



Land and Environment Court
New South Wales

Case Name: Cleary & anor v Hemmes Property Pty Ltd; Crehan v Hemmes Property Pty Ltd; Latimer v Hemmes Property Pty Ltd

Medium Neutral Citation: [2017] NSWLEC 1577

Hearing Date(s): 10 October 2017

Date of Orders: 12 October 2017

Decision Date: 12 October 2017

Jurisdiction: Class 2

Before: Fakes AC

Decision: The applications are dismissed.

Catchwords: TREES [NEIGHBOURS]: Hedge; obstruction of sunlight and views from three adjoining units in a strata plan; severity of obstruction; quality of evidence.

Legislation Cited: Trees (Disputes Between Neighbours) Act 2006
Pittwater Local Environmental Plan 2014

Cases Cited: De Zylva & anor v Staas & anor [2012] NSWLEC 1242
Grantham Holdings Pty Ltd v Miller [2011] NSWLEC 1122
Haindl v Daisch [2011] NSWLEC 1145
Tenacity Consulting v Warringah Shire Council [2004] NSWLEC 140

Texts Cited: Nil

Category: Principal judgment

Parties: Desmond & Kerry Cleary (Applicants: 17/267956)
Thomas Crehan (Applicant: 17/267957)
Alan Latimer (Applicant: 17/208987)

Hemmes Property Pty Ltd (Respondent – all matters)

Representation: Applicants 17/267956: D & K Cleary (Litigants in person)
Applicant 17/267957: T Crehan (Litigant in person)
Applicant 17/208987: A Latimer (Litigant in person)

Respondent all matters: Mr D O'Donnell (Solicitor)

Solicitors: Addisons Lawyers

File Number(s): 2017/267956; 2017/267957; 2017/208987

Publication Restriction: No

JUDGMENT

- 1 COMMISSIONER: The owners of Units 2, 3 and 4 in a residential apartment block in Newport have each applied under s 14B Part 2A of the *Trees (Disputes Between Neighbours) Act 2006* (Trees Act) for orders seeking the pruning of a row of *Waterhousia floribunda* (Weeping Lillypilly) growing along the respondent's eastern boundary to a height of 3m above ground level and their ongoing maintenance at that height. The applicants also request the removal of any overhanging foliage from their properties.
- 2 The orders are sought on the basis that the trees severely obstruct sunlight to windows of their dwellings and or severely obstruct views to the west and southwest of Pittwater and Bayview from their dwellings.
- 3 The respondent's property is the Newport Arms Hotel. The applicants' apartment building is to the east and adjoins the car park and exit driveway. Both properties are orientated to take advantage of the views to the south and southwest of the south-eastern arm of Pittwater. The applicants' six unit apartment building is situated on a south-facing slope, Unit 1 is at the lower end of the slope and Unit 6 is at the upper, northern end of the slope.
- 4 All units have a very similar floor plan with a south-facing front garden/terrace accessed from the open-plan kitchen/ dining/ lounge area. The bedrooms are primarily on the western side of each unit. The open plan living area and bedrooms generally open onto a secondary area of private open space/terraces within the western side setback between the unit building and

the property boundary. Part of the unit above overhangs the north-western façade of each unit. All nominated windows are on the western façade of the three units.

- 5 The trees the subject of the application (*Waterhousia* sp) are growing along the common side boundary. To the northwest of Unit 4 is a large and established Canary Island Date Palm. To the west and north-west of the three units are tall and well-established eucalypts growing in island garden beds within the car park. The eucalypts nearest units 3 and 4 are approximately 10 m away from the common boundary. To the southwest of the units is a group of Coral Trees near the foreshore of the respondent's property. To the southwest of Unit 2 are an established Pittosporum and African Olive growing in a westerly extension of the southern end of the garden bed in which the *Waterhousia* are planted.

Jurisdiction

- 6 In applications under Part 2A, there are a series of jurisdictional tests which must be sequentially satisfied before the Court's powers to make orders are engaged. The sequence is outlined in *Grantham Holdings Pty Ltd v Miller* [2011] NSWLEC 1122.
- 7 Section 14B of the Act enables an owner of land to apply to the Court for an order to remedy, restrain or prevent a severe obstruction of a view from a dwelling or of sunlight to windows of a dwelling on the applicant's land as a consequence of the trees to which Part 2A applies. Although the Owners Corporation of the Strata Plan owns the land, the court has held that as tests apply to obstruction of windows of, or views from, a dwelling, the owner of the affected dwelling should make the application. Hence, the owners of Units 2, 3 and 4 have made separate applications.
- 8 The first jurisdictional test, in s 14A(1), is whether the trees are trees to which Part 2A applies; that is, are there two or more trees planted so as to form a hedge, and if so, do they rise to a height of at least 2.5m above ground level?
- 9 The trees the subject of each application are a row of *Waterhousia* planted by the respondent in or about April 2016 along the common boundary at the eastern edge of the hotel car park. On 11 September 2017 the respondent's town planner, Mr Robert Chambers, measured several trees along the 40m

length of the row which adjoins the applicants' units. The heights ranged from about 4.25m at the southern end (near Unit 2), 4.72m near the mid-point (near Unit 3), and 4.55m at the northern end (near Unit 4). The trees have not been pruned in the period since those measurements were taken and the on-site hearing.

- 10 The trees are planted wholly on the respondent's land at about 1.4m centres, they are a species commonly used for screening and hedging purposes, the arrangement is linear and their height exceeds 2.5m. For these reasons, I am satisfied that the trees are trees to which Part 2A applies. While not part of any application, the Canary Island Date Pal, the Eucalypts, African Olive and Pittosporum, as individual trees, are not trees to which Part 2A applies.
- 11 I am satisfied to the extent required by s 14E(1) of the Trees Act that the applicants, co-ordinated by the owner of Unit 3, have made a reasonable effort to reach agreement with the respondent. It would appear from the correspondence between the parties (in Exhibit A3) that the owner of Unit 3 initially proposed that the trees be pruned to a height of 5m. This was later revised to 4m, and after consulting with other unit owners, further reduced to the height sought by the proposed orders of 3m. The correspondence indicates that the respondent considers a height of 5.5m to be reasonable. The trees were pruned in or about June 2017, some months before Mr Chambers measured them. As the parties were unable to reach an agreement, the Class 2 applications were filed with the court.
- 12 The key test in applications made under Part 2A is found in s 14E(2) which states:
 - (2) The Court must not make an order under this Part unless it is satisfied:
 - (a) the trees concerned:
 - (i) are severely obstructing sunlight to a window of a dwelling situated on the applicant's land, or
 - (ii) are severely obstructing a view from a dwelling situated on the applicant's land, and
 - (b) the severity and nature of the obstruction is such that the applicant's interest in having the obstruction removed, remedied or restrained outweighs any other matters that suggest the undesirability of disturbing or interfering with the trees by making an order under this Part.

- 13 The use of the word 'are' in s 14E(2)(a)(i) requires the trees to be severely obstructing the view at the time of the hearing. This is discussed in some length in *Granthum Holdings* at paragraphs [43]-[52]. In regards to sunlight, while the time of the hearing may not coincide with the time the sunlight is severely obstructed, the applicant must provide sufficient evidence to prove the trees, at their height at the time of the hearing, are severely obstructing sunlight to the nominated windows.
- 14 Each of the applications is considered in turn. The respondent's position is common to all applications and is separately identified. Separate findings are then made for each application.

Unit 2 application

- 15 The owners of Unit 2 contend that the *Waterhousia* severely obstruct sunlight to a number of windows of their dwelling. The nominated windows, from south to north are: W1 and W2 – dining/living room; W3 – bedroom; and W4 – bedroom. The application claim form also refers to obstruction of sunlight to the adjoining garden terrace. Part 2A only applies to obstruction of sunlight to windows of a dwelling and not to gardens/terraces or to clothes drying areas.
- 16 Windows 2-4 are located beneath a timber pergola/awning covered with translucent material. The level of the terrace is some 3.1-3.2m below the top of the timber dividing fence and therefore about 1.4m below the ground level of the respondent's property.
- 17 The application claim form includes a number of photographs taken on 4-5 July 2017 from the courtyard of Unit 3. Essentially, the applicants' apartment building is constructed so that each single storey unit partially overhangs the unit below. The owners of Unit 2 contend that if the trees shade the awning, the windows are also in shade. The photographs show that at 11.13am there may be some shading by the building, the awning closest to the wall is in sun at 11.43am and 12.11pm with trees shading the awning from 12.57pm onwards. It is unclear from the photographs if and when the dividing fence starts to shade the windows.
- 18 The applicants have each included 'view from sun' diagrams prepared by *debebdesign*. The diagrams show the units, shadows from the respondent's

building and the hedge at 5m and 3m. The diagrams include several trees at the southern end of the row which are not included in the application. The diagrams do not include palms and Eucalypts also growing on the respondent's property and which could reasonably be expected to cast shadows on the applicants' building.

- 19 The windows of Unit 2 are not shown and nor is the awning. In regards to the view from the sun diagrams, the owners of Unit 2 contend that if you can't see the part of the façade in which the windows are located, they cannot be receiving sunlight.

Unit 3 application

- 20 Unit 3 is to the north of and partially above Unit 2. The owner of Unit 3 contends that the trees severely obstruct both sunlight to windows of his dwelling, and views from his dwelling. The nominated windows and viewing positions were confirmed on site. W1 is a large west-facing window at the south-western end of the open plan living/dining room, partially overhung by the front terrace of Unit 4 above; W2-W3 are bedroom windows; W4 is a glass sliding door that opens onto an adjoining terrace; W5 is a glass sliding door from another bedroom and which opens onto the terrace (part of the unit above overhangs this window). The terrace adjoining windows W4 and W5 is bounded to the west by a brush fence which ranges from about 2.5m to 3m in height above the terrace.
- 21 The application claim form includes a series of photographs taken on 4 and 5 July 2017. The photographs are mostly taken from the western courtyard adjoining W4 and W5. Up until 12.10pm these windows appear to be shaded by the applicants' building; at 1.00pm the top portion of the windows are shaded by the building and the bottom half appears to receive sunlight. Shading of those windows by vegetation is clear from about 1.30pm; from 2.00pm it is unclear as to whether the taller Eucalypts to the west and northwest are also contributing to the shadows.
- 22 At 11.13am W1-W3 appear to be shaded by the apartment building by 1.00pm W1-W3 are unobstructed by vegetation or the building, W1 is slightly shaded by the terrace above; by 2.00pm the windows are shaded by vegetation. The

pattern of shading shown at 13.27pm and 14.02pm on p 11 of the application claim form appears to be from both the hedge and the Eucalypts.

- 23 The 'view from sun' diagrams do not show the windows of unit 3 and provide little assistance.
- 24 In regards to the views, the owner of unit 3 has nominated two viewing positions. V1 is from within the open-plan living area through W1 to the west/southwest. V2 is from the terrace adjoining the second and third bedrooms accessed via W4 and W5.
- 25 The applicant contends that from V1 the Waterhousia severely obstruct views to the west across the car park to Pittwater and the hillsides of Bayview beyond. From V2, the Waterhousia obstruct upward views of the upper canopies of the nearby Eucalypts growing in the hotel car park; which the owner of Unit 3 prefers to look at.
- 26 The applicant submits that the planting of the trees along the boundary is appreciated and the trees provide a reasonable screen however, his concern is that the trees are too tall and unreasonably impact upon his amenity and that of his neighbours. He is not seeking the removal of the trees but their pruning to 3m, which in his opinion is appropriate given other height control measures he says apply to obstructions on the applicants' land.

Unit 4 application

- 27 The owner of Unit 4 is a long term resident. He contends that the trees severely obstruct sunlight to and views from his dwelling.
- 28 The nominated windows are W1 – living room; W2 – two windows in bedroom 1; W3 a glass sliding door to an adjoining terrace from bedroom 2; W4 – a glass sliding door from bedroom 3 to a terrace at a lower level to W3 and above which is part of Unit 5.
- 29 Photographs included in the application claim form taken at various times on 31 August and 1 September 2017 show W4 and W5 shaded by the building up until 1.15pm. Shadows from vegetation appear on the terrace floor outside W4 at about 1.49pm and on the wall from 14.27pm. The shapes of the shadows show shading by the large date palm to the northwest, the hedge and

elsewhere by the eucalypts. Bedroom 1 is shown in only one photograph at 15.25pm and is shaded by vegetation.

- 30 As for the other units, the 'view from the sun' diagrams do not show the windows of unit 4 and are similarly of little assistance.
- 31 Prior to the planting of the *Waterhousia* in 2016, the applicant states he had clear views to the west across the hotel car park to the water and the dog beach at Bayview, and when the Coral Trees were deciduous, there were also views to the southwest. He contends that the *Waterhousia* now severely obstruct those views from the living room, the bedrooms and the terraces off bedrooms 2 and 3. While he states that there are gums that also impact the views, they have more open canopies and are further away from the boundary and thus have less impact than the *Waterhousia*.

The respondent's position

- 32 In considering the dictionary meaning of the word 'severe' as cited in *De Zylva & anor v Staas & anor* [2012] NSWLEC 1242 at [31], Mr Chambers opines that the trees do not severely obstruct sunlight to any of the nominated windows of Units 2, 3 and 4. During the hearing he drew attention to the awning, and relative position of the windows to the dividing fence adjoining the windows of Unit 2. As most of the windows are bedroom windows, Mr Chambers is of the opinion that direct sunlight to those windows is less critical.
- 33 In regards to views, Mr Chambers does not consider the trees severely obstruct views from the western courtyards of Unit 3 and 4 as there are no views available from them; views to the west are otherwise a view of the hotel car park. The primary view and orientation of the units is to the south. As for Units 3 and 4 living rooms, Mr Chambers considers that there are filtered views through the trees across the car park and beyond to Pittwater.
- 34 Mr O'Donnell, the respondent's solicitor, submits that while all applicants have attempted to obtain good information to support their claims, the diagrams are not helpful. He contends that the diagrams have not been prepared in accordance with the Land and Environment Court's requirements for the preparation of shadow diagrams; specifically Mr O'Donnell questions the accuracy of any survey details and data used to prepare the diagrams and

notes the failure to include other nearby trees, such as the Eucalypts, growing on the respondent's property. He maintains that the 'view from the sun' diagrams are not as clear as more conventional shadow diagrams.

35 Mr O'Donnell contends that the applicants have not proved that the respondent's trees are severely obstructing sunlight to the nominated windows or are severely obstructing views from their dwellings and thus the Court's jurisdiction is not engaged and no further assessment is required. He submits that if I find otherwise, then as a matter of discretion in balancing the parties' interests, he presses the following points he contends are relevant to matters in s 14F of the Trees Act which would indicate that there be no intervention with the trees.

- Clause C1.4 Solar Access in Pittwater Development Control Plan (PDCP) generally requires the main areas of private open space to receive a minimum of 3 hours of sunlight between 9.00 am and 3.00 pm on the winter solstice and windows to the principal living area to receive a similar amount of sunlight to at least 50% of their glazed area. Variations may apply in situations where the orientation of the lot precludes a northerly orientation, where there is adverse slope or topography, and where there is existing vegetation /fences /development that overshadow. As such, each unit has an extensive open terrace/ principal area of open space which adjoins the living area. Each terrace would receive at least 3 hours of direct sunlight at the winter solstice. The 'hedge' is not solid and filtered sunlight is available through it. Apart from the living room windows, the other windows are to bedrooms and whilst considered as habitable rooms, they are not usually rooms in which people spend most of their time.
- The applicants' property adjoins a zone boundary. The respondent's property is zoned B2 – Local Centre, the applicants' property is zoned E4 – Environmental Living [under *Pittwater Local Environmental Plan 2014*] and thus in a planning sense it is not unusual to use landscaping to soften the car park and screen the adjoining residential development from that car park.
- The trees afford privacy and amenity to the respondent's property, and arguably to the applicants' property, and landscaping is valued by the respondent as important for the property. The landscaping is relatively modest but effective.

36 In regards to views, Mr O'Donnell presses the Court's usual reference to the view sharing principles published in *Tenacity Consulting v Warringah Shire Council* [2004] NSWLEC 140 as well as the finding in *Haindl v Daisch* [2011] NSWLEC 1145 that views should not be considered on a slice-by-slice basis. He presses Mr Chambers' opinion and submits that the primary orientation and

design of the units and principal living areas is to take full advantage of the unobstructed views to the south of Pittwater and the opposite shoreline, a view which can be protected and not built out given the applicants' waterfront position. The views in contention are secondary views across a side boundary and over a very large hotel car park; views across side boundaries being more difficult to protect. When views from the whole of each unit are considered, the obstruction caused by the respondent's trees is not severe.

37 In conclusion, Mr O'Donnell submits that each application be dismissed.

Findings Unit 2 – matter 267956 of 2017

38 On the evidence before me I cannot be satisfied to the extent required by s 14E(2)(a)(i) that the trees the subject of the application are severely obstructing sunlight to the nominated windows of Unit 2.

39 I agree with Mr O'Donnell that unfortunately the 'view from the sun' diagrams are of little if any assistance in determining the impact of the trees on the nominated windows. The scale is too small, the windows are not shown, and the shading which may be created by other structures such as the fence, the building, the pergola over the windows, and other trees is not clearly shown or is omitted. While I understand the intent of the photographs included in the claim form, they are insufficient to prove the applicants' contentions. Because they are taken from the unit above they do not show the actual windows and the possible impacts of the pergola, fence, building overhangs or window rebates on available sunlight. Given the relatively narrow side setback, the overall orientation of the unit, the significant difference in levels between Unit 2 and the respondent's property and the relative height of the fence, it would appear, absent any other evidence, that direct sunlight to the nominated windows would be very limited, particularly on the winter solstice. On the summer solstice the taller trees to the southwest may also limit sunlight to these windows.

40 Given this finding, I have no jurisdiction to further consider the matter and the application for Unit 2 is dismissed.

Finding Unit 3 – matter 208987 of 2017

- 41 As for unit 2, neither the photographs in the application claim form nor the ‘view from the sun’ diagrams are sufficient to prove that if there is a severe obstruction of sunlight to any of the nominated windows that the obstruction is as a consequence of the trees the subject of the application. The photographs show self-shading by elements of the apartment building as well as shading by other vegetation. As s 14E(2)(a)(i) is not met, the application in regards to sunlight is dismissed.
- 42 As noted by Mr Chambers, the Court often has regard to the Planning Principle on view sharing published in *Tenacity Consulting v Warringah Shire Council* [2004] NSWLEC 140. The first three steps of this Principle are quite applicable to applications made under Part 2A. The first step considers the nature of the view – whether the view is of iconic structures, water, land/water interface, or district views. Water views and views of the land/water interface are generally valued more highly than views of land. Whole views are valued more highly than partial views. The second step considers the location from which the view is seen – across front/rear or side boundaries and from sitting or standing positions, including views available from the whole of the property. Sitting views across side boundaries are noted as being more difficult to protect. The third step considers the use of the rooms from which the views may be affected – views from living areas and kitchens being rated more highly than views from bedrooms/ service areas. The Planning Principle includes a scale of impact ranging from negligible, to minor, moderate, severe to devastating.
- 43 The Court has also considered the meaning of ‘a view’ in *Haindl v Daisch* [2011] NSWLEC 1145 where the Commissioners at [26] state:
- 26 However, we are of the opinion that the words *a view* relate to the totality of what can be seen from the viewing location and does not permit some slicing up of that outlook – thus requiring separate assessment of the severity of the obstruction of the view from a particular viewing location on some incremental, slice by slice basis.
- 44 As noted by Mr Chambers, in a number of decisions, including the one he cites in his written evidence (Exhibit 1 in all proceedings), the Court has considered the dictionary meaning of ‘severe’. Perhaps the most apposite to ‘hedge’ cases

are the words 'extreme' or 'harsh'. Thus the legislature has set a high bar in using the word 'severely' in Part 2A of the Trees Act.

- 45 The applicant has nominated two viewing positions, as noted in [24] above, V1 is from within the open-plan living room through W1 and V2 is from the western terrace adjoining bedrooms 2 and 3.
- 46 In applying the relevant steps in the *Tenacity* principle, the view to the west is a distant view across the hotel car park to the body of Pittwater between Newport and Bayview and the hills beyond. Thus the view includes water and district views. The view is across a side boundary from a standing position as the height of the solid balustrade beyond obscures sitting views. When views from the whole of the property are considered, or from the viewing position if one were to turn to the south, there are expansive and near views of Pittwater and the land/water interface on the Mona Vale shore.
- 47 When standing near W1 and looking to the west I saw glimpses of the distant water view through the trees. In applying the qualitative scale in step three of *Tenacity* and the meaning of 'severe', I am not satisfied that the obstruction is severe although it is towards the upper end of moderate. From V2 the tops of the Eucalypts can be seen above the Waterhousia; the principal view to the west is of the brush fence; it is possible to stand on the western terrace and see views of Pittwater to the south. As such I find s 14E(2)(a)(ii) not met.
- 48 However, if I am wrong in this, in considering the balancing of interests inherent in s 14E(2)(b), and thus relevant matters in s 14F, I note the following:
- the applicant's unit is relatively close to the boundary fence (F(a));
 - the trees have grown to their current height in the period the applicant has owned his unit and I acknowledge that prior to the planting of the Waterhousia, the views to the west were less obstructed (F(c));
 - the planting appears consistent with usual planning controls as pressed by Mr O'Donnell (see [35] above)(F(e)); the screen planting softens the appearance of the car park and the appearance of the applicants' building from the hotel and presumably is quite useful in moderating the glare of headlights as vehicles exit the hotel car park; thus the row of Waterhousia provide amenity to both properties (F(h)(i)(l));
 - absent any independent arboricultural evidence provided by either party, with the expertise I bring to the Court, the trees are young, healthy vigorous

specimens that could tolerate some further reduction without causing undue stress however as they are currently about 4.5-5m tall, reduction to 3m would remove a significant percentage of foliage and, in my opinion, would be detrimental to their health (F(k));

- the view to the west of the water and hills beyond is constrained by other trees and part of the hotel terrace/car park (F(m));
- the respondent has pruned the trees but not to the extent pressed by the applicant(s) (F(n));
- the trees are evergreen (F(p));
- the nature of the views affected and unaffected is considered in [46] above (F(q));
- the view to the west is obstructed from the living room and from a terrace adjoining bedrooms, however, views to the south are available from these areas (F(r)).

49 While I do not find the obstruction of views as a severe obstruction and thus have no jurisdiction to make any orders, after considering the matters relevant to s 14E(2)(b) I find insufficient reasons to warrant the reduction of the trees to 3m.

50 Therefore as a consequence of my findings for both obstruction of sunlight and views, the Unit 3 application is dismissed.

Findings Unit 4 – matter 267957 of 2017

51 During the on-site hearing the owner of Unit 4 was less concerned about the obstruction of sunlight to W1 than loss of views and agreed the obstruction of sunlight was not yet severe. However he pressed the shadowing illustrated in the photographs of the bedroom windows.

52 In regards to the alleged severe obstruction of sunlight to the nominated windows of Unit 4, I make the same findings as for Unit 3. That is, neither the photographs in the application claim form nor the 'view from the sun' diagrams are sufficient to prove that if there is a severe obstruction of sunlight to any of the nominated windows that the obstruction is as a consequence of the trees the subject of the application. The photographs show self-shading by elements of the apartment building as well as shading by other vegetation. As s 14E(2)(a)(i) is not met, the application in regards to sunlight is dismissed.

- 53 The applicant has identified viewing points from each of the rooms and associated terraces. I accept that from the living room and possibly from Bedroom 1, that until the planting of the Waterhousia, the applicant enjoyed less constrained views to the west. During the on-site hearing I observed filtered views of the sand on the dog beach at Bayview and boats on the water from W1 and W2. The views from the terrace outside W3 are more oblique and constrained by other vegetation and structures; the view from W4 and the lower terrace are principally of the fence.
- 54 For the reasons given for Unit 3, I am not satisfied that s 14E(2) is met for this elements of the application and thus the Unit 4 application is dismissed.

Conclusions and orders

55 Having considered the evidence provided by the parties and with the benefit of the site inspection, the Orders of the Court are:

- (1) In Matter 267956 of 2017 the application is dismissed.
- (2) In Matter 267957 of 2017 the application is dismissed.
- (3) In Matter 208987 of 2017 the matter is dismissed.

Judy Fakes

Acting Commissioner of the Court

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