



Land and Environment Court
New South Wales

Case Name: Fryday v The Owners – Strata Plan No 15039

Medium Neutral Citation: [2019] NSWLEC 1150

Hearing Date(s): 13 March 2019

Date of Orders: 1 April 2019

Decision Date: 1 April 2019

Jurisdiction: Class 2

Before: Galwey AC

Decision: (1) Pursuant to r 6.29 of the Uniform Civil Procedure Rules 2005 (NSW), respondents 1–5 listed on the application (P Richter, V Richter, J Baker, S Scott and R Jopling) are removed as parties to this matter, leaving The Owners – Strata Plan No 15039 as the only respondents.

(2) The application is refused.

Catchwords: TREES (DISPUTES BETWEEN NEIGHBOURS) – Part 2 application – damage to property – sewer – Part 2A application – whether the trees form a hedge – severity of sunlight obstruction – severity of view obstruction – whether views and sunlight were previously available to the applicant

Legislation Cited: Trees (Disputes Between Neighbours) Act 2006 (NSW)
Uniform Civil Procedure Rules 2005 (NSW)

Cases Cited: Coleman & anor v Leddy & anor [2013] NSWLEC 1094
Holland v Bell [2017] NSWLEC 1322
Johnson v Angus [2012] NSWLEC 192
Lord v Grech; Brooke v Grech [2015] NSWLEC 1190
McDougall v Philip [2011] NSWLEC 1280
Price & anor v Harrison & anor [2013] NSWLEC 1149

Summers v Kumar [2019] NSWLEC 1041
Wisdom v Payn [2011] NSWLEC 1012

Texts Cited: Review of the Trees (Disputes Between Neighbours)
Act 2006 (NSW) (2009)

Category: Principal judgment

Parties: Mark Fryday (Applicant)
The Owners – Strata Plan No 15039 (Respondents)

Representation: M Fryday, litigant in person (Applicant)
P Richter, agent (Respondents)

File Number(s): 2018/307449

Publication Restriction: No

JUDGMENT

The application

- 1 Next to Mark Fryday's Fairlight property, a row of tall, slender cypress trees grows alongside a neighbouring driveway. Mr Fryday has applied to the Court seeking orders for sewer pipe repairs and tree pruning, pursuant to both s 7 (Part 2) and s 14B (Part 2A) of the *Trees (Disputes Between Neighbours) Act 2006* (NSW) ('the Trees Act').
- 2 The application was initially made against individual owners of dwellings on the neighbouring Strata Plan. The trees grow on common property belonging to the owners of the Strata Plan. An earlier direction of the Court joined The Owners – Strata Plan No 15039 as respondents but did not remove the individual respondents. Any orders made should only apply to the owners of the Strata Plan. Therefore, pursuant to r 36.16(3B) of the Uniform Civil Procedure Rules 2005 (NSW), I include in the orders made below the removal of the five individual respondents named in the original application.

The Part 2 application

- 3 Mr Fryday's Part 2 application seeks compensation for repairing his sewer pipe and orders for all trees in the row to be pruned, on the grounds that roots from the trees have blocked his sewer pipe.

- 4 Mr Fryday obtained an estimate from Royal Flush Plumbing with options for replacing or relining his sewer pipe. His preference was that the pipe be relined, the estimated cost of those works and other costs being \$17,288. Mr Fryday submitted that it would be reasonable for the respondents to contribute 50%, or \$8,644, as the problem has been caused by the age and condition of his pipes as well as the roots of their trees.
- 5 Mr Fryday's Part 2 application seeks orders for pruning the trees, although the basis for this is not clearly explained. Lining the pipes should prevent roots entering for many years. Mr Fryday clarified that his principal aim is for relining of the pipe, but he was advised to seek orders for pruning within both parts of his application.

The Part 2A application

- 6 Mr Fryday's Part 2A application seeks orders for pruning all trees in the row to a height of 2.5 metres and then maintaining them at that height, on the basis that they severely obstruct views from, and sunlight to, his dwelling.

The trees

- 7 Twenty-seven fastigiate Italian Cypress trees (*Cupressus sempervirens* 'Stricta') ('the trees') are planted in a single row in the narrow garden bed between the respondents' driveway and the common boundary. They are spaced regularly, approximately one metre between each tree, with a larger gap between trees 5 and 6 and between trees 19 and 20. Due to their narrow form, the crowns of most trees are largely separate from adjacent trees.
- 8 The driveway and trees belong to the respondents. Owners and occupiers of several other properties have right-of-way access along the driveway.

The hearing

- 9 The hearing took place onsite, allowing observations of: the trees; Mr Fryday's path, beneath which lies his sewer pipe; views; view obstruction; Mr Fryday's windows near the trees; and other relevant features.
- 10 Mr Richter represented the respondents, with some comments from other owners of the Strata Plan during the hearing.

Relevant jurisdictional tests for the Part 2 application

- 11 Relevant jurisdictional tests for the Part 2 application are set out at s 10 of the Trees Act:

10 Matters of which Court must be satisfied before making an order

(1) The Court must not make an order under this Part unless it is satisfied:

(a) that the applicant has made a reasonable effort to reach agreement with the owner of the land on which the tree is situated, and

(b) if the requirement to give notice has not been waived, that the applicant has given notice of the application in accordance with section 8.

(2) The Court must not make an order under this Part unless it is satisfied that the tree concerned:

(a) has caused, is causing, or is likely in the near future to cause, damage to the applicant's property, or

(b) is likely to cause injury to any person.

- 12 I am satisfied that the applicant has made reasonable effort to reach agreement with the respondents and has given the required notice. The remaining relevant issues, then, are whether the trees have damaged Mr Fryday's sewer pipe and, if so, what should be done to remedy, restrain or prevent damage. If I find that trees have caused damage to the applicant's property, I can make orders as described at s 9 of the Trees Act, but only after considering the matters listed at s 12.

Have the trees damaged the applicant's property?

- 13 In early 2018, Mr Fryday's sewer was overflowing, so he engaged a plumber to clear it. The plumber found seven blockages along the pipe, adjacent to trees. Mr Fryday submitted that trees 6–19 have damaged the pipe.
- 14 As the sewer pipe is underground, beneath a concrete path alongside his dwelling, Mr Fryday relied on video footage taken within the pipe before and after it was cleared of roots. There is no dispute that roots were present in the sewer pipe.
- 15 Mr Fryday conceded he has not shown that the roots found in his sewer pipe were from the cypress trees, but submitted that he could wait until the next blockage to collect root samples for DNA analysis. As the applicant, Mr Fryday had the opportunity to collect all necessary evidence before making this

application. I see no reason to suspend the matter for an unspecified period, awaiting further evidence from Mr Fryday.

- 16 Mr Fryday submitted that, despite the age of his sewer pipe, it would not need repairing or replacing were it not for the respondents' trees.
- 17 The respondents refuted that roots of their trees have damaged Mr Fryday's pipe. They said the previous owner of the applicant's property had the same pipe cleared of roots repeatedly up until 2000, when gum trees thought to be causing the problem were removed. The respondents, in consultation with the then owner of the applicant's property and landowners with right-of-way access over the driveway, selected the cypress as a suitable replacement.
- 18 The respondents suggested that roots could come from the applicant's climbing fig, which grows on parts of the boundary wall.
- 19 The respondents submitted that the applicant's terracotta pipes are old, dating from the 1930s, and their condition has deteriorated with age. Cracks have not been caused by roots; rather roots have just grown into existing cracks. Pool works on the applicant's property damaged their own pipes, so are likely to have also damaged the applicant's pipe. The applicant pointed out that any damage to the respondents' pipes was a separate issue that has been resolved and does not provide evidence that those works damaged his own pipes.
- 20 While watching video footage taken within the sewer pipe after it was cleared of roots, the respondents pointed out fine cracks in the pipe, arguing that these were age-related rather than the result of any root growth.
- 21 The respondents submitted that the wall along the common boundary is likely to limit root growth from their trees into the applicant's property.

Findings

- 22 There is no sign that the sewer pipe has been directly damaged by roots. I accept that roots entered and blocked the pipe. This blockage, and the resulting overflow of sewage, count both as damage and as a health risk, or risk of injury. That is, damage has occurred, and there is a risk of damage or injury occurring in future. The damage that occurred was limited to the

blockage caused by tree roots, which has now been remedied. There is no current damage caused by tree roots requiring remedy or restraint, but there may be the need to prevent future damage.

23 Mr Fryday, however, has not shown that the roots which caused the blockage were from the cypress trees. Roots may be from his climbing fig, as the respondents suggested. The location of the blockage makes it more likely that cypress roots were responsible, but I cannot be satisfied to the extent required by s 10(2) that this is so.

24 Even if I could be satisfied that cypress roots were present in the pipe, Mr Fryday makes no claim for past damage, only for a portion of the cost of repairing his pipe to prevent future ingress and damage. Lining of the sewer pipe would prevent future ingress of roots, but might well be needed regardless of the cypress trees. Roots of the climbing fig, or other plants, may be equally likely to cause future blockages.

25 Because there is no evidence to indicate specifically which trees have caused damage or are likely to, I can't order pruning of the trees under Part 2. Orders can only be made for each tree that satisfies the test at s 10(2), as explained at [24] in *Summers v Kumar* [2019] NSWLEC 1041.

26 Based on the respondents' description of earlier pipe clearing efforts by the previous owner of the applicant's property, I find that the pipe's current condition is likely to be little different to its condition at the time of Mr Fryday's purchase. The pipe's condition, the extent of tree roots, and the likelihood of sewer pipe blockage, have changed little since Mr Fryday purchased his property, yet he is asking his neighbours to contribute to replacement of his 80-year-old sewer pipe.

27 For the above reasons, no orders will be made for the Part 2 application.

Relevant jurisdictional tests for the Part 2A application

28 Part 2A of the Trees Act applies only to certain trees (s 14A(1)):

14A Application of Part

(1) This Part applies only to groups of 2 or more trees that:

(a) are planted (whether in the ground or otherwise) so as to form a hedge, and

(b) rise to a height of at least 2.5 metres (above existing ground level).

(2) ...

- 29 For Part 2A, relevant jurisdictional tests are set out at s 14E(2) of the Trees Act (the test at s 14E(1) being similar [and similarly satisfied] to s 10(1)):

14E Matters of which Court must be satisfied before making an order

(1) ...

(2) The Court must not make an order under this Part unless it is satisfied that:

(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.

- 30 If I find that the trees form a hedge and cause a severe obstruction of sunlight or views for the applicant, I must consider matters listed in s 14F. If the obstruction's severity outweighs any reasons for not interfering with the trees, I can make orders described at s 14D.

Are the trees planted so as to form a hedge?

- 31 The trees are all more than 2.5 metres tall. While the applicant submitted that the trees form a hedge, the respondents disputed this. They submitted that the trees are a 'row' rather than a 'hedge', as there are gaps between the foliage of adjacent trees.

Findings

- 32 I am not convinced by the respondents' arguments. The trees are planted at regular close spacings. Were it not for their narrow form, their crowns would be touching. Although there are several decisions for Part 2A applications referring to the intent of the Trees Act, specifically that it is to deal with only the most serious hedges, especially those that form a dense wall-like screen (for instance, *Holland v Bell* [2017] NSWLEC 1322), there is no clear definition of 'hedge' in the wording of the Trees Act. There is no requirement within s

14A(1)(a) that each tree's crown is touching adjacent trees. There are several criteria that might need to be considered when determining if trees form a hedge. Preston CJ offered the following at [41] in *Johnson v Angus* [2012] NSWLEC 192:

“41 But the criterion of sufficient proximity does not exhaust the relevant criteria to be considered in determining whether trees are planted so as to form a hedge. Section 14A(1)(a), construed in its own terms and in the context of Part 2A, does not so circumscribe the criteria that may be considered in determining whether the trees are planted so as to form a hedge. Other criteria are relevant, including the species of trees planted; whether the trees are all of one species or different species and, if different species, the similarity or dissimilarity and compatibility or incompatibility of the different species in terms of morphology (the form and structure of the trees), function and growth of the trees; the planting arrangement of the trees, such as whether the trees are planted in a linear, curvilinear, or another spatial relationship conducive to the trees forming a hedge.”

- 33 The respondents took the Court to *Coleman & anor v Leddy & anor* [2013] NSWLEC 1094 where at [15] Fakes C quoted *Wisdom v Payn* [2011] NSWLEC 1012:

“15 By way of comparison, as considered on site, the 2001 and 2006 plantings along the western boundary are distinctly different in character to the row of *Camellia sasanqua* planted along the northern boundary of the respondents' property. The Camellias would, in my view, be readily perceived as 'planted so as to form a hedge'. 'So as to form a hedge' has also been considered in a number of other judgments including *Wisdom v Payn* [2011] NSWLEC 1012 at [45] where in part the Commissioners consider that the "the impression that is given by the planted arrangement of the trees must be one that, in an ordinary English understanding of the word, would be perceived as a hedge".”

- 34 The respondents' cypress trees are of a single species, uniform in appearance, planted in a linear fashion along their driveway, at close and regular spacings. I find they would be perceived as a hedge within the ordinary English understanding of the word.

Do the trees cause a severe obstruction of views from the applicant's dwelling?

- 35 Mr Fryday took the Court through the three levels of his dwelling, pointing out the view obstruction at relevant areas. He submitted that trees 6–27 severely obstruct his views. The rear of the dwelling faces south. On each level the main view is to the south, through large glass windows and doors. Southward views of North Harbour and beyond are largely uninterrupted. The trees grow along the applicant's western boundary and partially obstruct views to the southwest,

including the western end of North Harbour and North Harbour Reserve. Gaps between trees allow glimpses of those views.

- 36 On the upper level, the views are from the main bedroom. On the middle level, views are from the living and dining areas and a bathroom. On the lower level the views are from another living area and an outdoor deck.

Findings

- 37 I considered the overall view available at each level, and the extent of view loss. As the principal view is uninterrupted, and views across the side boundary are only partially obscured, I do not find the trees cause a severe obstruction of views from Mr Fryday's dwelling. Furthermore, even if I did consider the obstruction severe, for the same reasons as set out below regarding sunlight obstruction, I would not make any orders.

Do the trees cause a severe obstruction of sunlight to the applicant's windows?

- 38 Mr Fryday submitted that trees 6–19 severely obstruct sunlight to his windows, pointing out these windows at each level of his dwelling. He submitted that in winter his dwelling is cold as a result of the tree's shading.
- 39 These west-facing windows receive only afternoon sunlight, which is obstructed partially by the trees. For some windows, the obstruction might be considered severe. This does not require me to grant Mr Fryday's orders, as I must first consider matters at s 14F.

Matters to consider before making orders

- 40 Having considered the matters at s 14F, I find the following relevant.
- 41 The trees are close to the common boundary and to Mr Fryday's dwelling.
- 42 Mr Fryday submitted that the Court has repeatedly found this species to be unsuitable close to dwellings as it forms a wall-like screen (for instance *Lord v Grech*; *Brooke v Grech* [2015] NSWLEC 1190 at [10]), so the Court has frequently ordered its removal. However the trees he referred to were Leyland Cypress (*Cupressus × leylandii*) or other dense screen-forming cypress. His neighbours' trees are the slender cultivar of Italian Cypress.

- 43 The trees provide amenity for the respondents. Mr Fryday submitted that the respondents gain little amenity from the trees, seeing them only when they drive along their driveway, whereas he suffers their consequences constantly.
- 44 Mr Fryday conceded that the trees shade his west-facing wall during summer, but they make his house cold in winter. His extra heating costs during winter offset any cooling savings made in summer.
- 45 The trees' contribution to privacy is not significant. The respondents submitted that the trees filter out noise for Mr Fryday.
- 46 The windows to which sunlight is obstructed are the windows on the side wall of Mr Fryday's dwelling. They are smaller than the large south-facing windows and doors. On the middle and lower levels they are windows to living areas; on the upper level to a bedroom.
- 47 Most relevant to the outcome here, I find that when Mr Fryday purchased his dwelling the trees were of a similar height to their present height. The impact of the trees on Mr Fryday's access to sunlight (or indeed to his views) has changed not one bit since he purchased his property. Mr Fryday asserted that this should not prevent the Court making orders, referring me to *Price & anor v Harrison & anor* [2013] NSWLEC 1149, where orders were made for tree removal despite the hedge being present when the applicants purchased their property. Mr Fryday has chosen to present only part of Fakes C explanation in that matter. At [18] and [19] Fakes C explained:

“18 While the intent of the 2010 review of the Trees Act (and its extension to include Part 2A) was not to provide an applicant with more sunlight or views than were available to them when a property was purchased (see discussion in *McDougall v Philip* [2011] NSWLEC 1280 at [20] - [25]), the practical outcome of the Court's orders may have this effect. So it is in this matter. While I am certain that the applicants did not have unobstructed sunlight when they purchased their property, the practical difficulties of pruning and maintaining the trees are such that removal is the most sensible option.

19 However, given the visual impact the removal of the trees will have on the respondents' property, the parties agreed that the trees should be replaced with six advanced specimens of *Camellia sasanqua*. These trees will provide an attractive screen but will not reach a height that is likely to severely obstruct sunlight to the applicants' dwelling.”

- 48 The additional access to sunlight gained in that case was a result of the Commissioner's determination that pruning to the height at which the trees

were when the applicant purchased would be detrimental to the trees' viability, so replacing the trees was the preferred outcome. The Commissioner prefaced this explanation with a description of the Trees Act's intent, specifically, that it is not to provide an applicant with greater access to sunlight or views than was available to them earlier.

- 49 I have also previously relied on the *Review of the Trees (Disputes Between Neighbours) Act 2006* (NSW) (2009) ('the Review') to shed light on the intent of the Trees Act, for instance in *Holland v Bell* [2017] NSWLEC 1322 at [13]:

"13 On page 39 the Review describes the Trees Act's scope (with my emphasis):

The Court would only have the power to hear matters regarding:

...

...

...

... 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.

..."

- 50 Mr Fryday conceded that the trees' size has not changed in any material way since he purchased his property. For the reasons outlined above, I will not grant the orders he seeks in his Part 2A application.

Conclusions

- 51 Mr Fryday has not satisfied the Court that the need to reline his sewer pipe is a result only of the neighbouring cypress trees. He claims no compensation for past damage but wishes to prevent future damage. The situation regarding the neighbouring trees and his sewer pipe is no different to the situation at the time he purchased his property in 2014.

- 52 I do not find the neighbouring trees cause a severe obstruction to Mr Fryday's views. If they cause a severe obstruction of sunlight, this was also the situation at the time he purchased his property. The intent of the Trees Act is not to provide an applicant with greater access to sunlight or views than was previously available to them.

53 As a result, I will not grant the orders sought by the applicant under either Part 2 or Part 2A of the Trees Act.

Orders

54 For the reasons set out above, the orders of the Court are:

- (1) Pursuant to r 6.29 of the *Uniform Civil Procedure Rules 2005* (NSW), respondents 1–5 listed on the application (P Richter, V Richter, J Baker, S Scott and R Jopling) are removed as parties to this matter, leaving The Owners – Strata Plan No 15039 as the only respondents.
- (2) The application is refused.

D Galwey

Acting Commissioner of the Court

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