

15/06/09

YOUR GARDEN: A LEGAL MINEFIELD?

It looks as if the weather is going to allow us to enjoy our gardens this summer. But there are a number of topics which can give rise to problems with neighbours which are worth thinking about, e.g boundaries, tree roots, bonfires and even garden burial, all of which can affect any one of us.

BONFIRES

Bonfires are not illegal however the smoke from a bonfire can be considered either a private or statutory nuisance. It is interesting to note that if you live in a smokeless zone then burning house coal or unseasoned wood is illegal whereas drywood or smokeless coal (phurnacite) is acceptable. There is nothing in the Control of Pollution Act 1974 which affects bonfires in your garden. That is not to say that you can have a bonfire all the time or that you are free to cause a nuisance to your neighbours so that they would have to go in doors or shut their windows. A regular bonfire, say more than once a month, could amount to a statutory nuisance, and that could result in action by the Local Authority. It is duty bound to give notice to abate the nuisance, particularly if it is regular and there is copious smoke. You must also consider highways legislation because it is obviously an offence for smoke from a bonfire to drift on to a public highway causing danger to road users. This could also result in action from the Police.

Even barbecue smoke can amount to a nuisance if it is on a regular basis and the smoke is bad. Commonsense and consideration for your neighbours are the best starting points.

TREES

A tree or shrub belongs to the owner of the land on which it grows even if its branches or roots go over or under the neighbouring garden. The Theft Act 1968 makes it a criminal offence to take wild flowers, fruit and foliage from any plant if it is sold for commercial gain. Falling leaves and fruit still belong to the owner of the tree or shrub but the law

does not require the owner to come and sweep up leaves or pick up the fruit on neighbours land. However if falling leaves block a gutter which results in water damage, the tree owner is at risk from being sued for that damage. The tree owner is not allowed to go onto his neighbour's land or even to lean over to cut his hedge. He must get permission from his neighbour to do this. In fact branches that overhang your neighbour's garden are technically trespassing on his air space. The neighbour is allowed to cut the branches back to the boundary line but those branches belong to you so that the neighbour must return them together with any fruit that might have been on them. If your neighbour cuts your branches beyond his boundary and into your garden then he becomes a trespasser – once again it is really a subject for commonsense and consideration.

HIGH HEDGES

An evergreen or semi-evergreen hedge over 2 metres in height can restrict light to a neighbours property and become the subject of a complaint to the Local Authority or an actionable nuisance. These restrictions came about as a result of the monstrous leylandii hedgerows which can grow very rapidly to an enormous height and whilst effective at blocking out sound are also very effective at blocking out light. It is, therefore, possible to take steps to have these reduced to a reasonable height.

TREE PRESERVATION ORDERS

Specific trees or groups of trees can be made the subject of one of these orders which prohibit felling, topping, lopping or uprooting or other wilful damage to such listed trees. The Local Authority can take enforcement proceedings in the Magistrates Court and hefty fines can be imposed. Once a TPO has been made only the Local Authority can enforce it but any member of the public can apply for such enforcement once they become aware that a tree is at risk. Note that individuals are not entitled to take any action on their own behalf. If you are fortunate enough to live in a Conservation Area of which there are many in Devon and Cornwall then there are many restrictions which relate to trees of which you must be aware.

ROOTS

Roots can often lead to substantial damage for example by growing under the foundations of a house or garden wall and causing them to become unsafe or causing the soil to dry out which in turn results in subsidence. Technically roots that grow on to your neighbours land are trespassing and can be cut along the boundary line without your permission. The consequences of intrusive roots can result in expensive claims in nuisance or trespass to make good the consequences of the damage. Incidentally if you are insuring your property then you should disclose to your insurers if there are any trees either within your own garden or next door which may be close enough to the house to result in damage through encroaching roots leading to subsidence or by falling branches to say nothing of the whole tree! If you fail to do so your insurer may seek to avoid a claim because of non-disclosure or an existing risk.

GARDEN BURIAL

There is no problem about scattering ashes in the garden or burying them in a container. Generally speaking a pet owner can bury his pet in the garden so long as it does not amount to hazardous waste. It is always as well to check with the Local Authority. You can have a headstone in your garden, subject to certain rules as to size and proximity to the highway-where planning permission may be required. Otherwise, if you wanted to have a headstone in your garden you are allowed to do so. The situation becomes far more complicated if you actually want to bury a loved person in your garden. Here we are in the realms of "clinical waste" and you can probably imagine how many rules and regulations there are to control the situation. However if you follow all the rules and regulations then it can be permitted but usually with the assistance of a licensed operator. Again you would need to check with your Local Authority. Once done it can only be imagined what would happen if you wished to move home or how the existence of burial might impact on a buyer's decision to proceed.

ACTION

If you have any legal problems concerning your use of or occupation of land, feel free to contact me, **David Helman** at **Busbys** on **01288 35 9000**. You can email me at **david.helman@busbyslaw.co.uk**. Otherwise, come to see me at my office. I am here to help.

David Helman
Solicitor & Notary Public
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