
AUSTRALIA / JUDGMENT

Bao v Mylonas [2017] NSWLEC 1216

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Land and Environment Court

New South Wales

Medium Neutral Citation: Bao v Mylonas [2017] NSWLEC 1216

Hearing dates: 23 December 2016

Date of orders: 03 May 2017

Decision date: 03 May 2017

Jurisdiction: Class 2

Before: Galwey AC

Decision: The application is upheld. See orders at paragraph (37).

Catchwords: TREES (DISPUTES BETWEEN NEIGHBOURS); bamboo; damage to fence; orders for fence replacement; hedge; obstruction of sunlight; severe; orders for pruning.

Legislation Cited: Dividing Fences Act 1991

Trees (Disputes Between Neighbours) Act 2006

Cases Cited: Barker v Kyriakides [2007] NSWLEC 292

Category: Principal judgment

Parties: Minggang Bao (Applicant)

George Mylonas (Respondent)

Representation: Minggang Bao, litigant in person (Applicant)

Michael Arch, solicitor (Respondent)

File Number(s): 229175 of 2016

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Judgment

Background

1. Mr Mylonas ('the respondent') lives in an inner city single-storey terrace house, part of a row. Houses in the row have small back gardens, or courtyards, facing northeast. Beyond Mr Mylonas' rear boundary, to the northeast, is a 4-storey block of units.
2. In or around 1999 Mr Mylonas planted bamboo around the perimeter of his rear courtyard to screen the view of the brick apartment block, to provide privacy and to create a serene enclosed space. The bamboo, now 10-12 metres tall, has achieved those aims, forming a green screen around his courtyard.
3. In 2002 Mr Bao ('the applicant') purchased the property to Mr Mylonas' southeast. The bamboo was approximately 8 metres tall at that time. In 2004 Mr Bao obtained consent for a Development Application for improvement works to the rear part of his dwelling. The works were done in 2006.
4. Over time Mr Bao found the bamboo reduced the amount of sunlight to the rear of his dwelling and his garden. Debris from the bamboo fell in his garden, onto his roof and into guttering. The fence extending along the common boundary, from the rear of his dwelling, became displaced. Mr Bao approached his neighbour, seeking relief from these issues.
5. Mr Mylonas has taken no action, wishing to maintain the bamboo's benefits that he enjoys. So Mr Bao has applied to the Court, pursuant to both Parts 2 and 2A of the Trees (Disputes Between Neighbours) Act 2006 ('the Trees Act') seeking orders for the bamboo to be pruned and maintained at a height of 2.5 metres or lower, and for the fence to be fixed. The application under Part 2 is made on the basis that bamboo has damaged the fence. The Part 2A application arises from the obstruction of sunlight.
6. The hearing took place onsite, allowing for a view of the relevant matters before each party made submissions.

Application under Part 2

The fence

1. A timber paling fence approximately 1.2 metres tall runs along the common boundary between the parties' properties. Mr Mylonas' bamboo grows against the fence. Mr Bao says the bamboo has displaced the fence into his property. His landscaper has propped the section nearest his dwelling, where the fence is most displaced. Mr Bao wants Mr Mylonas to replace the fence along the entire common boundary, a length of approximately 10 metres.
2. Mr Bao contends that bamboo must be removed within 200 mm of the boundary to allow proper replacement of the fence.

3. Mr Bao wants Mr Mylonas to pay for these works as the fence would not require replacing were it not for the bamboo.
4. Mr Mylonas argues that there is no evidence that the fence's lean is attributable to the bamboo. He says the fence's 20-year age explains its condition, but doesn't see the fence's lean as a significant issue.
5. Mr Mylonas argues that the fence could be realigned, rather than being entirely replaced with a new fence.
6. Mr Mylonas contends that if the Court makes orders regarding the fence, the parties should share the costs, as they normally would for a common boundary fence. He says any orders should ensure the fence is located on the surveyed boundary, and that bamboo removal should be minimised. He argues that the fence could be re-aligned rather than replaced.

Debris

1. Mr Bao also contends that debris dropped by the bamboo has damaged his property, by landing and sitting on the garden and roof. He says it requires work to clean it up. Mr Mylonas argues that such matters have been dealt with by the Court before, as demonstrated by Barker and Kyriakides, and that Mr Bao is responsible for cleaning up his property.

Findings regarding damage to the fence

1. The fence is not otherwise badly dilapidated. I find that bamboo is the principal cause of the fence's displacement. Having displaced the fence, the bamboo has caused damage to the applicant's property, enlivening the Court's jurisdiction under Part 2 of the Trees Act.
2. Bamboo closest to the fence must be removed to prevent damage recurring. It appears almost impossible to remove the bamboo adjacent to the fence without demolishing the fence, so orders for simply re-aligning the fence are impractical. I accept Mr Bao's contention that bamboo within 200 mm of the common boundary will need to be removed to allow construction of a new fence.
3. Fence replacement will result in a better fence than the existing one even were it not damaged by the bamboo. Mr Bao should not gain improvements without some input. I appreciate he has spent time and money in making his application to the Court, but it would be reasonable for him to pay 40% of the cost of a new fence. However he should not have to pay for removal of bamboo adjacent to the fence.
4. The boundary will need to be surveyed prior to replacing the fence. The cost of this should be shared equally by the parties.
5. If there are parts of the fence along the common boundary not damaged by bamboo, the Dividing Fences Act 1991 gives the Court jurisdiction to make orders for the entire length of fence to be replaced.

Findings regarding debris

1. In *Barker v Kyriakides* [2007] NSWLEC 292, the Commissioners established a principle that has been consistently followed by the Court. Trees benefit the urban environment in which they grow, and it is reasonable to expect that those living in such an environment carry out maintenance on their property, including the regular cleaning up of external areas such as gardens, paving and roofs. If debris from a neighbouring tree caused damage to a surface by being left to sit there, the Court's jurisdiction may be enlivened but that would not ordinarily give cause to the making of any orders. And so in this case, as in many others, no orders will be made on the basis of fallen debris.

Application under Part 2A

Obstruction of sunlight caused by the bamboo

1. Mr Bao says the neighbouring bamboo obstructs sunlight to his dwelling from April to September. He says a living room window is shaded by the bamboo. Mr Bao contends that, for much of this period, sunlight is obstructed for up to six hours each day, from 10 a.m. until 4 p.m.
2. Mr Bao says the bamboo obstructs sunlight to his garden, although the Act's jurisdiction only reaches to obstruction of sunlight 'to a window of a dwelling' (s 14 E(2)(a)(i)).
3. Mr Bao says he needs access to sunlight for medical reasons, although such direct access to sunlight would be best gained in the garden, to which the Court's jurisdiction does not extend. Mr Bao also contends that shade from the bamboo prevents grass growing in his garden and laundry drying on his clothesline.
4. Mr Mylonas appreciates the benefits of the bamboo. He has created a peaceful and serene outdoor room, walled by verdant bamboo. He wants to maintain the screening that the bamboo provides, preventing overlooking into his property from the units, and softening the otherwise hard outlook from the rear of his dwelling, where living spaces are located.
5. Mr Mylonas argues that Mr Bao has provided no shadow diagrams demonstrating the extent of sunlight obstruction. He has therefore supplied his own, which show sunlight obstruction at the winter solstice, including the obstruction caused by the multi-storey building to the northeast. He argues that because Mr Bao has not demonstrated a severe obstruction with evidence such as shadow diagrams, the Court cannot be satisfied that any obstruction is severe.
6. Mr Mylonas says that, at the winter solstice, the units to the northeast prevent any sunlight reaching Mr Bao's windows until midday, and then the windows would only have sunlight for two hours.

7. The Trees Act's jurisdiction is only enlivened if the sunlight obstruction is 'severe' (s 14 E(2) (a)(i)). Mr Mylonas contends that the obstruction here is not severe, relying on previous decisions made by the Court and other planning principles. He argues that typical planning controls include a general principle that windows of living areas need only to receive 3 hours of sunlight. He says the Court has found that utility rooms such as bathrooms and toilets do not warrant protection.
8. According to Mr Mylonas, even if the obstruction were severe, the balance of matters to be considered at s 14 F of the Trees Act should fall in his favour. He says the bamboo existed prior to construction of the additions to Mr Bao's dwelling. He says pruning the bamboo to 2.5 metres would have a negative impact on it. He argues the amenity and screening provided by the bamboo is significant. He says other factors cause much of the sunlight obstruction. And he questions whether the rear of Mr Bao's dwelling is used as a principal living area.

Findings regarding sunlight obstruction

1. For the purposes of the Trees Act, bamboo is a tree. Mr Mylonas established many bamboo plants along the outer perimeter of his courtyard to provide screening. There is no doubt in my mind that the bamboo comprises multiple trees planted so as to form a hedge. According to s 14A, the Trees Act applies to the bamboo.
2. The bamboo obstructs sunlight to the rear windows of Mr Bao's dwelling. At least part of this section of the dwelling includes living areas. I accept Mr Bao's claim that he spends time in this part of his house. One window may be to a bathroom, but this does not prevent orders being made on the basis of the obstruction to another window.
3. Prior to Mr Bao's renovation, windows were present in the dwelling in a similar position. Mr Bao therefore had access to sunlight at a window in a similar position – it is not a new situation that he has created.
4. The obstruction occurs during winter, when sunlight and its warmth are most appreciated.
5. The units to the northeast also obstruct morning sunlight to Mr Bao's dwelling during winter. Mr Mylonas' shadow diagrams show obstruction at the winter solstice. However the unit building's contribution would be less, and for shorter periods, further from the winter solstice, while the bamboo's contribution would remain significant for many months due to its location and proximity to Mr Bao's dwelling. I accept Mr Bao's contention that the impact of the bamboo is obvious onsite. Shadow diagrams from the winter solstice alone do not demonstrate the extent of the obstruction. Severity is not necessarily defined by numbers of hours, but can be a result of perception. If sunlight to Mr Bao's window is obstructed by other static features for several hours, the remaining hours of sunlight may indeed be more critical. A building won't be moved, whereas plants can be pruned and, often, still maintain their positive attributes.

6. The obstruction of sunlight is exacerbated by the bamboo's habit, as stems closest to the common boundary lean into and hang over Mr Bao's property.
7. I am satisfied that the bamboo causes a severe obstruction to Mr Bao's window.
8. The bamboo's benefits to Mr Mylonas are real and significant: amenity, privacy, shading and cooling. However, I find that sufficient of these benefits could be maintained with the bamboo at a shorter height. I noted during the onsite view that maintaining the bamboo at a height of at least 6 metres would retain the privacy screening he seeks between his dwelling and the neighbouring units. When asked what impact pruning the bamboo to such a height would have on its health and the amenity it provides, Mr Mylonas was uncertain.
9. The hedge was approximately 8 metres tall when Mr Bao purchased his property. There is no suggestion in the Trees Act that applicants are entitled to more sunlight than they may have enjoyed previously. Pruning the bamboo to a height greater than 6 metres would maintain its screening benefits. Pruning annually below 8 metres would allow for regrowth to resume the height that existed when Mr Bao purchased his property.

Orders

1. Based on the foregoing, the orders of the Court are:
 - (1) The application is upheld.

Survey

- (2) Within 14 days of the date of these orders the parties are each to obtain two quotes from registered surveyors to provide an accurate survey of the common boundary from the rear wall of the applicant's dwelling to its north-eastern end where it meets the properties' rear boundaries. The parties are to select the cheapest quote from the four quotes, unless they agree on one of the other quotes.
- (3) Within 30 days of the date of these orders the respondent is to engage the surveyor selected in (2) to survey the common boundary from the rear of the applicant's dwelling to the rear boundary, to mark it onsite with pegs, and to provide the respondent with a plan showing this surveyed boundary.
- (4) The respondent is to provide the applicant with at least two days' notice of the surveyor's date for carrying out the works.
- (5) The applicant is to allow all access required during reasonable hours of the day for the surveyor to carry out the boundary survey.
- (6) Within 7 days of receiving the survey plan and invoice, the respondent is to provide the applicant with a copy of the survey plan and a copy of the paid invoice.

- (7) Within 7 days of receiving a copy of the paid survey invoice, the applicant is to pay the respondent 50% of the cost of the survey.

Fence

- (8) Within 30 days of the date of these orders the parties are each to obtain two quotes from suitable contractors to:
1. remove and dispose of the fence along the common boundary, from the rear wall of the applicant's dwelling to the rear boundary;
 2. remove to ground level and dispose of any bamboo within 200 mm of the pegged, surveyed boundary; and
 3. construct along this surveyed section of the common boundary a new fence of similar materials and height to the existing fence. The invoice must be itemised to show the cost of removing and disposing of bamboo within 200 mm of the boundary as a separate item.
- (9) The parties are to select the cheapest quote from the four fencing quotes, unless they agree on one of the other quotes.
- (10) Within 60 days of the date of these orders the respondent is to engage the contractor selected in (9) to carry out the works described in (8).
- (11) Both parties are to allow access to the contractor to carry out the works.
- (12) Within 7 days of receiving an invoice for the completed fencing works, the respondent is to provide the applicant with a copy of the paid invoice.
- (13) Within 7 days of receiving a copy of the paid invoice, the applicant is to pay the respondent 40% of the cost of fence removal and replacement (but not of bamboo removal and disposal).

Bamboo pruning

- (14) Within 30 days of the date of these orders the respondent is to engage a suitably qualified contractor with appropriate public liability insurance to prune the bamboo surrounding his rear courtyard to a height no greater than 7 metres.
- (15) Every subsequent year within one month of the anniversary of the date of these orders, the respondent is to engage a suitably qualified contractor with appropriate public liability insurance to prune the bamboo surrounding his rear courtyard to a height no greater than 7 metres.
- (16) The respondent is to provide the applicant with at least two days' notice of the works in (14) and (15) above.
- (17) The applicant is to allow access required during reasonable hours of the day for the works in (14) and (15) to be completed.

D Galwey

Acting Commissioner of the Court

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