NORTHERN IRELAND VALUATION TRIBUNAL

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

CASE REFERENCE NUMBER: 71/12

MICHAEL MAXWELL - APPELLANT

AND

LISBURN CITY COUNCIL - RESPONDENT

Northern Ireland Valuation Tribunal

Chairman: Mr James V Leonard, President

Member: Mr Tim Hopkins FRICS

Hearing: 23 July 2013, Belfast

DECISION

The unanimous decision of the tribunal, for the reasons provided below, is that the appellant's appeal against a remedial notice dated 28 November 2012 is not upheld and the tribunal Orders the appellant's appeal in this matter to be dismissed.

REASONS

Introduction

1. This is a reference under the High Hedges Act (Northern Ireland) 2011 ("the 2011 Act"). The statutory regime is new and is somewhat different to that exercised in other jurisdictions of the Northern Ireland Valuation Tribunal. It is prescribed by the 2011 Act and by the regulations made thereunder, amending the tribunal's rules of procedure. The regime provides for a site visit by the Valuation Member of the tribunal and thereafter for a consideration of the appeal by a tribunal constituted of a Legal Member and the Valuation Member. There is no oral hearing and any evidence is taken from the papers placed before the tribunal and as a result of the Valuation Member's site visit and that member's inspection of the locus and any pertinent information gained thereby.

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 Ravarnet House, 24 Carnbane Road, Lisburn, Co Antrim BT27 5NG ("the subject property"). The appellant, Mr Maxwell, is the owner of the subject property. A neighbour of the appellant, Mr Orr (" the complainant"), resides at 7

Shelling Court, Ravarnet, Lisburn, Co Antrim BT27 5DT. The background is that the complainant, after various dealings with the appellant, made a complaint to the Respondent to this appeal, Lisburn City Council ("the Council"), under the 2011 Act. The complaint was dated 2 September 2012 and was made using the Council's high hedges complaint form.

3. The substance of the complaint to the Council reads: "*The hedge in question restricts light to the rooms at the rear of our property, the Kitchen and main living room. We have to put on electric light in the kitchen at all times of the day due to the denial of light to the room by the hedge. The reductions of the hedge height to date have had a marginal effect but not enough to allow enough natural light to the kitchen*." It is therefore clear that the complainant, in making his complaint to the Council, has acknowledged that the appellant had indeed taken some action, but he has asserted that this action has had a marginal effect only.

4. In this decision, the tribunal does not need to go into the detail of the preliminary meetings and various correspondence and discussions between the appellant and the complainant, for the reason that the Council has readily accepted that proper endeavours had indeed been made by the complainant to resolve matters prior to the formal complaint being made to the Council. It is sufficient to say that agreement was not reached between the parties and the complainant accordingly proceeded to lodge his complaint with the Council. The correspondence does however serve to illustrate the views of the respective parties and the positions adopted. That will be mentioned further below.

The Council's Action

5. Upon receiving the complaint the Council arranged to investigate the matter; the Council arranged to survey the site. The site visits on behalf of the Council were made on 26 October and 31 October 2012. Measurements were taken and the tribunal has inspected calculation sheets in the standard form in respect of the action hedge height determination. The Council commissioned a survey, conducted upon the latter of the two forgoing dates, 31 October 2012, by the firm Clarke Cunningham Tree Maintenance Ltd. As this was one of the issues which had been specifically raised by the appellant, the purpose of the survey was expressly stated, under the terms of reference provided to Clarke Cunningham Tree Maintenance Ltd, as being to establish the likely survivability of a row of Leyland cypress trees (*x cupressocyparis leylandii*) which were identified as being the subject of the complaint. This survey resulted in the production of a report by Mr Gareth Casement of that firm ("the Clarke Cunningham report").

6. The Clarke Cunningham report shall be mentioned in further detail in paragraph 13 below, but, in brief, the report identified a row of mature Leyland cypress trees forming a hedge between the subject property and the complainant's property. The report addressed the hedge in two separate sections, "*the upper section"* and *"the lower section".* It was observed that the upper section of the hedge was in reasonable condition. However, this section had limited live foliage on the Shelling Court side due to previous facing back of the hedge and light suppression on account of its proximity to the garage and shed at this location. The lower section of

the hedge was observed to be in reasonable condition and had a well-developed crown with abundant live foliage. It was noted that the entire hedge had a very limited live crown on the subject property side due to light suppression. Regarding the technical issue of conifer height reduction, Mr Casement expressed an opinion on the basis of his experience that a reduction in the live crown of a cypress hedge of 50% was normally survivable. The recommendation was that an action height of 3.7m was not currently achievable on the upper section of the hedge due to the limited live foliage on that section. However the action height of 3.7m would be achievable on the lower section of the hedge without the likely failure of the trees. In consideration of the height reduction work already carried out in that year (2012) Mr Casement stated that it would be preferable to defer any further height reduction operation until during or after the next growing season. He also stated that to ensure future compliance with the action height, it would be preferable to reduce the hedge below the action height of 3.7m to allow for a growing margin, but that an immediate reduction below 3.7m would be detrimental to the hedge at this time.

7. The Council in the light of this information produced a report concerning the complaint which placed substantial reliance both upon the Council's own site visits and observations and also upon the specific findings and the matters of opinion as expressed by Mr Casement in the Clarke Cunningham report. The Council's report provides some detail regarding such matters as a description of the hedge and its surroundings, the Council's function and the main considerations taken into account, a summary of the respective cases advanced for the complainant and for the appellant, and the Council's response to the points advanced, the methodology employed by the Council, and the conclusion and the formal decision made by the Council. The decision made by the Council was a determination that the height of the hedge in question was adversely affecting the complainant's reasonable enjoyment of the complainant's property and that a remedial notice was to be issued as a result of that.

The Remedial Notice

8. The remedial notice, dated 28 November 2012 ("the remedial notice"), identified the hedge in two sections, referred to as "Section A" and "Section B". Initial action prescribed was that Section A must be reduced to a height not exceeding 3.7 m above ground level and Section B must be reduced to height not exceeding 4.5 m above ground level. Preventative action was further prescribed so that the respective sections would at no time exceed the forgoing prescribed heights. Further information was provided as to how this was to be done to allow for re-growth between annual trimmings. A time for compliance was specified: (1) Section A was to be reduced to a height not exceeding 3.7m within 10 months of 26 December 2012 and (2) Section B was to be reduced to a height not exceeding 3.7m within 22 months of 26 December 2012. The consequences of failure to comply were stated in the notice, as specified in the statutory provisions.

The Appeal

9. In exercise of his statutory entitlement to appeal, the appellant, by appeal notice dated 15 December 2012, appealed to the tribunal. The tribunal shall comment in

some further detail below concerning the appellant's specific grounds of appeal but, in summary, the appellant in his appeal notice identified three grounds. These were, firstly, that no remedial notice should have been issued as the matter fell outside the remit of the statutory provisions; secondly, that the required works went too far and that any further reduction would kill the trees; and, thirdly, that the Council had not permitted the appellant sufficient time to carry out the works and that any action should be suspended for two years to allow the trees to recover.

10. After the appeal was instituted further correspondence and written submissions were received both from the appellant and also from the Council.

The Statutory Provisions

11. The statutory provisions concerning the high hedges regime are to be found in the 2011 Act. It might be helpful, as this is a new statutory regime with appeals being made under the jurisdiction of the tribunal, if the procedure under the 2011 Act were to be set forth in its most basic terms. The procedure is as follows (for ease of description "B" being the owner or occupier of the land upon which the high hedge is situated and the party complaining being "A"): -

1. A first approaches B concerning the high hedge adversely affecting reasonable enjoyment of A's domestic property and endeavours to negotiate a resolution of the problem with B.

2. If A is unsuccessful, A then lodges a complaint with the appropriate Council (section 3) and pays the appropriate fee (section 4). Each Council may determine an applicable fee (if any), up to the statutory maximum of £360.00 (see the High Hedges (Fee Regulations) (Northern Ireland) 2012). Provisions enable the Council, once the remedial notice takes effect and after any appeals, to refund the fee (if any) to A, and the Council may then levy a fee on B.

3. The Council then determines the appropriate action, if any, under the 2011 Act (sections 5 & 6).

4. The Council's action may result in the issue of a "remedial notice" (section 5) which may require initial action to be taken before the end of a "compliance period" (such as reduction in hedge height by a specified amount, but not to a height of less than two metres) and any further preventative action following the end of a compliance period, and any consequences of non-compliance. The remedial notice shall specify an "operative date".

5. The remedial notice may be relaxed or withdrawn by the Council (section 6).

6. If B fails to take the action specified in the remedial notice he or she may be subject to proceedings (section 10).

7. Either A or B can appeal against the Council's decision to the Northern Ireland Valuation Tribunal (section 7).

8. The tribunal shall arrange for the tribunal's Valuation Member to conduct a site visit. Statutory powers of entry upon land, upon due notice, are provided in the Act

both to the Council and to the tribunal. A two-Member tribunal panel consisting of the Legal Chairman and Valuation Member shall then determine the appeal by quashing or varying the remedial notice, by issuing a remedial notice where none has been issued, or by dismissal of any appeal. There are no oral hearings.

9. If any action such as is specified in the remedial notice is not taken within the compliance period, the Council can itself take appropriate action and can recover any expense reasonably incurred from B (section 12).

10. Any remedial notice, and any fees payable or expenses recoverable under the Act, may be registered as a statutory charge (section 15) under Schedule 11 of the Land Registration Act (NI) 1970.

A number of provisions now need to be set out, as the wording is material to the issues in this case. In respect of the technical definition of what constitutes a "high hedge" for the purposes of the 2011 Act, it is provided as follows: –

High hedge

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.

In respect of remedial notices it is provided as follows: –

Remedial notices

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.

Under section 7 of the 2011 Act appeals against remedial notices and other decisions of councils many be made in the prescribed manner to the tribunal and in this instance the appeal by the appellant is against the issue of a remedial notice.

In regard to the specific amendments to the Valuation Tribunal Rules (Northern Ireland) 2007 ("the Rules") the Valuation Tribunal (Amendment) Rules (Northern Ireland) 2012 introduced a number of amendments after rule 5 of the Rules which include the following material provisions:-

5B. An appeal under section 7 (1) of the 2011 Act against the issue of a remedial notice may be made on any of the following grounds –

(a) 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; and
(d) that the period specified in the remedial notice for taking the initial action so specified is not what should reasonably be allowed.

The Evidence and Submissions

12. The tribunal noted the written evidence adduced and arguments advanced. The tribunal had before it all of the papers which were made available to the Council in connection with the complaint at the time of a remedial notice being made under section 5 of the 2011 Act. These papers included the complainant's complaint made to the Council, copies of correspondence between the appellant and the complainant and copy correspondence between the appellant, the complainant and the Council and the Clarke Cunningham Report commissioned by the Council. The content of the Council's remedial notice issued on 28 of November 2012 under the provisions of the 2011 Act was noted together with the detailed report concerning the matter prepared by the Council and explaining in summary form the evidence and information gathered by the Council and how the Council had weighed the various issues raised in the matter. In addition, the tribunal had before it and considered the appeal documentation and any submissions made by the appellant as a consequence of the appeal being instituted. This documentation included a report from Mr Tristan Stocking of Treeple Limited ("the Stocking report") produced as a result of a site inspection conducted by Mr Stocking on 25 March 2013 at the request of the appellant. The tribunal's Valuation Member, in accordance with the applicable procedure, attended the site on 21 June 2013 and conducted a site survey and inspection. Any information and evidence gained as a result of that survey and inspection was considered by the tribunal together with the other evidence available in reaching a determination in the matter.

The Technical Evidence concerning the issue of Conifer Height Reduction.

13. Technical evidence was made available from the Clarke Cunningham report and the Stocking report concerning the issue of conifer height reduction.

The Clarke Cunningham Report

The Clarke Cunningham report which informed the Council's decision-making identified a row of mature Leyland cypress trees forming a hedge between the subject property and the complainant's property. The report makes the observation that, in the opinion of Mr Casement, the hedge in question should be addressed in two separate sections, these being described as, firstly, "*the upper section to the rear of the garage and garden shed*… and, secondly, the " *lower section from the garden shed down the bottom of the garden*". It was observed that the upper section of the hedge was in reasonable condition. However, this section had limited live foliage on the complainant's side due to previous facing back of the hedge and light

suppression on account of its proximity to the garage and shed at this location. The lower section of the hedge was observed to be in reasonable condition and had a well-developed crown with abundant live foliage. It was noted that the entire hedge had a very limited live crown on the subject property side due to light suppression. Regarding the technical issue of conifer height reduction, Mr Casement expressed an opinion on the basis of his declared over 15 years experience in the tree care industry as a climbing arborist and as an arboricultural consultant. Firstly, Mr Casement acknowledged that in the absence of scientific results or papers on the survivability of conifers to height reduction, a number of estimates had been adopted. These ranged from 30% (a reference made to paragraph 7.5 of BS3998: 2010 Tree Work – Recommendations) up to about 50%, depending on species and vitality (a reference made to paragraph 35 of " High Hedges" published by the Planning Inspectorate). Mr Casement stated that, upon the basis of his experience, a reduction in the live crown of a cypress hedge of 50% was normally survivable. The resultant recommendation was that an action height of 3.7m was not currently achievable on the upper section of the hedge due to the limited live foliage on that section. However the action height of 3.7m would be achievable on the lower section of the hedge without the likely failure of the trees. In consideration of the height reduction work already carried out in that year (2012) Mr Casement stated that it would be preferable to defer any further height reduction operation until during or after the next growing season. He also stated that to ensure future compliance with the action height, it would be preferable to reduce the hedge below the action height of 3.7m to allow for a growing margin, but that an immediate reduction below 3.7m would be detrimental to the hedge at this time. A specific issue raised by the appellant in this appeal was that there had been an observation made by an employee of Clarke Cunningham Tree Maintenance Ltd (Ian Barr) to the effect that in Mr Barr's opinion the proposed reduction in height was too severe and would endanger the trees. However this was addressed further by Mr Casement by affording the explanation that Mr Barr, after full assessment, had felt that the action height would be achievable. Accordingly the tribunal's view is that this does nothing to detract from the weight of the opinion expressed in the Clarke Cunningham report.

The Stocking Report

This report was somewhat briefer than the Clarke Cunningham report and was seemingly obtained to assist the appellant in making his case in this appeal to the tribunal. Mr Stocking of Treeple Limited confirmed than on 25 March 2013 he had inspected the appellant's *leylandii* trees close to his boundary, which he understood had been reduced in height twice within the previous 18 months. Mr Stocking was of the opinion that the trees could not be reduced further without the trees being killed. He stated that he understood that it was proposed to reduce the trees in section A to 3.7m and in section B to 4.5m in late Autumn 2013, with annual cutting back to 3.2m and 4 m respectively. Mr Stocking stated that there was no likely regeneration or regrowth of foliage of the trees from the complainant's side of the property. In his opinion the proposed further reduction was unreasonable in that it would inevitably kill the trees. Mr Stocking confirmed that his qualifications where as an ISA certified arborist with nine years' experience in the business and also that he had also obtained a level 3 professional tree inspection qualification.

The Findings of the Valuation Member

14. The Valuation Member of the tribunal conducted a site inspection and survey on 21 June 2013. This revealed that the area to the rear boundary of the complainant's property had a line of Leyland cypress evergreen trees acting as a boundary hedge and running the entire length of the eastern boundary of the subject property. The boundary adjacent to the complainant's property was to the rear of the site occupied by the subject property and consisted of an area of the garden that was densely overgrown with a variety of both deciduous and evergreen trees. Some of these trees might be considered to be specimen species. There were groups of trees to the rear of the conifers that formed the boundary hedge. It was noted that the Council had determined that as one of the conifers forming the boundary appeared to be deceased, the Council had decided to separate the boundary into two sections, referred to as section A and section B. The Council had then considered two separate action hedge heights (as has been mentioned above). Following this site inspection the Valuation Member was of the opinion that splitting the hedge into two separate sections was possibly unnecessary and that it might have been permissible, in the alternative, for the Council to have proceeded to calculate the hedge height on the basis of one single hedge. Adopting, for the purposes of the site survey the assumption of a single hedge length, the calculations produced different results to those of the Council. However, the area of the garden as measured by the Council was confirmed by the Valuation Member as being approximately 203 square metres. The orientation was confirmed as being approximately due West with an orientation factor of 0.35. On the basis of a single hedge assessment, the confirmed action hedge height in respect of loss of light to the garden was 3.15 m and the confirmed action hedge height for loss of light to windows was 5 m. Save for the forgoing observations, in the assessment of the Valuation Member there was nothing present in the Council's recorded site assessment and in the calculations made that appeared to be in error. The Council's survey, in the manner in which it had been conducted and in the interpretation of the appropriate calculation methodology and data, was confirmed as being correct.

The appellant's first submission - that no remedial notice should have been issued.

15. The appellant's first submission was that no remedial notice should have been issued and that the Council had wrongly determined that the trees did not form part of woodland in excess of 0.2 hectares. "Woodland" was not defined in the Act but was interpreted liberally in legislation elsewhere. The trees which were the subject matter of the complaint joined and formed part of a block of similar trees. The mix of this block of trees, taken with Scots pines and mature deciduous trees, was collectively "woodland". Furthermore, the Council had wrongly concluded that the fact that Northern Ireland Environment Agency had listed the house, gates and walling of the subject property meant that the trees within the grounds were of no significance. It was wrong to suggest that the trees were not part and parcel of the listed building. The Council had not addressed at all the fact that the house was of historical importance and, whilst the trees were relatively recent, they were important to the degree of privacy and amenity.

The appellant's second submission - that the required works went too far.

16. The appellant's second submission was that the required works went too far. He stated that he had lowered the relevant trees twice, first at the end of 2011 and more

recently in June 2012. On the former occasion approximately 6/8 feet had been taken off the trees. On the second occasion in June 2012 approximately 4 foot 6 inches was taken off the tree height. He was advised at that time by his tree surgeon, R B Tree Services, that any further reduction in height would kill the trees. Following receipt of the remedial notice he had obtained a further opinion from a representative of Clarke Cunningham Tree Services on 14 December 2012. The representative had inspected the trees closely from the subject property side and from the road on the complainant's side and had informed the appellant that in his opinion the proposed reduction in height was too severe and would endanger the trees. Clarke Cunningham Tree Services would not give an assurance that the proposed works would not kill the trees.

The appellant's third submission - that that the Council had not given enough time to carry out the works.

17. The appellant's third submission was that the Council had not given him enough time to carry out the works. There was very little technical difficulty in carrying out the remedial works but the time frame was unreasonable. The trees had twice been lowered recently and had not had a chance to recover. A single growing season would not allow the trees to develop sufficient foliage growth to sustain them. Their ability to grow upwards had been eliminated. There was limited foliage on the subject property side and almost all the growth was on the complainant side. The remedial notice should be suspended for two years to allow the trees to recover and the matter should then be reviewed in the light of what recovery and additional growth had taken place.

THE TRIBUNAL'S DECISION

18. The tribunal begins its task by considering the nature of the task required to be performed by the tribunal in such an appeal as this. It is important to note that this appeal is not an adjudication concerning a dispute between the complainant and the appellant but, rather, this is an appeal against a determination by the Council and the consequent issue of a remedial notice under the provisions of section 7 of the 2011 Act. The tribunal examined the appellant's grounds of appeal and some further documentation amplifying or providing further detail in respect of the points made. It is noted that the papers contained some communications from the complainant which post-date the institution of the appellant's appeal. In view of the technical nature of this appeal which lies against the Council's decision, any further comment or submission on the part of the complainant is, in the view of the tribunal, not relevant or material and for that reason any such has been left out of consideration by the tribunal.

19. The tribunal's Rules as amended by the Valuation Tribunal (Amendment) Rules (Northern Ireland) 2012 provide at Rule 5B that (under the specific circumstances applicable to this case), the appeal under section 7 (1) of the 2011 Act against the issue of a remedial notice may be made on the grounds that, firstly, 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; secondly, that the initial action specified in the remedial notice exceeds what is necessary or appropriate to remedy the adverse effect; and, thirdly, that the period specified in the remedial notice for taking the initial action so specified is not what should reasonably

be allowed. The tribunal is not entirely sure that the appellant's appeal substantially encompasses the first point, but the tribunal shall nonetheless, for completeness, make some observations in regard to all three matters.

20. However, the appellant's appeal addresses initially a rather more fundamental issue. Looking at the issues raised by the appellant and the evidence in the case, the first issue expressly stated by the appellant in his appeal falls into two parts. The initial argument advanced by the appellant is that no remedial notice should properly have been issued in the first place; the Council had wrongly determined that the trees did not form part of woodland in excess of 0.2 hectares which would have brought matters outside the reach of the 2011 Act. The appellant's case was that whilst "woodland" (as referred to in Section 2 (4)) was not defined in the 2011 Act, nonetheless the expression ought to be interpreted liberally as it was in legislation elsewhere. Here the appellant had made some references to taxation law and to the interpretation by HM Revenue and Customs of that expression. The appellant's case is that the subject matter of the complaint joined and formed part of a block of trees, taken with Scots pines and mature deciduous trees, which were collectively to be viewed as "woodland".

21. The tribunal gave careful consideration to that latter submission. If the tribunal were to accede to the appellant's contention, anything deemed to be "woodland" would have been exempt from the application of the provisions of the 2011 Act and the Council's remedial notice would have been wrongly invoked. It is not in contention that there is an area of the land located within the subject property which has trees growing upon it, the total area of which land is in excess of 0.2 hectares. However, the issue to be determined is whether or not the tribunal brings into account all of these trees or if it is permissible to distinguish from the remainder of the trees located upon the subject property those Leyland cypress trees which run along the subject boundary and which are contiguous to the complainant's property. Taking account of all of the evidence in the case, including the evidence available from the Valuation Member's inspection, the tribunal does not accept the validity of the basis of the appellant's submission. The appellant himself does concede that the subject Leyland cypress trees are of relatively recent origin and it is clear from the evidence that they were planted along the boundary with the complainant's property. Whether that planting was done before or after the complainant's dwellinghouse was constructed is not entirely clear. The incontrovertible evidence is that there is a clear and defined line of evergreen Leyland cypress trees which are contiguous to the boundary between the subject property and the complainant's property. These, as such, do fall within the definition of a " high hedge" contained within section 2 of the 2011 Act. There are of course other trees and shrubs, but these do not form part of the subject matter of the complaint nor any part of the remedial notice issued by the Council. The Council's remedial notice addresses specifically the clearly identifiable line of Leyland cypress trees (albeit that is done in two parts). These trees have thus been identified in two sections in the remedial notice. Looking at all of this, the tribunal does not accede to the appellant's argument that the tribunal must focus upon all of the trees located upon the subject property and must accordingly deem everything to be exempt from the operation of the 2011 Act. The tribunal's determination is that there is an identifiable " hedge", fulfilling the statutory definition in section 2 of the 2011 Act, at this location. It is this hedge which is the subject of the Council's remedial notice; everything else may properly be left out of the reckoning. The Council in reaching its determination in this respect is correct. Accordingly, the appeal does not succeed on the basis of this argument and the provisions of the

2011 Act are applicable to the “high hedge” such as is described in the remedial notice. The survey conducted by the tribunal’s Valuation Member has also confirmed that the Council is correct in the Council’s assessment that the height of the high hedge specified in the remedial notice is adversely affecting the complainant’s reasonable enjoyment of the domestic property so specified; that assessment by the Council is a valid one and is based upon sound and proper evidence.

22. The second part of the appellant's first contention mentions the listed building status of the appellant's property. Again, that status is not in contention. However, the issue is whether or not that status has any particular bearing on the subject matter of this appeal. Whilst noting the appellant's arguments in that respect and the evidence produced, in the absence of any evidence that the trees forming the hedge are covered by a tree preservation order, or are in some way protected on account of the listed building status, the tribunal is unable to make anything more of the issue. The tribunal's consequent determination is that the status of the hedge for the purposes of the applicability of the 2011 Act is not affected by the listed building status of the subject property and that latter status has no material bearing upon this appeal and thus may properly be left out of account.

23. The appellant's second contention is that the works specified in the remedial measures will go too far and that any further reduction in height of the Leyland cypress trees would be prejudicial to their survival. Here the tribunal notes that there are two reports, the Clarke Cunningham report and the Stocking report. The statutory regime, perhaps regrettably, does not provide for an oral hearing and for the tribunal exercising an inquisitorial approach by the questioning of expert or technical witnesses. The tribunal is accordingly reliant solely upon the written reports produced, respectively, by Mr Casement and by Mr Stocking. Both of these persons appear, from the brief details provided, to possess material experience and to be in a position to make comment with some degree of experience and expertise.

24. As this is an early appeal under the statutory regime of the 2011 Act, the tribunal would wish to make the observation that it might be of assistance in any future cases concerning the high hedges jurisdiction, where technical reports or evidence is to be considered by the tribunal, if full and precise details of any technical qualifications and relevant experience on the part of any arboricultural expert or technician would be clearly stated in as much detail as might be reasonably required. This information might be of considerable assistance in evaluating experience and expertise and the consequent weight to be attached to any evidence. This is especially so in the absence of such persons being available to assist the tribunal with oral evidence. As will be understood, where there is a difference of technical opinion between two experts, the tribunal is required to determine which opinion carries the more weight. It is of course recognised that any technician or arboricultural expert might be instructed at the point of the initial complaint to the Council and that such person might have the focus of assisting the instructing party in the early stages of the matter. Nonetheless, it must be recognised that any reports shall inevitably find their way to the tribunal and that any such might be relied upon and might be viewed as significantly material in assisting the tribunal to reach a determination in any appeal.

25. In this case there is a clear conflict between the view expressed by Mr Casement and that of Mr Stocking. Mr Casement indicates that height reduction of 50% is possible without unacceptable risk to Leyland cypress trees. In contrast, Mr Stocking's opinion is that any further height reduction will inevitably cause the hedge in this case to die.

26. The issue arises, in the first place, as to whether the tribunal is obliged to take any of this into account at all. Nowhere in the 2011 Act is there any mention made expressly and directly concerning whether consideration ought properly be afforded to the matter of survival risk in the context of remedial action being taken by hedge height reduction. Accordingly the tribunal gave some consideration to that issue. Section 5(3) of the 2011 Act provides that 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. Whilst the 2011 Act is silent on the issue of expressly requiring the Council to consider whether any action might result in the destruction of the hedge, nonetheless the tribunal's view is that, in the context of these provisions which clearly state that the remedial notice is not to require or involve the hedge being removed entirely, the tribunal is entitled to consider whether any remedial notice would, upon balance of probabilities and based upon the available evidence, result in the destruction of the hedge. The tribunal accordingly sees its task as being to examine closely any evidence and in doing so the tribunal has to determine if any remedial action ordered might, on balance, risk the destruction of the hedge. The determination of that issue will then be set against other issues of materiality in the case.

27. In conducting this task, the tribunal examined the evidence available from the Clarke Cunningham report and from the Stocking report. The tribunal must determine in the light of the clear conflict of opinion expressed, which of the two opinions is the more persuasive and which must carry the more weight. Examining the contents of both reports and the status and qualifications of the persons responsible for the reports in each case, the tribunal is more persuaded by the view expressed by Mr Casement in the Clarke Cunningham report. This is so in the light of the comprehensive nature of that report and the greater and more lengthy experience indicated by Mr Casement. Accordingly the remedial action ordered by the Council on the basis of the Clarke Cunningham report appears, on balance, to be rational, reasonable and appropriate and does not suggest to the tribunal that the consequence will be the inevitable destruction of the hedge, given that the remedial action is to be taken within the time frame provided. Thus, the tribunal does not find favour with the appellant's argument that the remedial action will inevitably result in the destruction of the hedge and the tribunal does not uphold the appellant's submission in that regard. It is to be noted that the Valuation Member was of the opinion that the Council could have permissibly taken an alternative view that splitting the hedge into two separate sections was unnecessary. It might have accordingly been permissible, in the alternative, for the Council to have proceeded to calculate the action hedge height on the basis of one single hedge. If that had been done, the calculations would have produced a different, lower, action hedge height and one indeed less favourable to the appellant. However, the tribunal bears in mind that this is an appeal against a particular determination by the Council and that must be the focus. The appellant's appeal concerning the action hedge height as specified in the remedial notice is accordingly not upheld by the tribunal.

28. The forgoing determination substantially also addresses the appellant's third point in submission which is that the Council had not given him enough time to carry out the works. The appellant had contended that the time frame was unreasonable. He argues that the remedial notice should be suspended for two years to allow the trees to recover and that the matter should then be reviewed in the light of what recovery and additional growth had taken place. In addressing high hedges appeals, the tribunal sees its task, upon appeal, as scrutinising the balance struck by the Council in making its determination concerning the interests of the complainant in asserting the rights provided for in the 2011 Act and resulting in the issue of the Council's remedial notice, on the one hand, and the interests of the hedge owner, such as the appellant in this case, on the other. Whilst the tribunal does fully recognize the very evident concern expressed on the part of the appellant that the action ordered by the Council might risk the destruction of the hedge and that such action might compromise the privacy of the appellant's property and amenity, nonetheless in the absence of materially conclusive evidence that insufficient time has been afforded to carry out the works in the context of tree recovery, the appeal must be decided in favour of the Council on this point.

29. These findings accordingly dispose of the issues raised by the appellant on appeal and the appeal is dismissed, for the reasons stated.

Mr James V Leonard, President
Northern Ireland Valuation Tribunal

Date decision recorded in register and issued to parties: