to a height of more than 2 metres above ground level, and
>
> (c) forms a barrier to light.

The text of the opening section of the Act.



Extract from the Court of Session's plan.

There was not long to wait for changes. In 2016, again with no public consultation but after private lobbying by Scothedge and the Plain English Campaign, fresh guidance was issued, but rather than make things clearer, the crucial test of hedge-ness was removed. In a masterpiece of circular definition, it now said that *'For trees and shrubs to be considered as a "high hedge", they must be a high hedge as defined by the Act.'* Gone from the guidance, but still there in the Act, was the fundamental need for the high hedge to be ... a hedge.

Less than a year later, in early 2017, the post-legislative scrutiny of the effectiveness of the Act began. The committee assembled witnesses, comprising High Hedge applicants, Scothedge, councils and the Planning and Environmental Appeals Division (DPEA). No hedge owners were represented. Not all representations were considered by the committee, including mine, the final line of which typified responses: *'I believe everybody would welcome clarity and retrospective improvements. We should not wait for the Court of Session to struggle someday to make sense of the inadequacies of the High Hedge regime if it can instead be repaired in a way that brings the citizens of Scotland along with it.'*

Mr and Mrs N were among the witnesses imploring clarity. And quite rightly, back at home they made another High Hedge application in late 2017. This time Highland Council, apparently not needing to rely on the Guidance, found eight months later that *'the trees, though closely planted have been planted in a belt several metres wide, it is possible to walk amongst the trees, which although not planted in a row form a hedge'*. A High Hedge Notice was issued, requiring the reduction of the trees to 2 metres height within 60 days. The plan on the notice showed the hedge as a thick red line along the boundary. Mr and Mrs N were doubtless cock-a-hoop, but not for long.

There had by now been two High Hedge decisions that contradicted one another. Within a few weeks Mr R had submitted an appeal to the Scottish Ministers (yes, the same ones that promoted the Act and wrote the Guidance). The grounds of appeal were that *'The trees form part of a forested or wooded area rather than comprising a hedge.'* The Ministers appointed a Reporter through the DPEA to determine the appeal.

Thus far, reader, I have not really described the hedge, but after a visit to Mr and Mrs N's side I was able with the aid of lasers and tacheometry to draw up an inventory of the trees on the boundary, and I can describe them to you now. For the most part there were two fairly clear parallel rows of leylandii with large 'bookend' trees at either end, spilling out beyond the boundary for several metres. The largest leylandii had a stem diameter of 40cm and a height of 23 metres, but the sizes were very variable. One could now define the hedge either as two rows of stems or as one large linear coalescent canopy, or perhaps as both. An annotated scale plotting of the stems and canopy was duly lodged, together with calculations of light loss that supported the council's proposed reduction to 2 metres and photos/narrative that showed no privacy would be lost. I showed that the Area TPO pre-dated the trees and the woodland and so they were not protected.

A letter had been obtained from the original owners stating that *'when we planted the Leylandii they were planted as a hedge as at the time there was no screening to that part of our boundary. If we had intended the trees to be anything other than a hedge, we would not have planted Leylandii but some other species.'*

The council was asked by the Reporter to confirm what it had intended to include in the high hedge for the purpose of the Notice. With a little adaptation, my plan was submitted.

In December 2018 the Reporter issued her decision. She found that considering all the trees together, there was a high hedge formed wholly or mainly by a row of two or more trees or shrubs. Consistent with the 2016 guidance there was no need to say whether the high hedge was simply a 'hedge' too. The High Hedge Notice stood, with a more two-dimensional plan. Mr and Mrs N were able to breathe a happy sigh of relief.

Just one month later (January 2019) the Guidance changed again. Since the Ministers do not consult on it, we cannot know why, but the trip-hazard under the carpet where hedges had been swept was back out in the open. 'The Act only applies to hedges; for trees and shrubs to be considered as a "high hedge", they must first be considered to form a hedge.' The hedge test was back where the Act had put it.

Then in March 2019 an Interlocutor from the Court of Session arrived with Mr and Mrs N. It invited submissions on a Judicial Review of the Reporter's decision by Mr R. In brief, the petitioner sought a decision for the court that the trees were not a hedge. The argument included that Parliament chose 'specifically that it is the High Hedges (Scotland) Act 2013 and not the High Trees (Scotland) Act 2013'. At times like these it does not matter how individuals feel about the morality of a case, as every citizen should generally be allowed to rely on a literal meaning of the word of law. Indeed it was argued in court that the Act says that a high hedge must be formed wholly or mainly by a row of 2 or more trees or shrubs. Mr R, admittedly, seemed to have a point. I have sympathy too for the Reporter who had had to decide in the 'twilight zone' of the 2016 guidance that several rows and one single canopy were a high hedge.

The day in court in November 2019 was formal and intense. It would be a disservice to either party to choose selective quotes, so I will only mention an off-the-cuff comment by Lady Carmichael that has stayed with me. Asked to look afresh at the wording of section1 of the Act, she looked up and said 'It may be that Parliament hasn't done its job properly.'

Before and after.

The parties were left on tenterhooks until late February 2020, when a written decision was issued. The judge opens the decision with reference to that sleepy Interpretation and Legislative Reform (Scotland) Act 2010. Its section 22 says 'In an Act of the Scottish Parliament or a Scottish instrument (a) words in the singular include the plural, (b) words in the plural include the singular' and so there could be more than one row of trees or shrubs in a hedge. The judge immediately reasoned that this would not result in a descent into madness, as *'There is no real risk of absurdity arising from the possibility that a high hedge might have an indefinite number of rows ... Looking at the language and structure of section 1, trees and/or shrubs must be a hedge before they can be a high hedge.'*

Dismissed was the argument that attention should be given to discussions of what Parliament had intended before the Act was passed. There's more but I'll keep it brief. It was stated that the Reporter was entitled to take into account information placed before her indicating that the leylandii had been planted in order to form a hedge, and the circumstance that they were located at the boundary between the two properties. There was no criticism of her findings regarding the adverse effects on the property. In short, her confirmation of the council's High Hedge Notice had been reasonable and lawful.

There has long been a tension between a strict technical definition of a 'high hedge' and the possible need for it to be a 'hedge' too. My overall impression of the court decision was that of fairness, preventing technicalities getting in the way of the raw purpose of the Act, and a welcome clarification that a high hedge must firstly be a hedge. It is unfortunate that it was needed at all, and that a citizen had to pay for it, but the court has done its job properly.

A particularly interesting aspect of the written decision is the inclusion of the council's plan showing the arrangement of the trees. A picture, after all, paints a thousand words. Some will be reassured by the removal of the pedantic single-row defence, others dismayed by the apparent abandonment of parameters.

I sought the views of Scothedge, which was formed as a lobbying and interest group to represent individuals affected by the unneighbourly nuisance of high hedges and trees. It and others felt that councils have been applying the Act too cautiously, and had a desire to have the Act apply more widely to non-hedge trees having the same shading effects as hedges. As spokesperson, Pat McLaren says, *'This Act was seen as a triumph against unneighbourly behaviour which badly affected the enjoyment of a person's property and which could ultimately affect mental health.' On the subject of the recent court decision, she adds, 'Had it not been necessary for the government to defend their position we would not have any judicial guidance on the Act. The [Judicial Review] has confirmed the broad definition in the Act, the clear conclusions of the Post Legislative Scrutiny Committee and the explanations of Scothedge. It is now up to the government, the [councils] and the DPEA to respect the clear requirements of the law.'*

About that committee: it reported to the Minister in September 2017 and this undoubtedly contributed to the Guidance being amended, although too late for this case. In all other respects nothing much has changed. The Minister has looked inwardly at local government, and was last heard to intend to 'hold a Forum in the Spring of 2020 to allow practitioners to come together for an open discussion on achieving best practice and how we can continue to improve delivery of the legislation for the benefit of communities'.

Meanwhile, where it matters most, in June 2020 Mr and Mrs N woke to the sound of chainsaws. Within days the hedge was removed. I asked them how it felt. *'Light streamed into our house, garden and lives. How did it feel? Weird and wonderful. Weird because for a short time when the trees came down it felt as though the prison door had unexpectedly swung open. Suddenly, we could see the sky, and focus on more distant things. But it was also wonderful, as we enjoyed our home as we should have been able to for the preceding 20 years.*

'What has been highlighted by our experience, for our politicians and officials at all levels, is that poorly drafted legislation and a system not fit for purpose perpetuates misery for victims of intransigent neighbours. We hope that our story will form a precedent to help the many other high hedge sufferers in Scotland to get light back into their lives.'

I cannot disagree. Even for the oft-maligned hedge owner, who occasionally has genuine reasons for a hedge, it is not much to ask that citizens know where they stand, long before animosity and expense arises. No one would object to further guidance that reflects the Court of Session decision, a decision that turned (unplanned) on reliance on other legislation. The Ministers deny that there are plain deficiencies in the Act, and there are other inequities and ambiguities in the system that frequently turn applications and appeals in unforeseeable directions. But for now, there is a little more light; it is a different matter still as to whether the Act goes far enough in our northern latitudes.