Griffiths & anor v Owners Corporation Strata Plan 9383 - [2016] NSWLEC 1294

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Land and Environment Court

New South Wales

Medium Neutral Citation:	**Griffiths & anor v Owners Corporation Strata Plan 9383 [2016] NSWLEC 1294**
Hearing dates:	18 July 2016
Date of orders:	18 July 2016
Decision date:	18 July 2016
Jurisdiction:	Class 2
Before:	Fakes C
Decision:	Application dismissed
Catchwords:	TREES [NEIGHBOURS] Hedge; obstruction of views; obstruction not severe
Legislation Cited:	Trees (Disputes Between Neighbours) Act 2006
Cases Cited:	Ball v Bahramali [2010] NSWLEC 1334 Haindl v Daisch [2011] NSWLEC 1145 Kiely v Willock; Kiely v Williams & anor [2015] NSWLEC 1356 Tenacity Consulting v Warringah Shire Council [2004] NSWLEC 140
Category:	Principal judgment
Parties:	Applicants: Deryck & Shirley Griffiths Respondent: Owners Corporation Strata Plan 9383
Representation:	Applicant: Mr D Griffiths (Litigant in person) Respondents: Ms J Graham, Mr J Willock, Mr M Williams (agents/ owners)
File Number(s):	153968 of 2016

Judgment

1. COMMISSIONER: Since 2006 the applicants have owned a unit in Queenscliff. In their application claim form they state that at that time, they obtained good daytime views of the ocean and Manly Beach from their living area and balcony. In the evening, they enjoyed the view of the broad span of lights across the full width of Manly Bay.

2. The applicants contend that while a view of Manly Beach remains across the rooftop of the respondent's dwelling, the growth of five Casuarina trees on the respondent's driveway has considerably diminished the applicants' day and night views to the point where it no longer includes the broad bay with its waves sweeping in to the surf and shoreline.

3. The applicants have applied under s 14B Part 2A of the *Trees (Disputes Between Neighbours) Act 2006* (Trees Act) for orders seeking the pruning or removal of the five trees. The basis of the application is that the trees severely obstruct views from their dwelling.

4. The respondent's trees have been the subject of a previous application under Part 2A of the Trees Act (see *Kiely v Willock ; Kiely v Williams & anor* [2015] NSWLEC 1356). That application (the Kiely application), made by an owner of another unit in the applicants' apartment building and which also sought removal or pruning of the trees on the basis that they severely obstructed views from that unit, was dismissed.

5. The respondent's position has not changed; they do not want the trees removed or pruned to the extent requested by the applicants.

6. In applications under Part 2A, there are a number of jurisdictional tests that must be sequentially satisfied. The respondent's property is across the road. As discussed in the Kiely judgment at paragraphs [6] to [8], the trees are trees to which Part 2A applies.

7. The key remaining test in this matter 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.

8. While s 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, the obstruction must first be found to be a severe obstruction as a consequence of the trees to which the Part applies.

9. The applicants own a unit on the first floor at the southern end of the unit block. Photographs taken in 2006 from the applicants' balcony show the views they describe in their claim form – that is, the beach, surf, most of the bay, the "St Patrick's" headland, the land/water interface across the bay, and in the distance, the ocean and horizon. The 2006 views are punctuated by a casuarina which is not the subject of the application, and by Tree 5 – the tallest of the five casuarinas in question. The view of the water is also punctuated by a tall block of units which can be seen behind Tree 5. The portion of horizon illustrated in the 2006 'B1' photograph is a strip visible between the tall unit block and other blocks of units further to the north. Tree 5 interrupts this portion of the view.

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10. The claim form also includes photographs taken in April 2016. These are relatively dark however they clearly show the view of Manly Beach, the surf and a reasonable portion of the bay.

11. The hearing was held on site and the views were observed from the applicants' balcony; the balcony adjoins the applicants' principal living area. On a sunny day I had a clear view of the beach, sand, surf, people on the beach, and the land/water interface across the bay. I was able to see the headland and horizon above it. While it is true that Tree 5 does obscure part of the distant view of the horizon, views of the water and horizon were visible through it. None of the other four trees obstruct any view of water; the view beyond these trees is of residential development.

12. The applicants contend that they greatly value the view of the horizon and passing ships. That view is more constrained from some viewing points than others.

13. As discussed in *Haindl v Daisch* [2011] NSWLEC 1145 at [26], the Court considers the view as a whole and not on a slice by slice basis. In using the word 'severe', the legislature has set a high bar. Perhaps the most apposite synonym is 'extreme' (see *Ball v Bahramali* [2010] NSWLEC 1334). The view loss in this case is not extreme. In determining severity of impact, the Court often has regard to the Planning Principle on view sharing published in *Tenacity Consulting v Warringah Shire Council* [2004] NSWLEC 140. The qualitative scale of impact at paragraph [28] gives a range of negligible, minor, moderate, severe and devastating. In the applicants' case, I would rate the impact as minor to moderate.

14. Therefore as s 14E(2)(a)(ii) is not met, the Court has no jurisdiction to further consider the matter.

15. Therefore, the Orders of the Court are:

    1. The application is dismissed.

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Judy Fakes

Commissioner of the Court

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