



Land and Environment Court
New South Wales

Case Name: The Owners of Strata Plan 4033 v Hughes

Medium Neutral Citation: [2023] NSWLEC 1007

Hearing Date(s): 25 October 2022

Date of Orders: 11 January 2023

Decision Date: 11 January 2023

Jurisdiction: Class 2

Before: Douglas AC

Decision: The Court orders are:

- (1) Within 60 days of the date of these orders, the respondent, at his expense, shall prune the initial fourteen metre section of the common boundary hedge, south of where it commences in the north-west corner of the respondent's land. The hedge shall be pruned to a height not exceeding 2.8 metres above the respondent's natural ground level.
- (2) During April of 2024, and during April of each subsequent year, the respondent, at his expense, shall prune the initial fourteen metre section of the common boundary hedge, south of where it commences in the north-west corner of the respondent's land, to a height not exceeding 2.8 metres above the respondent's natural ground level.
- (3) All pruning works shall comply with the Safe Work Australia Guide to Managing Risks of Tree Trimming and Removal Work, 2016.
- (4) Should access be required to the applicant's property to undertake these pruning works, the applicant shall grant such access upon receipt of at least 72 hours written notice from the respondent.
- (5) All works shall be undertaken during reasonable

daytime working hours.

Catchwords:	TREES (DISPUTES BETWEEN NEIGHBOURS) – high hedges – view obstruction severity – balance between views and privacy
Legislation Cited:	Trees (Disputes Between Neighbours) Act 2006 ss 14A, 14B, 14C, 14E, 14F, Pt 2A
Cases Cited:	Grantham Holdings Pty Ltd v Miller [2011] NSWLEC 1122 Haindl v Daisch [2011] NSWLEC 1145 McDougall v Philip [2011] NSWLEC 1280
Texts Cited:	Safe Work Australia ‘Guide to managing risks of tree trimming and removal work’, 2016
Category:	Principal judgment
Parties:	Owners of Strata Plan 4033 (Applicant) David Hughes (Respondent)
Representation:	C James (Agent) (Applicant) Non-appearance (Respondent)
File Number(s):	2022/190340
Publication Restriction:	No

JUDGMENT

- 1 **COMMISSIONER:** Strata Plan 4033 is located at ‘The Hill’ in Newcastle, high above Newcastle Harbour. It shares a long north - south boundary with a large property on its eastern side, which is owned by the respondent, Mr David Hughes. A row of mature Oleander trees (the trees) are growing along the respondent’s side of the common boundary.
- 2 Mr Hughes occupied his property in 2015 or 2016. The prior owner of his property maintained the Oleander trees and pruned their height relatively regularly, but Mr Hughes discontinued this practice.
- 3 As the trees grew taller and more dense, various owners of Strata Plan 4033, the applicant, reported increasing obstruction of views and of sunlight. Since March 2016, letters were sent to Mr Hughes, both directly and through the strata’s property agent, with a marked increase in frequency in 2020. In

October 2020 mediation was conducted between the parties through a Community Justice Centre (CJC) without a tangible outcome.

- 4 In November 2020, the respondent completed “partial trimming of the Oleanders”, but the applicant claims that by 2022, view and light obstructions were severe and progressively worsening. The respondent was sent a final letter of demand on 9 March 2022. The owners received no response from Mr Hughes, and, as a consequence, an application under s 14B of Pt 2A of the *Trees (Disputes between Neighbours) Act 2006* (Trees Act) was filed with the Court on 29 June 2022.
- 5 An initial directions hearing was conducted on 18 August 2022. The Registrar advised the applicants to amend their application to ‘The owners of Strata Plan 4033’, rather than three individual owners, and orders were made for the applicant to submit a new affidavit of service by 12 September 2022. An amended application was filed with the Court on 8 September 2022. There was no appearance from the respondent.
- 6 At a second directions hearing on 19 September 2022, the Registrar granted leave for Dr Colin James, the Chair of the Strata Committee, to appear as Agent for the applicant. The respondent again failed to appear.
- 7 The Owners of Strata Plan 4033 seek the following (summarised) orders:
 - (1) Within one month of these orders, the respondent will trim the six Oleander trees on the parties’ common boundary, as indicated on the Application Details (Form G), to a height of 2.5 metres (m) consistent with Pt 2A of the *Trees (Disputes Between Neighbours) Act 2006*, measured from the ground level of the applicant’s property.
 - (2) The respondent will maintain the height of the hedge annually to a maximum of 2.5m, measured as described in order 1.
 - (3) The respondent will pay all costs associated with this application and with complying with orders 1 and 2.
 - (4) In the alternative to orders 1 and 2, within one month of these orders, the respondent will:
 - (a) remove the hedge, and
 - (b) with the agreement of the applicant as to the type and cost, replace the hedge with an appropriate fence or hedge consistent with the Act, and

- (c) the respondent and the applicant equally share the agreed costs of order 4b.

The on-site hearing

- 8 As is customary, the hearing commenced at the respondent's property for an inspection of the trees. Dr James, Agent for the applicant, was accompanied by Ms Ryan. Mr Hughes was not in attendance. His partner, Ms de Nino advised that he had been away for some time but had been provided with the case documentation. Ms de Nino had not perused the application documentation, but as the resident of the property in Mr Hughes absence, and in the interests of justice and transparency, I granted Ms de Nino leave to participate in the proceedings.
- 9 The northern section of the respondent's trees, about 14m in length, is the subject of the application. It is comprised of long established *Nerium oleander* (Oleander) but also includes Camphor laurel and other self-sown weed trees. The trees average about 5m in height, and their stems display pruning wounds at various levels.
- 10 The Court moved to the applicant's property, which has apartments on three levels. The application described these three levels as ground floor, second floor and third floor and I shall retain this protocol. A ground floor unit was initially assessed for severe obstruction of light to a window of a dwelling, followed by Ms Ryan's second floor unit where the claim was for severe obstruction of views. Third floor apartments were not inspected as they were not obstructed by the hedge.
- 11 In consideration of the applicant's proposed orders, Ms de Nino did not want the Oleander's removed and replaced. She valued their advanced age and long connection to the property. Ms de Nino disputed the applicant's expectation that the Oleander's need to be trimmed regularly and submitted that the 2-2.5m height sought by the applicant was too low as it would greatly reduce her families' privacy.

Jurisdictional requirements – Part 2A

- 12 In Pt 2A matters, the Court must consider a number of jurisdictional tests before any orders can be contemplated. The process is set out in *Grantham Holdings Pty Ltd v Miller* [2011] NSWLEC 1122 at [17]-[22].
- 13 The first test is s 14A(1) of the Trees Act, that is, is the Oleander a hedge for the purpose of the Act?
- 14 Section 14A(1) states:
 - (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).
- 15 Six trees are located in a fairly straight row along the common boundary. They are spaced apart evenly, and I am satisfied that they were planted so as to form a hedge. The trees average 5m in height and thus s 14A(1) of the Trees Act is satisfied.
- 16 The applicant has satisfied s 14C of the Trees Act, by providing at least 21 days' notice of the lodging of the application and the terms of any order sought.
- 17 Section 14E(1)(a) of the Trees Act requires that the applicant has made a reasonable attempt to reach agreement with the owner of the land on which the trees are situated.
- 18 Copies of repeated attempted communication by the applicant since 2016 were included in the application. The majority of these attempts resulted in no reply from the respondent. In 2020, following requests by the applicant, mediation was undertaken by the parties through a CJC, without a tangible outcome, and a final letter of demand to the respondent in March 2022 again brought no reply.
- 19 I am satisfied on the basis of this evidence that the applicant has made a reasonable attempt to reach agreement with the owner of the land on which the trees are situated. The fact that the applicant made various concessions in its demands on the respondent in an attempt to negotiate an agreement and

continued to attempt further mediation with the respondent in May 2022 through a CJC, reinforces my conclusion. As a consequence, s 14E(1)(a) of the Trees Act has been engaged.

20 The next step is to assess the severity of the obstruction of sunlight to a window of a dwelling, and obstruction of views from the applicant's dwelling as a consequence of any or all of the trees in the hedges.

21 Section 14E(2)(a) states:

(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.

Ground floor apartment – obstruction of sunlight

22 The ground floor apartment was located in the southern section of the L-shaped apartment block. It was a narrow rectangular shape with windows facing east, close to the common boundary, and to the north. The apartment was relatively dark, but I was not satisfied that a severe obstruction of sunlight was as a consequence of the hedge.

23 The applicant's land near the common boundary is about a metre below the respondent's land. The application form G notes (at question 3) that the trees were 2 - 3m tall upon the applicant's occupation, and this is not disputed by the respondent. Based on my observation of past pruning wounds on the trees, this range appears reasonable, though 3m (from the applicant's side) appears a more accurate estimate.

24 The Trees Act's scope specifically excludes outcomes that provide applicants with greater sunlight access or views than were available upon their occupation, and therefore, this 3m hedge height provides the base line for analysis of the hedge's impact.

25 Considering both the lower level of the applicant's land and the close proximity to the common boundary, even if the hedge was only three-metres tall, it would

obstruct sunlight in the early and mid-morning, while the roof overhang would obstruct sunlight before noon due to these windows' eastern aspect.

- 26 Further, a large north facing window allowed sunlight access in the morning, but the building design largely restricted sunlight from the west in the afternoon. Though the applicant provided estimates of four hours sunlight lost in winter, and three in summer, it provided no basis for these estimates, and it is unclear if they were based on a hedge three metres tall, or on no hedge at all. No shadow diagrams were provided by the applicant to support its estimates of sunlight loss, notwithstanding that this is explicitly encouraged by the Court.
- 27 Though the hedge was impacting sunlight to windows of this apartment, I was not satisfied that the obstruction of sunlight as a result of the hedge was severe.

Second floor apartment – obstruction of views

- 28 In the second-floor apartment, viewing points nominated by the applicant were from the living area with the claimed severe obstruction relating to views towards the north-east and east.

- 29 In assessing the severity of an obstruction of a view, I am cognisant of the Court's interpretation of the words 'a view' in *Haindl v Daisch* [2011] NSWLEC 1145 (*Haindl*), which states, at [26]:

"However, we are of the opinion that the words a view used in s 14 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."

- 30 Views of Newcastle Harbour remain available to the north, along with district views, notwithstanding that a house to the applicant's north obstructs views in this direction.

- 31 In *Haindl*, at [64], Moore SC and Hewett AC, note:

"It is clear to us, as in other aspects of assessment undertaken by the Court in its merit jurisdictions, that the assessment of severity involves both qualitative and quantitative elements. To give an extreme example, applying the proposition we have earlier described that the view from a viewing location comprises the totality of the outlook from that location,

if that view comprises predominantly an unrelieved outlook toward unattractive and blank-walled built form and there is only a limited viewing corridor or limited viewing corridors past that built form to some attractive more distant elements, whether natural or built and whether iconic or not, a significant reduction of the attractive elements by trees on an adjoining property may well constitute a severe contextual obstruction of the view from that viewing point...”

32 Regardless of the residual available views, it is clear that the most desired views potentially available to the applicant, including those of Nobbys Headland and lighthouse, and the Pacific Ocean, are obstructed by the upper section of the hedge. Given the quality and desirability of the obstructed view, I am satisfied that the view obstruction as a consequence of the hedge is severe, and therefore that s 14E(2)(a)(ii) of the Trees Act is engaged.

33 As s 14E(2)(a)(ii) is met for the hedge, there is a need to consider the balancing of interests required by s 14E(2)(b). This states:

(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.

34 In order to determine the balance inherent in this subsection, consideration of relevant matters in s 14F is required, as follows:

- (a) The hedge is located in the respondent's property, loosely parallel to his western boundary, and in close proximity to the applicant's dwelling.
- (b) The trees were long established and were mature at the time of the applicant's occupation.
- (c) The trees have grown to their current height since that time.
- (d) The trees are not protected by Council's tree management controls.
- (f) Though the respondent's property appears quite historic, no submission was made regarding its heritage status. The Oleanders thus have no recognised historical, cultural, social or scientific value, but, along with other species employed for the property's hedges, they reflect planting fashions from the first half of the twentieth century, and maintenance of this continuity and historical link was significant to Ms de Nino.
- (g) The hedge makes little contribution to the local ecosystem and biodiversity.
- (h, i) The hedge provides a contribution to the natural landscape and the scenic value of the land on which they are situated, but it is not in a sufficiently prominent location to provide intrinsic value to public amenity.

- (k) This species is particularly hardy and resilient. It is tolerant of regular pruning for maintenance of height.
- (l) The hedge plays an important role in providing privacy for the respondent. Having said this, the hedge could be judiciously pruned to reduce the view obstruction, yet still provide privacy.
- (m) A house to the north of the respondent's property is also obstructing the applicant's view. Ms de Nino noted that a potential new building will likely block views to the north-east in the future. but the phrase "are severely obstructing" used in s 14E(2) requires an assessment in the present tense, without consideration of future changes.
- (n) In late 2020, the respondent undertook minor pruning to marginally reduce the hedge's height, but the hedge rapidly regrew.
- (p) The hedge is evergreen.
- (q) The view impacted is Newcastle Harbour, Nobbys Headland and the Pacific Ocean. Views of Newcastle Harbour to the north and district views remain available to the applicant from some apartments, but I am satisfied by the applicant's submission that the views obstructed by the hedge are particularly valuable.
- (r) The views are primarily from living areas within the apartments.

Conclusion

- 35 Having considered the discretionary factors in s 14F of the Trees Act, I am satisfied that 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.
- 36 I am not satisfied that removal and replacement of the hedge is an appropriate remedy, however, nor that it would be a proportionate response. A height of three metres when viewed from the applicant's property is a reasonable estimate of hedge height upon the applicant's occupation. This is not disputed by the respondent, it is consistent with the applicant's submission, and is evidenced by pruning wounds on the Oleander stems which provide a history of the height of past pruning.
- 37 Orders shall be made for pruning the hedge at about this height, allowing for retention of privacy for the respondent, relief from severely obstructed views for the applicant, and conformity with the intent of the Trees Act, to provide a remedy where an applicant has suffered the loss of sunlight or a view, but not

where the obstruction already existed at the time a person purchased their property: see *McDougall v Philip* [2011] NSWLEC 1280 at [22]–[24].

- 38 Though the applicant's claim of severe obstruction of sunlight to a window was refused by the Court, most apartment occupants will incidentally gain increased light as a result of pruning to relieve the view obstruction.
- 39 The cost burden for carrying out orders normally falls on the respondent, and there is no reason for this to vary in this case.

Orders

40 As a consequence of the foregoing, the orders of the Court are:

- (1) Within 60 days of the date of these orders, the respondent, at his expense, shall prune the initial fourteen metre section of the common boundary hedge, south of where it commences in the north-west corner of the respondent's land. The hedge shall be pruned to a height not exceeding 2.8 metres above the respondent's natural ground level.
- (2) During April of 2024, and during April of each subsequent year, the respondent, at his expense, shall prune the initial fourteen metre section of the common boundary hedge, south of where it commences in the north-west corner of the respondent's land, to a height not exceeding 2.8 metres above the respondent's natural ground level.
- (3) All pruning works shall comply with the Safe Work Australia Guide to Managing Risks of Tree Trimming and Removal Work, 2016.
- (4) Should access be required to the applicant's property to undertake these pruning works, the applicant shall grant such access upon receipt of at least 72 hours written notice from the respondent.
- (5) All works shall be undertaken during reasonable daytime working hours.

J Douglas

Acting Commissioner of the Court

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