



Neutral Citation Number: [2009] EWHC 220 (Admin)

Case No: CO/5568/2008

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 13/02/2009

**Before:**

**MR JUSTICE CRANSTON**

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**Between:**

**Palm Developments Limited**

**Claimant**

**- and -**

**The Secretary of State for Communities and Local  
Government**

**Defendant**

**Medway Council**

**Second**  
**Defendant/**  
**Interested**  
**Party**

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**Charles Mynors** (instructed by **Kingsley Smith Solicitors**) for the **Claimant**  
**Daniel Kolinsky** (instructed by **Treasury Solicitors**) for the **Defendant**  
**Edmund Robb** (instructed by **Medway Council**) for the **Second Defendant/Interested Party**

Hearing dates: 13 and 14 January 2009

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**Approved Judgment**

**Mr Justice Cranston :**

INTRODUCTION

1. What is a tree? In particular does it include a young tree, a sapling? On one occasion Lord Denning MR said emphatically that many saplings were not trees and that in woodland a tree was something over seven or eight inches, 180 to 200mm, in diameter. As in the present case the issue arises because section 198 of the Town and Country Planning Act 1990 enables the making of tree preservation orders (TPOs) to preserve trees, groups of trees and woodlands. There is no statutory definition of a tree. I conclude that with tree preservation orders there are no limitations in terms of size for what is to be treated as a tree. In other words, saplings are trees. Moreover, a tree preservation order for a woodland extends to all trees in the woodland, even if not in existence at the time the order is made.
2. The present proceedings are, first, the claimant’s challenge pursuant to section 288 of the Town and Country Planning Act 1990 to the Secretary of State’s decision dated 1 May 2008 (“the section 288 application”). The Secretary of State dismissed four appeals against the decision of Medway Council to refuse applications for consent to undertake works within the woodland identified in the first schedule to the Medway Council (Land at Bore Hole and Trenchmann’s Wharf, North Halling) Tree Preservation Order 2005. Secondly, there is the claimant’s judicial review claim, as a “rolled up” permission and substantive hearing, in respect of the Secretary of State’s decision dated 22 May 2008 to award costs against the claimant in respect of those appeals.

BACKGROUND

Introduction

3. Until the Second World War, Trenchmann’s Wharf, North Halling (“the site”), was a lime and cement works. It used chalk from the associated quarry, Bores Hole, west of the site, on the other side of the Medway Valley railway line and Rochester Road. The raw material was brought beneath the road by way of a tunnel. The fascinating industrial history is described in D. Church, Cuxton. A Kentish Village (Arthur J Cassell, Sheerness, 1976), 129-147. The site adjoins the River Medway, which is tidal at this point. The buildings have largely disappeared above ground, although elements remain in a ruined condition. So there are some remains of floor slabs as well as roadways between the former buildings. Nonetheless, since the cessation of industrial activity in 1939 the disused works have gradually been colonised by vegetation. Birch, goat willow, sycamore and ash are all abundant, with elm suckering and regeneration prevalent to the west of the site. There is occasional whitebeam, holly, field maple, cherry and yew throughout.
4. Palm Developments Ltd, the claimant company (“Palm Developments”), acquired the site in 2001. It submitted an application for planning permission to the local planning authority, Medway Council (“the Council”), to use the land as a commercial wharf. That application was rejected by the Council, and Palm Developments appealed to the defendant Secretary of State for Communities and Local Government (“the Secretary of State”). That appeal was withdrawn because of the lack of detail available as to the landscaping and related works necessary in association with the proposed

development. No doubt prompted by the aborted planning application, the Council took steps to protect the trees on the site by means of a tree preservation order.

### The Order

5. The Medway Council (Land at Bores Hole and Trechmann's Wharf, North Halling) Tree Preservation Order 2005 ("the Order"), made under powers in the Town and Country Planning Act 1990 ("the 1990 Act"), follows the sample order in the Schedule to the Town and Country Planning (Trees) Regulations 1999, 1999 SI No 1892 ("the 1999 Regulations"). For present purposes the key aspect is as follows:

"4. Without prejudice to subsections (6) and (7) of section 198 [of the 1990 Act] (power to make tree preservation orders) and subject to article 5, no person shall –

cut down, top, lop, uproot, wilfully damage or wilfully destroy;  
or

cause or permit the cutting down, topping, lopping, uprooting,  
wilful damage or wilful destruction of,

any tree specified in Schedule 1 to this Order or comprised in a group of trees or in a woodland so specified, except with the consent of the authority and, where such consent is given subject to conditions, in accordance with those conditions."

Article 5 provides for various exceptions to the need for consent under the Order, and articles 6 and 7 and Schedule 2 provide for the making of applications for consent where it is required. Schedule 1 to the Order is headed "Specification of Trees", and under the heading "Woodlands" provides:

Reference on map	Description	Situation
W1	Mixed woodland	To the west of North Halling on land in and beside the former quarry known as Bores Hole
W2	Mixed woodland	To the northwest of and above the former quarry known as Bores Hole
W3	Mixed woodland	To the east of North Halling on the embankment of the River Medway, formerly Halling Lime and Cement

## Works

The map annexed to the Order shows the site as Woodland W3. Palm Developments objected to the making of the Order, but Medway Council confirmed it.

### Applications for consent

6. Regardless of its eventual use, Palm Developments said it wanted to carry out a full survey of the site; to secure adequate space for proper access along the side of the wharf, adjacent to the Medway; and to secure adequate access from the entrance from the Rochester Road, across the site, and down to the wharf. Following a meeting on the site in August 2006, its representatives understood that council officers would consider the creation of 2m-wide access rides, at 20m centres, and a wharf-side strip 6-8 metres wide. The Council had “a slight change of thought”, and produced a plan and schedule showing the works it would consider acceptable:

- (a) corridors of 2m width at 50m centres to be cleared of trees less than 75 mm at 1 m above ground, for the topographical survey, with vegetation allowed to regenerate; and
- (b) a 4-metre wide corridor along the wharf, and a 4-metre wide corridor down the access track from the entrance down to the wharf, both to be kept clear of trees, shrubs and other vegetation through regular clearance works.

Palm Developments accordingly sought consent under the Order for those works and consent was granted on 18 October 2006.

7. Palm Developments then applied for consent under the Order for further works. At this point it is convenient to note the Council’s Guidance Note on submitting planning applications. This states:

“Having completed a land survey, it will be necessary to undertake a tree survey and categorise trees growing on and adjacent to the development site. You may wish to seek the advice of an arboricultural consultant or member of Medway Council’s tree team to determine which trees should be included in the survey. As a general rule, you will need to engage a competent arboriculturist where there are trees greater than 75mm growing on the site or on adjacent sites and within a distance of 12 times their stem diameter. Stem diameters are to be measured at 1.5m above ground level.”

Those further works, and the reasons for them, were described as follows:

<b>Application</b>	<b>Description of proposed works</b>	<b>Stated reason for works</b>
(i)	Removal of all scrub, shrubs and	In order to undertake a

	saplings having a diameter of less than 75 mm at 1.5 m above ground level, in 2m wide swathes at 10m intervals – Plan 3/05A	levels survey
(ii)	Removal of all scrub, shrubs and saplings having a diameter of less than 75 mm at 1.5 m above ground level	They are not trees (as per Medway Council Guidance Note 1, dated Oct 2006)
(iii)	Removal of all vegetation including trees within 8m wide corridor, as shown on plan	To avoid danger to wharf users
(iv)	Removal of all vegetation including trees within 6m wide corridor (as shown on plan)	To permit vehicular access to the Wharf
(v)	Removal of all trees	Does not constitute woodland

Throughout this judgment this numbering is maintained to describe each appeal. The Council refused each of the five applications by a decision notice dated 5 December 2006. Applications (i) to (iv) were appealed to the Secretary of State, who appointed Gyllian Grindley, “the Inspector”, to prepare a report following a public inquiry. An inquiry was held on 15-18 January and 4-5 February 2008. No appeal was made against the refusal of application (v).

8. The Inspector submitted her report dated 4 April 2008 (“the Inspector’s Report”), recommending that the appeals be dismissed, and a further report of the same date, recommending that the Council’s application for an award of costs be allowed. The Secretary of State accepted the first recommendation in a letter dated 1 May 2008 and the second in a letter dated 22 May 2008.

#### The Inspector’s Report

9. After referring to certain procedural matters, the Inspector began by noting certain deficiencies in the plans presented in support of application (i). The 2m wide swathes were represented by single lines. The inspector then said that Palm Developments had

not made any challenge to the making of the Order, although in effect they were testing the matter through the inquiry. At paragraph 27 she set out the test for considering applications for works to woodlands protected by a tree preservation order, as set out in paragraph 6.45 of the Secretary of State's "Blue Book", quoted below. She identified two steps: first, to assess the amenity value of the woodland and likely impact of the proposed works on it; and secondly, to consider whether the proposals were justified having regard to the reasons put forward in support.

10. Then there is a section which outlines the Council's case. The Council described the "scrub" on site as consisting of "young trees" and relied on the evidence of Mr Bashford, who appeared for Palm Developments, and who "accepted in written and oral evidence that a tree is a tree however old or young it is". In the proof of his evidence Mr Bashford had said this:

"There can be no doubt in my opinion that at all stages of its life a tree is a tree, albeit that it can also initially be classified as a seedling or a sapling. However, to be of value, whether visual or ecological, a seedling tree must have germinated and be in a position to have full growth potential, i.e. not existing between gaps in a roadway, on shallow humus levels overlying built forms, or in crevices between hard surfaces and building."

The Council explained the amenity value of the woodland. It argued against the removal of small trees on the basis that "the removal of many small trees is so potentially harmful since it would remove the regeneration potential whilst greatly increasing the exposure of the remaining trees".

11. Palm Development's case, as advanced at the inquiry, is then summarised. The following points are perhaps the most important. First, the Inspector recorded its contention as to the "what is a tree" debate as follows: "It is unprofitable to debate what is a "tree", in particular because an acorn grows into a sapling and then into a fully-grown tree; there is bound always to be uncertainty as to what is the lower limit (by either age or size) below which the term is inappropriate". As recorded, Palm Development's submissions did not press any distinction between trees and saplings, although there was a distinction drawn between trees and "bushes, shrubs and scrub". The purpose of the applications (i) and (ii) was stated to be "to avoid tedious arguments as to what is a tree". At paragraph 83 the Inspector noted:

"Appeal (ii) sought authorisation for the removal of all saplings throughout the site. If consent were granted, the intention would be only to implement it to the extent necessary to enable the site to be explored properly – there is clearly no commercial incentive to go any further. But it is difficult to predict where it will be necessary to carry out works – hence the only practical course is to seek consent for removal of all small "trees", to ensure no liability. But the larger trees would remain, and the canopy would thus remain. The area would regenerate as it has done previously – to the extent that that is possible – or else, per Mr Bashford, it will have a limited future in any event. But – unlike the access track and wharfside strip – there is no intention to retain cleared area as such."

12. The Inspector then proceeded to deal, under a new heading, with conditions. She said:

“Concerning appeals (i) and (ii) for removal of scrub, shrubs and saplings within a grid or throughout, a condition could be required to ensure regeneration after the clearance works were carried out necessary to the survey of the site. However, it is not clear from the applications whether it was ever the appellants’ intention to permit regeneration or to continue to keep the undergrowth cleared.”

13. The Inspector’s conclusions begin by defining the main issues in terms of the impact of the proposals and the justification advanced for the proposed works. Her first sub-heading is: “The amenity value of the woodland and the likely impact of the proposals (i) – (iv) on the character and appearance of the area”. It is necessary to set out most of paragraphs 102-105, since these were the foundation of a large part of Palm Development’s case before me.

“102. Before I arrive at that analysis however, it is necessary to comment on the appellant’s submissions concerning “what can be preserved” in terms of woodland [45 onward]. My starting point must be paragraph 2.2 of the Blue Book which is worth quoting in full ...

103. So, from the date of a TPO, any vegetation that germinates and reaches a size that one would ordinarily term a “tree” is protected. But what of this plant between the germination / seedling / sapling stage and the time when it can ordinarily be termed a tree? There is no authoritative guidance on this, save for the text above. But if the whole purpose of the TPO is to safeguard the woodland as a whole, then there must be some common-sense commitment to regeneration in the form of the trees reproducing themselves or re-growth (as in the coppice example quoted in Bullock ...) The end result of an application such as (ii) to remove all scrub, shrubs and saplings having a diameter of less than 75 mm at 1.5 m above ground level would be the extinguishment of the woodland after the death of the remaining larger trees. This cannot be right because it does not further the stated purpose of a woodland TPO “to safeguard the woodland unit as a whole.”

104. ... [I]t seems to me that, as a woodland unit, vegetation that can ordinarily be called ‘trees’ cannot be considered in isolation from the scrub, shrub and saplings within it. This is because these will, in time, carry on that woodland unit as a whole. If these are removed leaving only the larger trees, then the woodland will ultimately disappear as the natural cycle of regeneration, whereby saplings grow up to replace mature trees, would stop. This cannot be right as it would fail to benefit the woodland ...

105. Mr Bashford, for the appellants, went further and stated ‘there can be no doubt in my opinion that at all stages in its life a tree is a tree, albeit that it can also initially be classified as a seedling or a sapling [my emphasis]. Hence it does not seem to me to matter very much whether some vegetation is freshly germinated, a seedling, 1m tall, or any other size. What matters is that it is a tree, in a woodland, and it is necessary for it to remain in the wood for the continuation of the woodland unit as a whole.

106. It could be argued that it is difficult to reconcile this view [that it does not matter very much whether some vegetation is freshly germinated, a seedling, 1m tall, or any other size] with the phrase ‘as far as the TPO is concerned, only the cutting down, destruction or carrying out of work on trees within the woodland area is prohibited’, but I would argue that within a woodland situation, at least, a ‘tree’ may include a tree at all stages of its life.”

14. The Inspector then considered the value of the woodland and after a lengthy analysis concluded that “the woodland has a very positive impact on the local environment and its enjoyment by the public. Loss of, or damage to, this woodland would diminish the character and appearance of the area”. There is no challenge to the Inspector’s conclusions on this issue. The Inspector then turned to consider the impact of the specific works under consideration. She concluded that the work required in respect of application (i) would reduce the amenity of the woodland because the amount of work could not be done by hand, and removing smaller elements without causing harm to anything remaining would be impractical:

[T]he vegetation is so close that roots will be entwined in a mat and trunks are close together. Removing smaller elements without causing harm to anything remaining would be impractical.

Moreover, in the Inspector’s view the stated intention to leave trees over a certain size would be impractical, and there was no arboricultural imperative to carry out the clearance work. In respect of appeal (ii), the Inspector identified the harm caused as essentially that discussed in respect of appeal (i), but on a greater scale.

15. Under her second sub-heading, the Inspector then considered the justification for the works proposed. In respect of applications (i) and (ii) that was said to be the need for a topographical survey. Based on the evidence at the inquiry, the Inspector concluded that “it is simply not necessary to clear the site to the extent applied for in these appeals for the purposes of producing a plan sufficient to accompany the planning application. The reason does not justify the works proposed.” As part of the section 288 claim there is no challenge to this conclusion. After considering the appeals relating to matters (iii) and (iv), not before me, the Inspector recommended that they be dismissed.

### The Secretary of State's decision

16. In her decision letter, the Secretary of State adopted the Inspector's approach. She agreed with the Inspector's formulation of the main issues as being the amenity value of the woodland, the likely impact of the proposals on the character and appearance of the area and whether there were reasons to justify the proposed works. The Secretary of State then noted the Inspector's comments on what is actually covered by the Order in the light of her policy in the Blue Book. The Secretary of State considered that it is ultimately a matter for the courts to decide what would constitute "a tree" in the context of the appeals. Thus she agreed with the Inspector's approach of considering the likely effects of the proposed works on the amenity value of the woodland as a whole. She was of the same mind as the Inspector, that the woodland had a very positive impact on the local environment. She agreed with the Inspector's conclusions that the works proposed in appeals (i) and (ii) would cause irreversible harm to the visual amenity of the woodland and that it was not necessary to clear the site to the extent proposed in appeals (i) and (ii) for the purpose of producing a plan to accompany a planning application. Overall, the Secretary of State agreed with the Inspector's conclusions that the woodland has a positive impact on the local environment, which would be harmed by the proposals, and that the reasons given did not justify the proposed works.

### THE LAW

#### The 1990 Act

17. Chapter I of Part VIII of the Town and Country Planning Act 1990, the key provision for present purposes, relates to "Trees". Section 197 contains powers for planning authorities to ensure adequate provision for the planting of trees, when granting planning permission. Section 198 provides for the making of orders to preserve trees, groups of trees and woodlands.

"(1) If it appears to a local planning authority that it is expedient in the interests of amenity to make provision for the preservation of trees or woodlands in their area, they may for that purpose make an order with respect to such trees, groups of trees or woodlands as may be specified in the order.

(2) An order under subsection (1) is in this Act referred to as a 'tree preservation order'.

(3) A tree preservation order may, in particular, make provision—

(a) for prohibiting (subject to any exemptions for which provision may be made by the order) the cutting down, topping,

lopping, uprooting, wilful damage or wilful destruction of trees except with the consent of the local planning authority, and for enabling that authority to give their consent subject to conditions;

(b) for securing the replanting, in such manner as may be prescribed by or under the order, of any part of a woodland area which is felled in the course of forestry operations permitted by or under the order;

(c) for applying, in relation to any consent under the order, and to applications for such consent, any of the provisions of this Act mentioned in subsection (4), subject to such adaptations and modifications as may be specified in the order.

...

(5) A tree preservation order may be made so as to apply, in relation to trees to be planted pursuant to any such conditions as are mentioned in section 197(a), as from time when those trees are planted.”

Subsection (3) is to be repealed under the Planning Act 2008.

18. Thus tree preservation orders may be made for individual trees, groups of trees or woodlands. In particular such orders may protect trees to be planted under section 197, from the time they are planted. The requirement under an order for consent is subject to a number of exceptions provided for in the 1999 Regulations, but there is not amongst them a minimum size exemption. Breach of an order is a criminal offence under section 210, and it has been held that it is an offence of strict liability: see Maidstone BC v Mortimer [1980] 3 All ER 552. Finally, an authority may require planting of a replacement tree if a protected tree is removed unlawfully, in which case the new tree will be protected by the order which applied to the tree removed.
19. Section 211 of the 1990 Act then provides protection for trees in conservation areas. It requires that works to them must be notified to the planning authority. Under section 212 of the Act, the section 211 prohibition can be disapplied. The relevant exemption in the 1999 Regulations refers to works to trees with a diameter at breast height of less than 75 mm, or 100 mm where the work is solely to improve the growth of other trees (see regulation 10(1)). Again, breach of section 211 is a criminal offence.
20. For the sake of completeness, I note that this Chapter of the 1990 Act has been the subject of substantial amendments introduced by section 192 and Schedule 8 of the Planning Act 2008. These are not yet in force.
21. The Secretary of State has issued guidance on the interpretation of the 1990 Act in a publication entitled Tree Preservation Orders: A Guide to Good Practice (2000) (referred to as the “Blue Book”). Paragraph 2.2 of the Blue Book states the ambit of protection of a woodland tree preservation order as follows:

“In the Secretary of State’s view, trees which are planted or grow naturally within the woodland area after the TPO is made are also protected by the TPO. This is because the purpose of the TPO is to safeguard the woodland unit as a whole, which depends on regeneration or new planting. But as far as the TPO is concerned, only the cutting down, destruction or carrying out of work on trees within the woodland area is prohibited; whether or not seedlings, for example, are ‘trees’ for the purposes of the Act would be a matter for the Courts to decide in the circumstances of the particular case.”

In relation to beneficial management work in a woodland, the Blue Book says at paragraph 3.16:

“A woodland TPO should not be used as a means of hindering beneficial management work, which may include regular felling and thinning. Whilst LPAs may believe it expedient, as a last resort, to make TPOs in respect of woodlands, they are advised (whether or not they make a TPO) to encourage landowners to bring their woodlands into proper management under the grant schemes run by the Forestry Commission.”

22. Apparently there is a popular belief that a woodland tree preservation order protects a woodland as a whole, that is, it protects plants other than trees, fungi, wildlife habitats, and other features of the woodland. Section 198(3)(a) makes plain that, except with consent, a tree preservation order protects “trees” from cutting and damage. That limitation applies to woodland orders as to any other tree preservation order, as is evident in article 4 of the present Order, quoted earlier. While a woodland tree preservation order may be designed to protect a woodland as a whole, it achieves that protection only by prohibiting unauthorised works to trees within it. That begs the question of what is meant by the word “tree”. There is no definition in either the 1990 Act or the regulations of “tree”, “sapling” or “woodland”.

#### What is a tree? Dictionary definitions

23. In this case the dictionary definitions placed before me are of limited assistance. The New Oxford Dictionary of English (the “Oxford Dictionary”) defines a “tree” as

“a woody perennial plant, typically having a single stem or trunk growing to a considerable height and bearing lateral branches at some distance from the ground. Compare with Shrub (in general use) any bush, shrub, or herbaceous plant with a tall erect stem, e.g. a banana plant.”

The entry in Chambers Dictionary is

“a large plant with a single branched woody trunk (sometimes loosely applied).”

“Sapling” is defined by the Oxford Dictionary as “a young tree, especially one with a slender trunk”.

24. At least in general use, therefore, the word “tree” has a somewhat imprecise meaning. An examination of the biological and botanical dictionaries does not advance the matter much further.

“A woody plant distinguished from a shrub in part by its larger size and in part from having a single, or at least only a few, main stems” (Gray, Dictionary of Biological Sciences)

“A tall, woody perennial plant having a well marked trunk with few or no branches persisting from the base” (George Usher, Dictionary on Botany)

“A woody, perennial plant with a main axis or trunk which bears branches” (Edward Steen, Dictionary of Biology)

Alan Mitchell, in his Field Guide to Trees of Britain and North Europe, (1974) says a tree is:

“a woody, perennial plant which can attain a stature of 6m or more on a single stem. The stem may divide low down, but it must do so above ground level. ... the Hawthorn qualifies because there are a few specimens over 10m tall with a single bole, although this plant is seen almost everywhere as a low shrub with many stems. The Elderberry and Dogwood, however, do not qualify for inclusion. The Hazel has been given the benefit of the doubt.”

As for “bush”, the Oxford Dictionary defines it as “a shrub or clump of shrubs with stems of moderate length”. “Shrub” is said to be “a woody plant which is smaller than a tree and has several main stems arising at or near the ground”, and “scrub”, vegetation consisting mainly of brushwood or stunted forest growth.”

#### Treatment of trees etc in the law generally

25. Many provisions in legislation relating to problems associated with vegetation refer explicitly to trees and shrubs, or to other types of vegetation, without distinguishing between them. The context is such that there is no need to do so. Thus section 82 of the Highways Act 1959, and sections 96 and 141 of the Highways Act 1980, refer to the planting of “trees and shrubs” in the highway. Section 117 of the 1959 Act covers wilful damage to a “tree, hedge or shrub”. In Section 1 of the Plant Health Act 1967 the reference is to pests and diseases injurious to agricultural or horticultural crops, or to “trees or bushes”. Section 4(3) of the Theft Act 1968 provides that it is not an offence to pick fruit from a “shrub or tree” growing wild, and section 10(1) of the Criminal Damage Act 1971 excludes from criminal liability damage to flowers, fruit or foliage of a “shrub or tree” growing wild.
26. As in these examples, the context explains why no distinction is drawn. Probably the best illustrations are section 154 of the Highways Act 1980, referring to obstruction or danger caused by an overhanging “hedge, tree or shrub, which includes vegetation of every description”; section 79 of that Act, referring to a “tree, shrub or other vegetation” obstructing visibility; and section 136, referring to a “hedge or tree”

shading a carriageway. Similarly, Schedule 4 to the Electricity Act 1989, concerning the removal of a danger or obstruction caused by trees in close proximity to power lines, defines “tree” to include “shrub”. Such provisions avoid the need for unprofitable disputes as to whether, for example, overhanging or dangerous plants are trees, shrubs, hedges or other vegetation, or whether roots or branches originate from them. To similar effect liability for dangerous plants under the common law of negligence or the Occupiers’ Liability Act 1957 does not turn on the correct classification of the offending vegetation. The same is true in relation to actions in nuisance arising from encroaching roots or branches. By contrast section 46 of the Civil Aviation Act 1982 enables the Secretary of State to make an order restricting the height, close to airports, of “trees”, but not of bushes, shrubs or other vegetation. In the particular context of hazards to aircraft omission of the latter is easily appreciated.

27. While these various provisions draw a distinction between trees on the one hand, and bushes, shrubs, hedges and other vegetation on the other, they do not advance the inquiry as to whether a tree includes a sapling, or the meaning of a woodland. The Forestry Act 1967 is, however, is more helpful.

#### Forestry Act 1967

28. In practice the Forestry Act 1967 plays as important a role in the protection of trees than tree preservation orders. Part II relates to the powers of the Forestry Commission “to control the felling of trees”. In particular section 9 provides that a felling licence must be obtained from the Forestry Commission for the felling of “growing trees” except those, inter alia, not exceeding a specified diameter.

“(1) A felling licence granted by the Commissioners shall be required for the felling of growing trees, except in a case where by or under the following provisions of this Part of this Act this subsection is expressed not to apply.

(2) Subsection (1) above does not apply –

(a) to the felling of trees with a diameter not exceeding [8 centimetres] or, in the case of coppice or underwood, with a diameter not exceeding [15 centimetres].

...

Various other exemptions are contained in the Act and regulations. “Tree”, “coppice” and “underwood” are defined in neither the Act nor regulations. Nor is there any provision extending the word “trees” to include bushes, shrubs, hedges or other vegetation. The minimum size provisions on the face of the statute make it plain that most, if not all shrubs and bushes, are excluded.

#### The case law on tree preservation orders

29. There is a limited case law on the ambit of tree preservation orders. The first aspect is whether the term “trees” includes saplings or small trees. An early mention of the

issue appears in the judgment of the Court of Appeal in Kent County Council v Batchelor (1976) 33 P&CR 185. Mr Batchelor had been restrained by an injunction from cutting or damaging on his land any tree subject to a tree preservation order. He disobeyed the injunction. The Council took proceedings to commit him for contempt, and the court at first instance ordered that he be imprisoned. On appeal, all three members of the Court found that there was insufficient evidence that the trees which had been grubbed up were in fact subject to the order and set it aside. But Lord Denning MR added, obiter:

“Furthermore, I must say that there is an ambiguity in this Act and in the order. We are not told what is a ‘tree’. Many bushes and saplings are certainly not “trees”. In woodland like this, it is often, from the agricultural point of view (especially in a derelict area such as this) very important to get out the bushes, scrub and saplings and to replant – as, indeed, Mr Batchelor was doing. There is no definition of ‘tree’. I should have thought that in woodland it ought to be something over seven or eight inches [178 – 203 mm] in diameter. I do not know that any of the trees referred to here would be of that diameter” (at 189).

30. Those obiter remarks have been the subject of considerable criticism. To quote the leading authority on this area of law, by Charles Mynors, The Law of Trees, Forest and Hedgerows (Sweet & Maxwell, 2002):

“A number of commentators at the time pointed out that this could not be right. In the first place, what is a sapling, if not a small tree? Thus, the 1990 Act itself provides that a tree preservation order may apply to a “tree” newly planted as a result of a planning condition or a replanting notice, which is likely to be a sapling. Secondly, there is no basis for the size limitation suggested. The Forestry Act 1967, as originally enacted, refers to “the felling of trees with a diameter not exceeding three inches, or in the case of coppice or underwood, with a diameter not exceeding six inches”, which suggests that small plants can be trees. The TCP (Trees) Regulations 1999 refer to a “tree whose diameter does not exceed 75 millimetres” (paragraph 15.6.6 [footnotes omitted]).

31. In Bullock v Secretary of State (1980) 40 P&CR 246, a landowner made an application under section 284 of the 1990 Act to quash a tree preservation order on the grounds that it related to a coppice, that is, a small wood of underwood and small trees grown for periodical cutting. Phillips J set out the statutory provisions, quoted the passage from Lord Denning MR in Batchelor, and continued:

“Obviously, those observations, though obiter, are entitled to great respect, but I have come to the conclusion that I ought not to follow them. In the first place, it is plain, on the terms of the order, that there is room and proper provision for applying for consent, so that the fact that the order goes to small trees does not prevent, provided that consent has been given, getting out bushes, scrub, or saplings. Bushes and scrub nobody, I suppose, would call “trees”, nor, indeed, shrubs, but it seems to me that anything that ordinarily one would call a tree is a ‘tree’

within this group of sections in the Act of 1971 [the predecessor to Ch I of Pt III of the 1990 Act]. It seems to me that, if it were not so, it would be difficult to apply section 59, which relates to the imposition of conditions for the planting of trees, which in the nature of things are quite likely to be saplings, or section 62, which makes provision for the replacement of trees, which again in the nature of things are likely to be replaced by saplings [respectively the predecessors to sections 197 and 206 of the 1990 Act]. (at 251).

32. A second aspect of the coverage of tree preservation orders was considered in Evans v Waverley Borough Council [1995] 3 PLR 80. The submissions of counsel in that case in the Court of Appeal emphasised that the order in that case protected not just trees existing at the date of the order but all trees including those appearing after that date. This was not disputed by opposing counsel and was accepted by Hutchinson LJ. In R (Plimsoll Shaw Brewer and others) v Three Rivers District Council [2007] EWHC 1290 (Admin) Sullivan J rejected a challenge to the making of a woodland tree preservation order and proceeded on the basis that all trees in the woodland were protected within the order, to allow for regeneration.
33. Thirdly, there is the possible relevance of a tree's location. In the Divisional Court decision, Barnet LBC v Eastern Electricity Board [1973] 1 WLR 430 the Board was prosecuted for damaging tree roots. It said that that would not be to destroy a tree. May J held that the underlying purpose of the relevant legislation was the preservation of trees and woodlands as amenities, "as living creatures providing pleasure, protection and shade". It was their use as such that was sought to be preserved. A tree, the subject of a tree preservation order, would be destroyed when, as a result of what was done to it, it ceased to have any use as amenity, as something worth preserving.

"Further, having regard to the way in which the trees are identified and described in Schedule 1 to the [tree preservation] order and to the annexed map, and indeed to general considerations as to what is or is not an amenity, we think that one of the relevant circumstances which a forester could or should take into account in deciding whether a given injured tree should be felled is its situation: a tree adjoining a highway, for instance, needs greater stability and more vigorous life than a similar tree in a country field and the former may thus, by reason of its position alone, be destroyed in contravention of the order by a lesser injury than would be needed to destroy the latter" (at 435).
34. Finally, it is as well to note that just as with listed building consent there is no method provided in the 1990 Act or the Regulations to determine authoritatively whether under a tree preservation order consent is required for particular works. If there were, a determination might include whether a particular plant was indeed a tree. By contrast, the question as to whether general planning permission is required for particular works can be resolved by the submission to the local planning authority of an application for a certificate of lawfulness of a particular use or development, with a right of appeal to the Secretary of State in the event of an unfavourable decision.

While in Chambers v Guildford BC [2008] JPL 1459, it was held that the court has jurisdiction to make a declaration in such cases, for practical reasons that would only rarely be appropriate. McCombe J held, in the context of a listed building case, that therefore it must be implied that the initial decision on whether consent were necessary was one for the planning authority and, subsequently if necessary, the Secretary of State on appeal. The same approach would seem to apply equally to questions as to whether consent under a tree preservation order is necessary for particular works.

#### Claimant's submissions on tree preservation orders

35. In clear and considered submissions Mr Mynors advanced a number of contentions on the lawful ambit of tree preservation orders. First, he submitted, that woodland tree preservation orders applied only to trees, not to shoots or young saplings. The dictionary definitions of tree refer to features such as “considerable height”, “branches at some distance from the ground”, “any bush ... with a tall stem”, “large plant”, “larger size”, and “tall” – all implying a certain size. Just as there is no precise moment at which a sapling becomes an adult tree, there is no moment when a seedling or shoot becomes a sapling. It follows that, even if a sapling is indeed capable of being a tree, there must be a cut-off point somewhere: de minimis non curat lex. The provisions of the 1990 Act are backed-up by penal sanctions and it could not be right that someone in a woodland might commit an offence by snapping off the branch of a young sapling, or trampling on a shoot emerging from an acorn.
36. With woodlands, undergrowth occurs around the base of trees, properly so called, undergrowth which inevitably includes saplings, immature bushes and shrubs and mature, but still small, bushes, scrub, other plant matter and miscellaneous vegetation such as grasses, ferns and wild flowers. In Mr Mynors' submission it is impossible or unreasonably difficult in practice to distinguish between these various groups, not least when “getting out the bushes, scrub and saplings”, a task which Lord Denning recognised to be very important, especially in derelict areas (Kent County Council v Batchelor (1976) 33 P&CR 185). It was no doubt these various considerations which led Lord Denning to his observation that a “tree” in a woodland ought to be something over 180-200 mm in diameter, a diameter which significantly exceeds the size exemptions in the Forestry Act 1967, generally 80 or 100 mm, and the conservation area notice provisions, generally 75mm.
37. Drawing on Barnet LBC v Eastern Electricity Board [1973] 1 WLR 430, Mr Mynors suggested that whether a particular shoot, seedling or sapling is de minimis, and thus not afforded protection by a tree preservation order, should be determined by reference to its location and surroundings. Therefore a sapling in a woodland may need to be larger than one in a more exposed location, such as a front garden, in order to be given protection by an area or woodland order. That too would echo the policy considerations underlying Lord Denning's observations in Batchelor.
38. Secondly, in Mr Mynors' submission, the generally held view is that a tree preservation order made by reference to “trees”, specified individually or by reference to an area, or “groups of trees”, only has effect to protect trees and groups of trees which are in existence at the date of the making of the order. In Evans v Waverley BC [1995] 3 PLR 80 it was assumed that an order made by reference to “woodlands” protects trees, whether self-sown or planted, which come into existence years, or even

decades, after the making of the order. In Mr Mynors' submission there was simply no logical basis for the distinction. The conclusion of law to that effect in Evans was per incuriam. It is not clear how an order made at a particular date can protect something that does not yet exist. It is understandable why some might wish such protection to be afforded with woodlands, but the tree preservation order mechanism cannot achieve it.

#### Saplings are trees and woodland orders cover future trees

39. As already noted, there is no definition in either the 1990 Act or the 1999 Regulations of "tree", "woodland", or "sapling". "Tree" must therefore mean anything that would ordinarily be regarded as a tree. Thus it would not include a shrub, a bush or scrub. There is also clear authority that it includes small trees. In Batchelor Lord Denning MR said many saplings were not trees and would need to be of over 180-200mm diameter before they could be regarded as trees. This is wrong, for the reasons Phillips J suggested in Bullock. There Phillips J held that trees in a coppice could be the subject of a tree preservation order. So Bullock is authority that a small tree is a tree. Because it was not an issue before him Phillips J did not specifically address the issue of size.
40. There is no minimum size exemption on the face of the 1990 Act or in the regulations. Where the legislator has intended a size limitation, that has been made express. In my judgment the felling licence provision in the Forestry Act 1967 is in pari materia with the tree preservation order provision of the 1990 Act. Both are directed at preserving the amenity provided by tress, woodlands or forests. The one can therefore be used to interpret the other. In the felling licence provisions of the Forestry Act 1967 a size exemption is explicit. Similarly, there are explicit, albeit different, size exemptions in the 1999 Regulations for trees in conservation areas. Given these unmistakable pronouncements of size in very similar contexts, their absence with tree preservation orders is compelling evidence that the legislation intended no comparable limitation. Therefore, in my judgment saplings of whatever size are protected by a woodland tree preservation order.
41. As far as the statutory purpose is concerned this conclusion does not raise the practical difficulties Lord Denning MR envisaged in his obiter remarks in Batchelor. The fact is that it is possible to apply for a consent order to remove saplings. That meets the objection that in a woodland a young sapling may be in an undifferentiated mass of undergrowth along with shrubs, scrub and other vegetation which are not subject to any removal restrictions. As for the example of someone in a woodland snapping off the branch of a young sapling, and therefore committing a criminal offence, that is a quite different issue and a matter for another day. In practice any difficulty will be met by the exercise of prosecutorial discretion. The same applies with the other example, of someone trampling on a shoot emerging from an acorn.
42. As for the temporal reach of woodland orders, I see nothing illogical in tree preservation orders applying to future trees. The tree preservation order for the one tree, or for a group of trees, may be intended to apply to specific trees only, but a woodland order would seem designed to protect the undifferentiated mass of trees in the specified area. The order would not achieve its purpose if it applied only to the trees existing at the date it was made. Since those trees would die it would be necessary if the woodland were to be protected to make new orders, on an uncertain

but periodic basis, to continue to protect the trees in the area. That cannot be a sensible construction of the legislation. As the Blue Book suggests, because the purpose of a woodland tree preservation order is to safeguard the woodland as a whole, which depends on regeneration or new planting, it must extend to trees which grow or are planted after the order is made. Even if I had any doubts that this was the correct interpretation of the 1990 Act, I would find it difficult to gainsay the remarks of Hutchinson LJ to that effect in Evans v Waverley DC, albeit that the conclusion may simply have been assumed.

#### THE SECTION 288 APPLICATION

43. The section 288 application relates to the decision by the Secretary of State to dismiss the appeal by Palm Developments against the Council's decision to refuse two of its four applications. These were the applications for (i) consent to remove all scrub, shrubs and saplings having a diameter of less than 75 mm at 1.5 m above ground level, in 2m wide swathes at 10m intervals; and (ii) for consent to remove all scrub, shrubs and saplings having a diameter of less than 75 mm at 1.5 m above ground level. Palm Developments envisaged these two applications as alternatives. Either would give the access they desired, to carry out a survey of the site. In my view the section 288 application is misconceived on each of the four grounds advanced.

#### The law

44. This court has discretion to quash a decision of the Secretary of State under section 288 of the Town and Country Act 1990 Act on grounds (1) that it was not within the powers of the Act; or (2) the relevant requirements have not been complied with in relation to the decision and the claimant has been substantially prejudiced as a result. In effect, the court has a discretion to quash if there has been an error of law. In considering the matter, the court must construe the Secretary of State's decision and the Inspector's report in a reasonably flexible manner: Seddon Properties v Secretary of State for the Environment (1981) 42 P&CR 26, 28. In particular the Secretary of State's decision letter must be "read in good faith" (see South Somerset DC v Secretary of State for the Environment [1993] 1 PLR 80, Hoffmann LJ at 83F-G) and as a whole. Moreover, Seddon makes clear that "[b]ecause the letter is addressed to the parties who are well aware of all the issues involved and of the arguments deployed at the inquiry it is not necessary to rehearse every argument relating to each matter in every paragraph". A modern encapsulation of principle is contained in Lord Brown's speech in South Buckinghamshire DC v Porter [2004] 1 WLR 1953, [36] which reaffirms the need to give reasons which refer to the main issues in dispute, not to every material consideration. As for the decision itself, the exercise of planning judgment and the weighing of the various issues is a matter entirely for the decision maker: Tesco Stores v Secretary of State for the Environment [1995] 1 WLR 759, 780. There is very limited scope for a perversity challenge given that an Inspector's recommendations are based not only on the evidence given at the inquiry but also on observations made at the site visit: R (Newsmith) v Secretary of State for Environment, Transport and the Regions [2001] EWHC Admin 74, [6]-[8].

First ground: the Inspector's assessment of the effect of the proposed works on the woodland.

45. In Mr Mynor's submission the Inspector was in error in her conclusions at paragraphs 103 and 104. It will be recalled that there the Inspector refers to the purpose of safeguarding the woodland as a whole and that vegetation which could ordinarily be called trees could not be considered in isolation from the scrub, shrubs and saplings within it.
46. Firstly, Mr Mynors submitted, in reaching those conclusions the Inspector failed to take into account that applications (i) and (ii) both envisaged works on a one-off basis, so that the remaining larger trees would provide the seed stock necessary for the regeneration of the woodland. It is true that continuously removing smaller vegetation would prevent regeneration of a natural woodland, but that was not what was intended, a point made perfectly clear in his closing submissions before the Inspector. There was a clear distinction between appeals (i) and (ii), which envisaged a one-off clearance, and appeals (ii) and (iv), which envisaged a permanent clearance of vegetation, with no replacement along the wharf and on the track between the entrance and the wharf. Even if she considered Palm Developments were not intending to permit regeneration, she could have imposed suitable planning conditions with applications (i) and (ii) to ensure that result. Given that factual position – that regeneration either would occur anyway or else could be guaranteed by a planning condition – the concern she expresses at paragraphs 103 and 104 as to the long-term future of the woodland could not be justified. The end result of an application such as (ii) would not be the extinguishment of the woodland after the death of the remaining larger trees, as feared by the Inspector at paragraph 103, since there would be ample opportunity for the understorey to regenerate, as it has done in the years since the war. The same was true of her concern at paragraph 104 that the woodland would ultimately disappear. It followed that such concerns were not a proper basis for dismissing the appeals, since they were not based on an accurate understanding of what was proposed.
47. Mr Mynors' second submission under this head was that, in making her comments at paragraph 103 and 104, the Inspector failed to take properly into account that consent is required only for the carrying out of works to trees, and not for works to bushes, shrubs, scrub, or saplings below a certain size. Moreover, a woodland order does not protect trees which grow after the date of the order. Thus the Inspector's comment at paragraph 103 as to "the stated purpose of a woodland TPO [is] to safeguard the woodland unit as a whole" was not correct. The ultimate purpose of an order may be to preserve a woodland in some wider sense, but the means provided by Parliament is only to control works to trees. It thus only operates to preserve those trees, and not to preserve scrub, shrubs, saplings below a certain size, or indeed any other vegetation. It follows that her assessment at paragraph 104 as to the effect of removing scrub, shrubs and saplings was misplaced since the removal of scrub and shrub, whether desirable or otherwise, does not need consent, nor the removal of saplings below a certain size.
48. Thirdly, it was submitted that in making her assessment of the effect of the proposed works at paragraph 103, the Inspector failed to take into account that the test of "benefit to the woodland" relates to the desirability in policy terms of permitting works which need consent, and not to whether particular works need consent at all. When the Inspector stated that certain works would not benefit the woodland, that is an opinion to which she was entitled. But that does not affect whether those works

need consent. Work to shrubs, scrub and small saplings does not need consent, regardless of whether such works might be beneficial.

49. My difficulty with these submissions is two-fold. First, as far as the law is concerned I have already expressed my conclusion that a tree preservation order covers saplings, and a woodland order both existing and future trees. Secondly, the submissions take paragraphs 103-104 out of context. It is obvious from the opening clause of paragraph 103 – “[B]efore I arrive at that analysis [of the amenity value and likely impact of the works]” – that the Inspector was addressing a preliminary issue, “what can be preserved”, before she tackles in subsequent paragraphs the issue of the amenity value of the woodland and the likely impact of the proposed works.
50. In this discussion of the preliminary issue the Inspector’s approach was that in a woodland context a tree at all stages of its life is capable of being protected. She based this conclusion in part on the need for a “common sense commitment to regeneration” so as to safeguard the longer term health of the woodland. In my view she was correct in this as a matter of law. She did not misunderstand the effect of the proposed works on the woodland because at this stage she was addressing the “what can be preserved” point. Thus her observations addressed theoretical questions of what can be preserved and based the case for trees at all stages of their life of being capable of being preserved in a woodland tree preservation order on the need in a woodland setting to ensure regeneration. At this stage of her analysis she was not making any specific findings about what the impact of the works under (i) and (ii) would be on the woodland. That comes later in her report. She specifically noted at paragraph 105 that the theoretical issues raised as to “what is a tree” did not provide any real foundation for solving the practical issues raised by the applications. Importantly, Palm Developments’ case before her was that she need not be concerned with these theoretical issues.
51. When she does address the effect of the proposed works, at paragraphs 122-125, the Inspector emphasised the widespread nature of the works proposed, their impracticality and the lack of an arboricultural imperative for them. It was no part of her reasoning that the cleared areas would remain cleared indefinitely. Nor did she misunderstand the application of the consent provisions. Her observations in paragraphs 122-125 as to the impracticality of disentanglement mirrors the Palm Developments’ observations, that it would be unreasonably difficult in practice to distinguish between little trees and other vegetation. Finally, it is clear from paragraph 97, quoted earlier, that the Inspector had in mind the possible imposition of a condition to ensure regeneration.

Second ground: the evidence of Bashford as to the definition of a tree

52. Mr Bashford was Palm Development’s arboricultural expert. It will be recalled that he had said there can be no doubt that at all stages in its life a tree is a tree, albeit that it can also initially be classified as a seedling or a sapling. In Mr Mynor’s submission, when read in context Mr Bashford was there making a distinction between the position in relation to the botanical or biological classification of a plant as a tree and whether or not it was appropriate to protect any particular tree by the imposition of a tree preservation order. It was thus wholly misconceived for the Inspector to say, at paragraph 105, that in the light of Mr Bashford’s view it did not

matter whether some vegetation was freshly germinated, a seedling, 1m tall, or any other size.

53. In my view this second ground of the section 288 application takes the case nowhere. The fact is that Mr Bashford gave evidence which was inconsistent with the contention now being advanced, that as a matter of law there is some size limit before a tree is capable of being protected under a woodland tree preservation order. The Inspector was entitled to refer to Mr Bashford's evidence as a point supporting her conclusion that a tree at all stages of life is capable of being protected. There is no error of law.

Third ground: failure to have regard to Government policy

54. The contention here is that the Inspector failed to have regard to government policy set out in the Blue Book. She referred to the Blue Book at paragraphs 102 and 106 but misunderstood that it is only work on trees within a woodland, not on vegetation generally, which is prohibited. In my view, however, there is nothing in this point. The Inspector rightly considered that in a woodland situation a tree may include a tree at all stages of its life. It is therefore clear that the Inspector had proper regard to the Secretary of State's policy as expressed in the Blue Book and reached a lawful and correct conclusion.

Fourth ground: failure by the Secretary of State to give reasons

55. Here it is said that the Secretary of State agreed with the Inspector's comments regarding what is covered by the Order, and with her approach in considering the amenity value of the woodland as a whole. In doing so, it is submitted, the Secretary of State failed to deal with the matters raised in relation to the First to Third Grounds, or to give adequate reasons for dealing with them in the way she did.
56. In relation to this ground I would simply say that the Secretary of State had before her applications to clear areas of woodland with many trees. It is plain that in respect of applications (i) and (ii) she agreed with the Inspector's conclusions in respect of the value of the woodland, the effect of the proposed works and their lack of justification. She did not err in law in following the Inspector's approach and addressing the practicality of the application before her.

Fifth ground: the entwined roots

57. At paragraph 122 the Inspector said that the vegetation was close so that roots would be entwined in a mat, and that tree trunks were also close together. Removing smaller elements without causing harm to anything remaining would be impractical. The Secretary of State effectively adopted that analysis. The submission is that in this regard both the Inspector and the Secretary of State departed from the Blue Book, which says that only works on trees within a woodland area is prohibited, and that a woodland tree preservation order should not be used as a means of hindering beneficial management work, which may include regular felling and thinning. Such "felling and thinning" would in many cases inevitably involve some damage to roots of nearby trees since it is highly likely that in any woodland trees will have interlocking root systems. If the approach of the Inspector were correct, routine management work would always require consent under a tree preservation order.

Even if that approach were wrong, and the removal of bushes, shrubs, scrub and general undergrowth would not be allowed because of possible effects on the roots of nearby trees, it would have been possible for the Inspector to recommend the imposition of appropriate conditions, requiring the non-tree plants to be removed only down to ground level, leaving the larger trees untouched.

58. In my view the Inspector was simply considering the practicalities of the works proposed. She concluded that it would inevitably lead to damage to roots and also that there was no arboricultural imperative. Her conclusions on this issue are conclusions in the exercise of her planning judgment and cannot be challenged on the basis that they are erroneous in law. The reference to the Blue Book is misconceived. The second passage is directed at the issue of whether it is appropriate to make a tree preservation order for a woodland, not whether applications for consent are necessary once an order has been made. The submission that a condition could have been imposed does not reveal any error of law. There is no suggestion that the idea of a condition was raised before the Inspector. In any event it is clear that it was the Inspector's view, having had the benefit of a site visit, that this would have been impractical.

### JUDICIAL REVIEW OF COSTS DECISION

#### The Costs Decision

59. The Inspector recommended that a full award of costs be made in favour of the Council. In respect of appeals (i) and (ii), the Inspector considered that Palm Developments did not have an adequate justification for the works proposed. The claim that the works were needed for a survey was in her view unjustified because, as it emerged in cross examination, Palm Developments "had never considered a remote survey, nor any alternative method of surveying the site". In her view the justification advanced about the need for a survey did not stand up. In addition, the Inspector considered that the plans advanced in respect of appeal (i) gave "no idea as to the potential scope of the tree loss". In respect of appeal (ii), the Inspector considered that the assertion that the stated justification for the application – "these were not trees" – had an unsound foundation, namely, the Council's Guidance Note quoted at paragraph 7 of this judgment, which was irrelevant to the need for consent under a tree preservation order. This point was a further indication that the appeal had no prospect of success.
60. In respect of appeal (iii), the Inspector considered that it was unreasonable to pursue an appeal for wharf clearance in the absence of a planning permission for a commercial wharf. The Inspector also commented on the absence of any evidence as to why the existing consent to carry out works was not adequate for the limited use which the wharf in reality had. In respect of appeal (iv), the Inspector considered that Palm Developments was pursuing consent to clear a route which was known to be impractical. Moreover, she observed that the plan in respect of these proposed works was unclear.
61. The Secretary of State agreed that a full order of costs should be made. In respect of appeals (i) and (ii), she agreed with the Inspector that Palm Developments was already in possession of sufficient information and there was no convincing evidence to demonstrate that the works proposed were necessary to produce the required plan.

She also agreed that an adequate plan had not been produced in respect of appeal (i) and that an irrelevant document had been used to justify appeal (ii). She agreed with the Inspector's conclusions in respect of appeal (iii). With respect to appeal (iv), she agreed with the Inspector that Palm Developments was aware from an early stage that the route of the proposed road required works for which they did not have planning permission and also that the plan did not show what was proposed. Thus the Secretary of State agreed with the Inspector's conclusion that Palm Developments had behaved unreasonably in pursuing an appeal which had no prospect of success.

### The Law

62. In planning appeals, the normal rule is that each party bears its own costs. However, there is a power under section 250(5) of the Local Government Act 1972, applied by section 320 of the 1990 Act, for the Secretary of State to order one party to pay the costs of another in relation to a planning inquiry. In paragraph 5 of Department of the Environment Circular 8/93 ("the Costs Circular"), the Secretary of State states that her policy guidance will apply to all the categories of inquiry proceedings listed in paragraph 9 of the Circular, and all the inquiry and hearing proceedings mentioned in Annex 7 to it. Neither paragraph 9 nor Annex 7 mentions appeals against the refusal of consent required under a tree preservation order. If the guidance in Annex 3 to the Circular is applied by analogy to such appeals "in any case, an appellant will be at risk of an award of costs against him if it is concluded that it must have been obvious, from the evidence presented, that the appeal had no reasonable prospect of success". In other words, to justify an award of costs against an appellant it is not enough that he or she should have lost an appeal, it is necessary that the appellant behaved unreasonably. That conclusion has to be based "on the evidence".
63. However, this court adopts a restrictive approach to judicial review of the award of costs. The decision to award costs is discretionary and informed by the decision maker's judgments as to reasonableness of the planning case presented. Assessing planning merits is the role of the decision maker and is informed in the case of an Inspector not only on the evidence heard at the inquiry but also on observations made on the site visit: R (Newsmith) v Secretary of State for the Environment [2001] EWHC 74 (Admin). In R v Secretary of State for the Environment, ex parte London Borough of Ealing, 22<sup>nd</sup> April 1999, unreported, Sullivan J outlined the limited scope for review of costs decisions:

"..I remind myself that it was the Inspector who heard all of the evidence. He heard the witnesses; he heard the cross-examination; he saw the site; he was in the best possible position to decide..... It is almost impossible, sitting in this jurisdiction, the Inspector having formed such a view, having heard and assessed all the evidence, for this court to be in a position to say that such a decision is Wednesbury perverse

...

The decision whether or not to make an award of costs is pre-eminently a discretionary matter, and the Inspector who actually heard the evidence is in the best position to judge, not merely whether or not the evidence is well founded in terms of the planning merits but also whether or not a party has or has not acted unreasonably."

Submissions and conclusion on costs

64. In its submissions Palm Developments contends that the Secretary of State acted irrationally or unlawfully in concluding that the four appeals had no reasonable prospects of success. Nor did the Secretary of State give sufficient reasons for her conclusions on costs.
65. As to appeals (i) and (ii), the matters before me, Palm Developments contended that it could not be said that it had sufficient information about the site and there was no convincing evidence why the proposed works were necessary. The fact that the Council had already given consent for vegetation clearance sufficient to create 2m-wide rides across the site was clear evidence that it recognised the need for some detailed investigative work actually on the site, rather than just a remote survey. Nor could it be said that the plan submitted was inadequate with lines, on the basis these did not adequately represent the vegetation which would be lost. The Council had never sought that type of plan itself prior to the inquiry. In any event, such a plan would be equally misleading since the application sought consent only for the removal of scrub, shrubs and saplings, leaving intact the larger trees and tree canopy above each ride. As to the Council's Guidance Note, it was necessary to work from some definition of what was a tree and Chambers v Guildford BC makes clear that there can be an appeal on the basis that particular works do not require consent. Overall, in relation to the arguments on appeals on (i) and (ii) it simply could not be said that they were without foundation – that they had no prospect of success. As for the appeals on (iii) and (iv), Palm Developments submitted that the Council had granted partial consent in relation to clearing vegetation from both the wharf and the track, even though planning consent had not been given for their use. What was at stake was the details of what was to be cleared. It could not be said unreasonable to pursue an appeal on either matter.
66. My conclusions on the issue of costs can be very shortly stated. Nice issues about “what is a tree” were agitated before me, but they were not at all central to either the Inspector's inquiry or the Secretary of State's decision. I remind myself that the Inspector simply did not think that the survey justifications for the works in appeals (i) and (ii) stood up to analysis. The plans advanced in respect of appeal (i) gave no indication of tree loss and she was distinctly unimpressed by the “these are not trees” argument and the planning policy argument advanced in relation to the appeal (ii) matter. In her view the wharf appeal was fatally affected by the absence of planning permission, and she thought the appeal (iv) matter, the track, was both unclear and impractical. In each case the Secretary of State endorsed the Inspector's reasoning. Given the very restrictive approach which this court adopts when reviewing the award of costs in planning cases, it is impossible for me to say that there were inadequate reasons underlying the award or that it was irrational in a public law sense. Accordingly I refuse permission on the judicial review on costs.

Order

*Section 288 application is dismissed and permission to proceed with judicial review is refused.*