Land and Environment Court

New South Wales

Case Name:	Champion v Strata Plan 42576; McKeon v Strata Plan 42576
Medium Neutral Citation:	[2018] NSWLEC 1063
Hearing Date(s):	13 February 2018
Date of Orders:	13 February 2018
Decision Date:	13 February 2018
Jurisdiction:	Class 2
Before:	Galwey AC
Decision:	Both applications are upheld. See orders at [20] and [21].
Catchwords:	TREES (DISPUTES BETWEEN NEIGHBOURS); hedge; sunlight and views; severe obstruction of views; previous pruning in breach of permit; applicant to contribute to cost of pruning; orders for annual pruning.
Legislation Cited:	Trees (Disputes Between Neighbours) Act 2006
Cases Cited:	Tenacity Consulting v Waringah [2004] NSWLEC 140
Texts Cited:	NSW Justice & Attorney General, 2009: Review of the Trees (Disputes Between Neighbours) Act 2006 (NSW)
Category:	Principal judgment
Parties:	Bruce Champion and Patricia Champion (Applicants, 298778 of 2017) John McKeon and Alexandra McKeon (Applicants, 369044 of 2017) SP 42576 (Respondent, both matters)

Representation:	Bruce Champion and Patricia Champion, litigants in person (Applicants, 298778 of 2017) John McKeon and Alexandra McKeon, litigants in person (Applicants, 369044 of 2017) Christopher Sluiter, agent (Respondent, both matters)
File Number(s):	298778/2017; 369044/2017
Publication Restriction:	No

JUDGMENT

This decision was given as an extemporaneous decision. It has been revised and edited prior to publication.

Background

1 A hedge of five Lilly Pilly trees grows along the western boundary of a Randwick apartment block. The property on which the trees grow is owned by Strata Plan 42576 ('the respondent' in both matters).

2 In the neighbouring apartment building to the west, the Champions ('the applicants' in 298778 of 2017) purchased a top-floor east-facing apartment in 2009. Photos from around that time suggest they had sea and district views from their balcony, living room, kitchen, laundry and a bedroom. They say the trees were around 11 metres tall at that time.

3 A permit was obtained from Randwick Council ('Council') in April 2011 to prune the trees, specifically to thin their crowns, crown-lift their lower branches, remove deadwood and prune for building and services clearance, all within the guidelines of the Australian Standard (AS4373–2007) *Pruning of amenity trees*. The Champions paid for a contractor to undertake the pruning, but contrary to the permit conditions their contractor lopped the top 3 or 4 metres from the trees, reducing them to approximately 8 metres in height.

4 In late 2011 the McKeons ('the applicants' in 369044 of 2017) purchased the east-facing apartment directly beneath the Champions'. Due to the recent pruning, they had at the time of purchase sea and district views from the balcony, living room, kitchen, laundry and a bedroom.

5 The Champions and McKeons have each applied to the Court, pursuant to s 14B of the *Trees (Disputes Between Neighbours) Act 2006* ('the Trees Act'), seeking orders for the trees: to be pruned every two years, or as required to maintain views, to a height of 8 metres, at the respondent's expense; and to thin their canopies. Both applications are made on the grounds that the trees severely obstruct views from their dwellings and sunlight to their windows.

6 The two matters involve the one hedge and very similar circumstances for the applicants. They were heard concurrently at the onsite hearing and are dealt with here in a single judgment.

Jurisdiction

7 There is no dispute that the trees are planted to form a hedge or that they are more than 2.5 metres tall (s 14A(1) of the Trees Act).

8 Having viewed the situation and considered principles in *Tenacity Consulting v Waringah* [2004] NSWLEC 140, I am satisfied that the jurisdictional test is met in both cases (s 14E(2)(a)(ii)). The trees severely obstruct views from both dwellings. Sea views are of high value. The views are lost from living areas.

9 I am not satisfied that the trees severely obstruct sunlight. November photographs provided by the respondent show that both apartments still receive some hours of morning sunlight, the only time it would be available to their east facing windows. In winter a Camphor Laurel on another property to the north of the respondent's may contribute to shading.

10 I am satisfied that the severity of the view obstruction outweighs any reason not to interfere with the trees, so I may make orders to prune them (s 14E(2)(b)).

Matters to be considered

11 I am required to consider other matters at s 14F of the Trees Act.

12 The respondent asked the Court to consider that the applicants in both matters do not live at their properties (both apartments are rented) and that their interest in increasing their views might be driven by the prospect of financial gain. I do not find these suggestions relevant to my decision.

13 The 2011 pruning clearly breached the permit conditions. I have contemplated taking this into account I when considering the hedge height at the times the McKeons purchased in late 2011. Had the permit conditions not been breached the hedge would have been more than 11 metres tall and, as far as I can tell, they would have had no sea view. Trees which block views or sunlight were considered during the NSW Government's 2009 *Review of the Trees (Disputes Between Neighbours) Act 2006 (NSW)*. The review concluded that the Trees Act's jurisdiction over hedges should have a strictly limited scope, only hearing matters regarding (page 35):

> …cases where the applicant themselves has lost the light or view. It would not be appropriate, for example, for a person to purchase a property knowing there is a high hedge next door, and then be able to seek orders against their neighbours so as to gain additional solar access which had not existed at the time of purchase.

14 There is no evidence that the respondent complained to Council that pruning went beyond the permit conditions. There is no evidence of any formal complaint made to the Champions by the respondent. I'm not sure that this means I might assume the respondent had no issue with the pruning at the time, but it seems apparent that there was no mechanism by which the McKeons would have become aware of this issue, nor how they could be expected to discover it no matter how thorough they were in any searches. For whatever reason, they had sea views when they purchased.

15 As the McKeons argued, the 2011 pruning does not seem to have adversely affected the trees, so they should tolerate pruning again to a similar height.

16 The Champions want the trees to be pruned to a height of 8 metres, although they say themselves they were around 11 metres tall when they purchased. Later, following the 2011 pruning, they enjoyed whatever 'extra' views were then available. In this case I will allow them their wish but they will pay 50% of the cost of the works. Were it not for the pruning they carried out, which breached permit conditions, they would not have had such extensive views, the McKeons would not have had views, and pruning would only be ordered to 11 metres, at the respondent's expense. There is nothing in s 14F of the Trees Act *requiring* me to consider the cause of earlier tree height and available views, but equally there is nothing to preclude such consideration.

17 The pruning ordered should restore views to those available to the McKeons' apartment at purchase. No action of theirs contributed to this situation and they will not have to contribute to the cost of pruning.

18 Any other pruning, such as thinning, building clearance or crown-lifting, is not required for views. Pursuing such pruning is a matter for the parties to sort out and obtain any permits as required.

19 Orders will be made separately for each matter. By carrying out the pruning for either matter, the respondent satisfies both sets of orders.

Orders for 298778 of 2017 (Champion v SP 42576)

20 The orders of the Court are:

(1) The application is upheld.

(2) Within 60 days of the date of these orders, and then annually within 30 days of the anniversary of the date of these orders, the respondent is to arrange and pay for a suitably qualified and experienced arborist (minimum AQF level 3) with all appropriate insurances to prune the five Lilly Pillies, reducing them to a height of no more than 8 metres above ground level measured from the base of each tree.

(3) The respondent is to give the applicants 7 days' notice of the works in (2).

(4) The applicants are to arrange with their Body Corporate all access required for the works in (2).

(5) Within 14 days of receiving a receipted invoice for the cost of annual works in (2), the applicants are to pay the respondent 50% of the invoice amount.

(6) If no such receipted invoice is received within 60 days of completion of works, order (5) lapses.

Orders for 369044 of 2017 (McKeon v SP 42576)

21 The orders of the Court are:

(1) The application is upheld.

(2) Within 60 days of the date of these orders, and then annually within 30 days of the anniversary of the date of these orders, the respondent is to arrange and pay for a suitably qualified and experienced arborist (minimum AQF level 3) with all appropriate insurances to prune the five Lilly Pillies, reducing them to a height of no more than 8 metres above ground level measured from the base of each tree.

(3) The respondent is to give the applicants 7 days' notice of the works in (2).

(4) The applicants are to arrange with their Body Corporate all access required for the works in (2).

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Acting Commissioner of the Court

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