

AUSTRALIA / JUDGMENT

Bolanos v Turpin [2021] NSWLEC 1810

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Land and Environment Court

New South Wales

Medium Neutral Citation: Bolanos v Turpin [2021] NSWLEC 1810

Hearing dates: 17 December 2021

Date of orders: 17 December 2021

Decision date: 17 December 2021

Jurisdiction: Class 2

Before: Douglas AC

Decision: The Court orders that:

(1) The application is dismissed.

Catchwords: TREES (DISPUTES BETWEEN NEIGHBOURS) –trees growing near boundary of respondent's land – damage caused by flying foxes – no jurisdiction under the Trees Act

Legislation Cited: Trees (Disputes Between Neighbours) Act 2006, ss 7, 8, 9, 10

Uniform Civil Procedure Rules 2005

Cases Cited: Barker v Kyriakides [2007] NSWLEC 292

Hornsby Shire Council v Malcolm (1986) 60 LGRA 429

Murray v Shoebridge [2007] NSWLEC 785

P. Baer Investments Pty Limited v University of New South Wales [2007] NSWLEC 128

Robson v Leischke (2008) 72 NSWLR 98; [2008] NSWLEC 152

Category: Principal judgment

Parties: Deidre Bolanos (Applicant)

John Turpin (Respondent)

Representation: Counsel:

D Bolanos (Self-represented) (Applicant)

John Turpin (Self-represented) (Respondent)

File Number(s): 2021/286557

Publication restriction: No

Judgment

This decision was given as an extemporaneous decision. It was given orally and has been revised and edited prior to publication.

Background

1. COMMISSIONER: The applicant, Deidre Bolanos, owns a property in Bass Hill, while John Turpin, the respondent, is her side neighbour, to the west. Between the properties is a bitumen sealed public laneway, about four metres wide and there is a gutter and a narrow verge on the respondent's side. This laneway, and both boundaries, run from north to south. The applicant's house has been constructed quite recently, while the respondent's dwelling is long established, and is leased to tenants.
2. The trees, four mature *Syagrus romanzoffiana* (Cocos or Queen Palm), about 10-11 metres in height with a canopy spread of about 8-9 metres, are planted about 600mm inside Mr Turpin's land, roughly parallel to the boundary facing the laneway. Three of the trees are located in the small front yard at the southern end, while the fourth is closer to the middle of the boundary, further to the north. There is a gap of about five metres between the trees and Ms Bolanos' side boundary.
3. Ms Bolanos lodged an application, pursuant to s 7 of Part 2 of the Trees (Disputes between Neighbours) Act 2006 (the Trees Act), in order to remedy damage that she says is currently occurring as a result of the trees, to prevent damage, that she believes is likely in the near future, and to mitigate risk of injury occurring as a result of the trees. The source of the damage is flying-foxes which the applicant says, occupy and/or feed from the trees.
4. At question 4 of her application, Ms Bolanos notes damage as a result of flying-fox excrement to boundary metal and brick fences, metal roof, exposed aggregate and marble paved paths, bricks and render, swimming pool and surrounds, garage doors, cladding, light fittings, and her water tank. The applicant says that she can't use her outdoor clothesline as a result of the flying-fox excrement, and that screeching noises that the flying-foxes make at night disturbs one of her children's sleep.

The applicant's proposed orders

1. In her application, Ms Bolanos proposes the following orders:

1. Respondent to remove (4) Cocos Palm (*Syagrus romanzoffiana*/ Queen Palm) trees which is (sic) causing significant damage to the Applicant's property. The cost of the tree removal to be borne by the Respondent. Three comparable tree removal quotes have already been sought by the Applicant and sent to the Respondent on 15th December 2020.
2. Reimbursement of professional cleaning costs to the Applicant for costs relating to cleaning of flying fox excrement from the swimming pool and exterior house facade, including fixtures and fittings. Refer to attached quotes.
3. Reimbursement of the Applicant's costs for the preparation of their application to the Land & Environment Court of NSW, including court fees, independent arborist report and disbursements, totalling \$821.30. Refer to attached invoices/receipts.

The respondent's case

1. Mr Turpin resists the proposed order for removal of the trees. In communication with Ms Bolanos by SMS on 15 December 2020, the respondent said, "I have decided that there are many more pressing priorities for me financially than cutting down the trees which I like".

The on-site hearing

1. The hearing was conducted on-site. Both parties were self-represented.

Jurisdictional requirements

1. With respect to s 7, an owner of land may apply to the Court for an order to remedy, restrain or prevent damage to property on the land, or to prevent injury to any person, as a consequence of a tree to which this Act applies that is situated on adjoining land.
2. The Land and Environment Court (LEC) has applied the decision of the Court of Appeal in *Hornsby Shire Council v Malcolm* (1986) 60 LGRA 429, in which the Court of Appeal held that adjoining does not mean immediately linked to or contiguous with. Trees located across a public street (*P. Baer Investments Pty Limited v University of New South Wales* [2007] NSWLEC 128) or separated by a public walkway (*Murray v Shoebridge* [2007] NSWLEC 785) from the applicant's property have been held to be "on adjoining land". Therefore, though these two properties are separated by a public laneway, I am nonetheless satisfied that for the purpose of this application, the trees are "situated on adjoining land".
3. Ms Bolanos has satisfied the requirement under s 8 of the Trees Act: to serve notice to the respondent more than 21 days prior to the proceedings.
4. She has also satisfied s 10(1)(a) of the Trees Act; to make a reasonable effort to reach agreement with the owner of the land on which the trees are situated, as displayed by evidence of messages and quotes she has sent to the respondent over a period of more than twelve months.

5. The next major test that is posed, by s 10(2) of the Trees Act, is that the Court must be satisfied that the tree concerned has caused, is causing or is likely, in the near future, to cause damage to the applicant's property, or is likely to cause injury to any person.
6. With respect to the claim of damage from flying-fox excrement, the Court has decided that the damage, or risk of injury must be caused by the tree itself, not by an animal living in, or on the tree. Therefore, the Court has no jurisdiction to deal with applications concerning trees harbouring or attracting such animals.
7. This is explained in *Robson v Leischke* (2008) 72 NSWLR 98; [2008] NSWLEC 152 (*Robson*), where, at [189], Preston CJ says:

"Finally, the specification of the tree as being a cause of damage to property or injury to any person excludes damage or injury directly caused by animals, such as mammals, birds, reptiles or insects, which may be attracted to a tree or use it for habitat. Thus, although a tree when it flowers might attract bees seeking nectar in the flowers, and the presence of the bees might increase the risk of persons in the vicinity being stung by bees, it is not the tree itself that is likely to cause such injury of bee sting to any person, but rather it is the bees: see *Immarrata v Mourikis* [2007] NSWLEC 601 (12 September 2007) (Bly C, Fakes AC). Similarly, the fact that an animal which has caused, is causing or is likely to cause in the near future damage to property on adjoining land, uses a tree as habitat, such as for feeding, roosting or nesting, does not result in the tree itself having caused, causing or being likely to cause in the near future damage to the applicant's property: *Dooley v Newell* [2007] NSWLEC 715 (23 October 2007) (Moore C, Thyer AC) at [22]-[23]."

1. Therefore, there can be no successful claim under the Trees Act related to flying-fox excrement, and this element of the applicant's claim is dismissed.
2. Within her application, Ms Bolanos included a report from Dr Trevor Hawkeswood of Advanced Arborist Reporting, dated 6 August 2021, which noted that "this report is intended for use in the Land and Environment Court of NSW" (LEC). Dr Hawkeswood did not satisfy the requirement of the LEC of acknowledging having read and agreeing to be bound by the Expert Witness Code of Conduct (Code of Conduct) in Sch 7 of the Uniform Civil Procedure Rules 2005.
3. Given Dr Hawkeswood's stated intention for his report to be used in the pending proceedings, failure to acknowledge the Code of Conduct does not release him from his obligations to the Court, but a consequence of this failure is that the significance attached to his contribution to Ms Bolanos' case shall be discounted.
4. On numerous occasions in her application, Ms Bolanos mentioned the close proximity of palm fronds and noted that they almost overhung her boundary.
5. At [55]-[56] of *Robson*, Preston CJ addresses the issue of encroachment under common law, saying;

"55 Nuisances of the first kind, causing an encroachment, are exemplified by branches or roots of a tree growing on the defendant's land, encroaching into the air above or the soil below the neighbour's land: Clerk & Lindsell on Torts, 19th ed, Sweet & Maxwell, London, 2006, [20-07], p 1165.

56 Mere encroachment into the neighbour's land is insufficient to complete a cause of action for nuisance; special damage must be suffered by the neighbour as a result of the encroachment to obtain the remedies of damages or injunction: *Asman v MacLurcan* (1985) 3 BPR 9592 at 9594."

1. This means that even if palm fronds were encroaching over her property, no remedy is available under the Trees Act, unless the fronds were also causing damage.
2. Dr Hawkeswood went further, claiming in his report that:

"Palm leaves are continuously falling onto Ms Bolanos' property during windstorms and other times. They continuously produce leaves and the older ones die regularly often falling into Mrs Bolanos' yard....The palm trees are so overgrown that when it's windy, the palms sway onto eaves/gutters making it noisy all night and day".

1. At my site visit the closest fronds were about 300mm from Ms Bolanos' boundary fence and about 1100mm from eaves and gutters. Though Ms Bolanos noted that on one occasion the respondent's tenants had the palms pruned, she made no written or verbal representation that such pruning had been recent, or that the palms were any different in appearance at the site hearing, relative to their form and appearance on which she based her application.
2. As a result, I do not accept Dr Hawkeswood's claim of refuse continuously falling into the applicant's land or fronds sweeping eaves and gutters. As shown in Photos 3 – 5 of Ms Bolanos' application, dying Cocos palm fronds normally progressively arch down to hang fairly vertically pendant beside their trunk before abscising and falling fairly close to the trunk base. Flowers and fruit are also produced close to the trunk in large inflorescences, and similarly normally fall close to the trunk. Photo 2 attests to this, showing accumulation of fruit in the lane close to the respondent's boundary, and photo 4 shows fallen fronds, similarly located. Live fronds are normally well attached to the trunk.
3. Even if debris from the trees was occasionally dropping and blowing onto the house, pool or other external surfaces of Ms Bolanos' property, under the Trees Act, this alone does not constitute damage.
4. The Court's position is described at [171] of Robson, where Preston CJ said that "annoyance or discomfort to the occupier of the adjoining land occasioned by nuisances of the third kind", is not "damage to property on the land" within s 7 of the Trees Act. "Hence leaves, fruits, seeds, twigs, bark or flowers of trees blown onto a neighbour's land might cause annoyance or discomfort to a neighbour, but unless they also cause damage to property on the neighbour's land, they will not be actionable under s 7."

5. The issue of maintenance required to deal with such refuse is addressed in *Barker v Kyriakides* [2007] NSWLEC 292, which, at para 20, establishes the Tree Dispute Principle:

"For people who live in urban environments, it is appropriate to expect that some degree of house exterior and grounds maintenance will be required in order to appreciate and retain the aesthetic and environmental benefits of having trees in such an urban environment. In particular, it is reasonable to expect people living in such an environment might need to clean the gutters and the surrounds of their houses on a regular basis."

"The dropping of leaves, flowers, fruit, seeds or small elements of deadwood by urban trees will not ordinarily provide the basis for ordering the removal of or intervention with an urban tree."

1. Other than small elements of refuse of this nature possibly blowing onto the applicant's land, no damage caused as a result of the trees has been proven.
2. Both the applicant and Dr Hawkeswood claimed that the trees may uproot in storms and thus cause damage to Ms Bolanos' property. This is unlikely, as Cocos palms, by the nature of their dense fibrous root systems, are generally well anchored in the ground, and their trunks are particularly flexible and resistant to impacts of winds. Soil around the base of all four palms appeared undisturbed, and no sound evidence was provided to support this ambit claim.
3. In conclusion, based on the reasons above, all elements of the applicant's claim with respect to damage to her property as a result of the trees are dismissed.

Risk of injury

1. Ms Bolanos claimed that the trees pose a safety issue because the fallen fruit are a "trip hazard for pedestrians who access this thoroughfare" and "also attract rodents and cockroaches". While tripping on fruit may present a low risk of injury, I accept the respondent's argument that the usage or occupancy of the lane would be infrequent as the lane "doesn't go anywhere", and also that the area of fruit distribution is relatively limited, around the base of each trunk.
2. Further, Ms Bolanos noted prior contact with Council to arrange cleaning of the lane. Such maintenance is reasonable for Council to complete, and a readily available means of mitigating an already low risk.
3. Dr Hawkeswood also made representations that flying-foxes may cause injury as a result of disease. He noted that "the swimming pool chlorine would kill bacteria but the bat faeces have added significant costs in time and money for regular pool cleaning and disinfecting. The smelly faeces on soil is more dangerous if handled. All bat droppings are a possible hygiene hazard and could contain bacteria like *Samonella* or *Escherichia coli* or leptospirosis".

4. Had the application included a claim for risk of injury related to diseases such of those mentioned above by Dr Hawkeswood, during the preparatory directions hearing of the case, the Court would have provided specific Supplementary Standard Directions requiring an applicant to provide properly qualified medical or scientific evidence of a link between the injury and the trees which are the subject of the application. These Supplementary Standard Directions are in the following terms:

"(1) Further to direction 6 of the principal directions in this matter, the applicant is to provide, by the close of business on (date), any statement of medical or arboricultural evidence and any supporting medical or arboricultural peer reviewed literature relied upon in support of a claim that a tree which is the subject of the application is a "likely cause of injury to any person";

- (2) Any expert evidence concerning matters contained in 1 above is to include acknowledgement that the expert has read and agrees to be bound by the Expert Witness Code of Conduct in Schedule 7 of the Uniform Civil Procedure Rules 2005."
1. No such evidence was provided to the court, nor has any formal risk assessment or other evidence been provided that could satisfy the Court that a genuine risk of injury any greater than low exists in this situation. A low risk is considered to be acceptable, so this element of the applicant's claim is also dismissed.
2. Overall, the onus is on the applicant to prove their case and Ms Bolanos has failed to do this. She has not provided appropriate or sufficient evidence to substantiate, on the balance of probability, that damage and or injury, as a result of the trees, has occurred, is occurring, or is likely to occur in future. Therefore, s 10 of the Trees Act is not satisfied, and I have no jurisdiction under s 7 of Part 2 of the Trees Act to make any orders with respect to the tree. As a result, there is also no requirement to consider the discretionary matters in s 12.
3. With respect to Ms Bolanos' claim for re-imbursement of costs for court fees, arborist report and disbursements, totalling \$821.30, Commissioners do not have powers to order such costs. Claims for items such as these require lodgement of a Notice of Motion to the Court, which is heard before the Registrar, or a Judge.

Orders

1. As a consequence of the foregoing, the Court orders that:
 1. the application is dismissed.

.....

J Douglas

Acting Commissioner of the Court

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