



Land and Environment Court
New South Wales

Case Name: The Owners Corporation Strata Plan 53347 v Ideal Beachside Pty Ltd

Medium Neutral Citation: [2017] NSWLEC 1627

Hearing Date(s): 23 October 2017

Date of Orders: 8 November 2017

Decision Date: 8 November 2017

Jurisdiction: Class 1

Before: Fakes AC

Decision: See [9]

Catchwords: TREES [NEIGHBOURS] : Damage to property; retaining wall; apportionment; Consent orders

Legislation Cited: Trees (Disputes Between Neighbours) Act 2006

Cases Cited: Nil

Texts Cited: Nil

Category: Principal judgment

Parties: The Owners Corporation Strata Plan 53347 (Applicant)
Ideal Beachside Pty Ltd (Respondent)

Representation: Applicant: Mr T Bacon (Solicitor)
Respondent: Mr D Grey (Agent)

Solicitors:
Applicant: Strata Title Lawyers

File Number(s): 203867 of 2017

Publication Restriction: No

JUDGMENT

- 1 COMMISSIONER: The applicant has applied under s 7 Part 2 of the *Trees (Disputes Between Neighbours) Act 2006* (Trees Act) for orders seeking the removal of trees growing on the respondents' Coogee property and replacement of a retaining wall and fence allegedly damaged by the trees. The applicant is concerned that given the dilapidation of the retaining wall, it poses a hazard to occupants and visitors.
- 2 In applications under Part 2, the key jurisdictional test is found in s 10(2). This states:
 - (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.
- 3 The trees in question are a large Camphor Laurel, Oleander and Illawarra Flame Tree growing at the rear of the respondent's property and close to the wall.
- 4 The hearing commenced on site with an inspection of both properties. The trees have been removed however there is photographic evidence of their existence and a number of large woody roots from the Camphor Laurel remain.
- 5 The wall is a double brick retaining wall along the common boundary. The wall is cracked and displaced and the render has started to come away. Photographs in the application claim form show a paling fence that had been erected on top of the wall in a state of collapse.
- 6 I am satisfied to the extent required by s 10(2) that the respondent's trees, in particular the Camphor Laurel, were a principal cause of the damage to the wall and as such, the Court's jurisdiction to make orders is engaged.
- 7 The hearing was adjourned to enable further discussions between the parties. The parties have proposed and filed consent orders, which give effect to those discussions. I note that proposed order 14 relates to the reserving of costs; Commissioners of the Court do not have the jurisdiction to order payment of legal costs, costs of expert reports, application fees and the like. If sought,

claims for these costs must be made by a Notice of Motion, which is heard and determined by a Judge or Registrar of the Court.

- 8 I am satisfied that the proposed consent orders are orders that can be made pursuant to s 9 of the Trees Act. The terminology has been amended to reflect the usual practice in these matters. The proposed orders have been renumbered as the first proposed order is a statement of jurisdiction rather than an order for something to be done.

Orders

- 9 By consent, the Orders of the Court are:

- (1) The respondent is to take all necessary steps to repair the damaged fencing and retaining wall ("the Fencing and Retaining Wall Works") subject to the conditions in the following Orders. The applicant is to pay for 20% of the cost of repairing the retaining wall and the respondent is to pay the remaining costs.
- (2) The respondent is to provide the applicant with the proposed drawings/ design from an appropriately qualified contractor, as well as a quotation from their selected contractor for the new fencing and retaining wall, within 14 days of the date of these orders, for their review.
- (3) The applicant is to review the proposed drawings and quotation within 14 days of the receipt, and must either provide consent to the drawings and quotation, or provide an amended design/ drawings and/ or an alternative quotation from a contractor.
- (4) In the event that the applicant's engineer requires any further amendments to the design/ drawings, the respondent's contractor must adopt these changes.
- (5) The respondent has a further 7 days to respond to any further quotation provided by the applicant in (3) and (4).
- (6) If no agreement in relation to quotation can be reached between the parties, the respondent is to engage the contractor that provided the least expensive quotation. However, that contractor must use the drawings/ design if amended by the applicant's engineer, in accordance with (4).
- (7) The respondent is to apply to Randwick City Council for any approval required for the works. The respondent must file any application with the Council within a further 14 days after reaching agreement with the applicant on the design and choice of contractor for the works. The respondent is to pay any fees incurred for any such application.
- (8) The respondent must carry out the works in (1) within 60 days of the date of consent from Randwick Council.

- (9) The applicant is to provide access to the respondent's contractors to carry out the works upon reasonable notice. The applicant is to ensure all occupiers' personal items in the area are removed prior to the works commencing and that the area is kept clear.
- (10) The respondent is to ensure the contractor is properly licensed and has current public liability insurance coverage of at least \$20 million prior to commencing the works. The respondent is to provide to the applicant a copy of a document evidencing the insurance coverage prior to works commencing on the site.
- (11) The respondent is to have the Fencing and Retaining Wall Works certified by an Independent Principal Certifying Authority, and to provide a copy of the certificates to the applicant within 2 days of receipt of same.
- (12) The applicant is to reimburse the respondent for 20% of the costs of the Contractor within 14 days of receipt of tax invoices and receipts for the completed works and after provision of Certification in (11).

Judy Fakes

Acting Commissioner of the Court

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