AUSTRALIA / JUDGMENT

Buffier v Ball

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Land and Environment Court

New South Wales

Medium Neutral Citation:

Buffier v Ball [2026] NSWLEC 1635

Hearing dates:

26 February 2026

Date of orders:

25 September 2026

Decision date:

25 September 2026

Jurisdiction:

Class 2

Before:

Douglas AC

Decision:

The orders of the Court are:

(1) The application is refused.

Catchwords:

TREES (DISPUTES BETWEEN NEIGHBOURS) — high hedges — view obstruction — do the trees form a hedge

Legislation Cited:

Trees (Disputes Between Neighbours) Act 2006 (NSW), Pt 2A, ss 3, 10, 14A, 14B, 14C, 14E, 14F

Cases Cited:

Black v Jeihooni (No 2) [2024] NSWLEC 13

Grantham Holdings Pty Ltd v Miller [2011] NSWLEC 1122

Haindl v Daisch [2011] NSWLEC 1145

Hickey v Inman [2022] NSWLEC 1491

Johnson v Angus (2012) 190 LGERA 334; [2012] NSWLEC 192

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

Smith & Hannaford v Zhang & Zhou [2011] NSWLEC 29

Tenacity Consulting v Warringah (2004) 134 LGERA 23; [2004] NSWLEC 140

Waugh v Payne [2026] NSWLEC 1064

Wein v Reeves [2022] NSWLEC 1019

Wisdom v Payn [2011] NSWLEC 1012

Texts Cited:

Port Stephens Development Control Plan 2025

Category:

Principal judgment

Parties:

Michael John Buffier (Applicant)

Roger Geoffrey Ball (First Respondent)

Denise Ball (Second Respondent)

Representation:

Counsel:

N Hammond (Applicant)

B Woolfe (Solicitor) (Respondents)

Solicitors:

Hills Solicitors (Applicant)

Woolf Associates Solicitors (Respondents)

File Number(s):

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Nil

Judgment

Introduction

COMMISSIONER: This is one of two applications lodged with the Court by Mr Buffier on 31 October 2025, which were heard together. Here, the respondents are Mr and Mrs Ball, whose Fingal Bay property is diagonally downslope from Mr Buffier's land. The northwestern corner of Mr Buffier's property is the southeastern corner of the Balls' land. This is sufficient to satisfy the requirements of the Trees Act.

The respondents in the second application are the Balls' east side neighbours', Mr Johnson and Ms Hume, who share their rear boundary with the applicant.

Both applications are made under s 14B of Pt 2A of the Trees (Disputes between Neighbours) Act 2006 (Trees Act) and Mr Buffier has proposed orders for removal or pruning of trees to restore and hence maintain his views.

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].

The Court cannot make orders under Pt 2A of the Trees Act unless it is satisfied that the trees form a hedge (s 14A(1)), and are causing a severe obstruction of sunlight to a window of an applicant's dwelling, or of a view from an applicant's dwelling (s 14E(2)(a)).

If so satisfied, the Court must determine if "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" (s 14E(2)(b)). In contemplating orders, a range of matters at s 14F inform the balancing of the parties' interests.

Background

From the upper level of his dwelling, Mr Buffier, the applicant, enjoys a view of Fingal Bay beach and Fingal summit to the north north-west and undulating coastal landforms, bushland, and the Tasman Sea across an arc through east to southeast.

Mr Buffier's property is in Pacific Drive, on a ridge above the respondents' land, while the Balls' frontline property faces Marine Drive, where beach and water views are largely unimpeded

The Balls occupied their property in 2000 and Mr Buffier purchased his property as a 'holiday home' in 2001. According to Mr Buffier, the Balls' began planting trees throughout their back garden soon after, the majority of which were Bangalow, Alexander, and Kentia palms. Only one large Bottlebrush tree predated the Balls' planting.

Based on the applicant's submissions and photographs, the respondents' trees started to grow into the Buffier's Fingal Bay beach view in or around 2012. By 2024, Mr Buffier contended the trees were heavily obstructing his family's beach view so in February 2024, he instructed his solicitor to write to the respondents, "seeking a reduction in height of the trees blocking our view".

On 1 April 2024, Mr Buffier visited the Balls to request removal and pruning of their trees to re-instate his view, but the Balls did not engage with Mr Buffier. Consequently, Mr Buffier made an application under the Trees Act, which was stamped by the Court on 31 October 2025.

The on-site hearing

The application against the Balls was heard initially. Both parties were legally represented; the applicant by Ms Hammond of Counsel and Mr Allen, of Hills Solicitors, and the respondents by Mr Woolf of Woolf Associates Solicitors, accompanied by Ms Haege-Thorvadson.

Attached to Mr Buffier's Tree Dispute Claim Details (Exhibit B), as Attachment 1, was a survey of the three sites by Duggan Mather Surveyors (applicant's survey), dated 19 May 2025, which included sight lines to Fingal Bay beach with and without an indicative sample of the respondents' trees to illustrate the impact of the trees on the view.

Site plans were included at Attachment 2 and Attachment 3 was a landscape and arboricultural report dated 14 June 2025 by Mr Kenworthy (Kenworthy report), an Australian Qualification Framework (AQF) level 5 arborist of Sydney Landscape Consultants.

The scope of the Kenworthy report was identification of the species of trees in the adjacent properties, their current and potential heights, and provision of a report including a plan demonstrating the locations of all trunks within both (respondents') properties, in scale, consistent with the survey plan. The survey was conducted in conjunction with Mr Kenworthy's site visit on 9 October 2024, and the Kenworthy report integrated sheets TS1 and TS2 from the applicant's survey. Mr Kenworthy noted the inability to access the respondents' property limited his data collection.

Attachment 4 of Exhibit B contained photographs and commentary on the view obstruction from each nominated location, separated for each application. Otherwise, the attachments were common to both applications, including Attachment 5, the Port Stephens Development Control Plan 2025 (DCP), Part B1 Tree Management, and Attachment 6, which was a series of comparative photographs of the Fingal Bay beach view from 2002, 2012, 2018, and 2023.

Exhibit C was an affidavit of Mr Allen, the applicant's solicitor, dated 19 December 2025 which referred to the Kenworthy report and included survey plans TS1 and TS2, which were incorporated in the Kenworthy report in A4, enlarged to A3 and in scale.

Exhibit D was a 'Statement of Facts' by Mr Buffier, dated 11 February 2026, in response to Mr Ball's Statement of 2 February 2026 (Exhibit 2).

After accessing the respondents' property for the first time on the day before the final hearing, the applicant advised the respondents of amendments to the trees comprising hedges and to the proposed orders. The applicant's claim of insufficient visibility to adequately view the trees prior to the access visit the day before the hearing was reasonable justification for the amendment of the proposed orders. The applicant's amended proposed orders are Exhibit E.

The applicant also submitted an 'Evidence Matrix', which addressed each of the jurisdictional requirements.

The respondents submitted a landscape architectural and arborist report dated 3 February 2026 by Ms Elke Haege-Thorvadson (Haege-Thorvadson report), an AQF level 5 arborist, registered landscape architect, and qualified horticulturist. The report's scope was, (a) opinion on whether the trees are planted so as to form a hedge, (b) opinion on the impact of pruning the trees in accordance with the orders sought in the applications, (c) other matters required to be considered by the Court which are within Ms Haege-Thorvadson's expertise, and, (d) assessment of view impacts and review of the Kenworthy report.

Ms Haege-Thorvadson noted that the respondents provided a previous landscape and arboricultural report by Sydney Landscape Consultants dated 18 December 2023, and a survey plan by the respondents' surveyor, North Point (respondents' survey), of 16 January 2026 (Exhibit 3), which indicated the locations of approximately 55 trees in the Balls' rear yard.

The site plan in Haege-Thorvadson report was adopted for the hearing. With the benefit of site access and the respondents' survey, the site plan included accurate tree locations and clarified misidentification from the Kenworthy report.

The parties in 2025/00420086 Buffier v Johnson, which followed, engaged the same legal representation, and expert witnesses. While the two applications have clear similarities, the respondent parties' sites displayed differences with respect to tree species, form, arrangement, the extent of obstruction, and privacy that the trees afforded the respective respondents. Thus, separate assessment and judgments are required.

The site

The hearing commenced in the respondents' rear yard which was filled with palms and similar strappy leaved subtropical vegetation. To accommodate the distinct upward slope, Mr Ball had installed sloping garden beds throughout the yard beside and around stone stairs, paving, and winding paths across the slope to Mr Ball's aviary in the southeast corner and a clothesline and utility area to the southwest.

The Court moved to the applicant's property to assess the severity and characteristics and of view obstruction from 9 locations as a consequence of the trees. Nominated viewing locations included the first-floor kitchen, living area, and deck, and a ground floor bedroom, living area, and back terrace. Oral submissions followed.

The applicant's submissions

Upon purchasing the property in May 2001, the applicant had "clear unencumbered views of Fingal Bay, including a full view of the beach and beach/water interface". While the Ball's Bottlebrush tree (Callistemon viminalis) (T14) was already present, the respondents planted the majority of the palms and other trees after their occupation in 2000.

The applicant's photographs from 2012 show some of the trees had grown above the Balls' roof and by October 2024, the applicant's beach and water view was said to be "almost completely obscured" by the Balls' trees.

Amongst the 55 trees on the respondents' property, the applicant contended there were 3 hedges that satisfied the requirements of the Trees Act. In the amended proposed orders, the alleged hedges were referred to as rows.

Row 1 (red row) comprised T20-T23 and T41-T44 inclusive. Row 2 (yellow row) comprised T14, T16-T19 inclusive, T49, and T50. Row 3 (purple row) was T29, T30, T30A, T31, and T48.

The applicant contended that "the Court would be satisfied that the palm trees have been planted so as to form the hedges as described in the applicant's revised proposed orders" as the selected trees formed relatively straight lines or similar regular patterns and arrangement within the garden beds. The applicant claimed the trees were taller than 2.5 m and had been planted with the intention of screening. Therefore, the applicant contended the nominated rows satisfied s 14A of the Trees Act.

A palm is defined as a tree for the purpose of the Trees Act, and the Court has found rows of palms to form hedges in previous cases. Mr Buffier has made a reasonable effort to resolve the issue and reach agreement with the respondents (s 14E(1)(a)) and has given 21 days' notice of his application (s 14C and s 14E(1)(b)).

Considering the applicant's photographic evidence, the Balls' trees caused a severe obstruction of a view from Mr Buffier's dwelling including the kitchen, living room windows, and balcony adjacent to the living room.

Applying the “Tenacity Principles, the views are valuable views of the beach including the whole of Fingal Bay and land/water interface”, and “they are views directly over the rear boundary (not a side boundary); from both sitting and standing positions”.

The applicant noted relevant considerations at section 14F are the trees have grown to a height of 2.5m or more during the applicant's occupation (s 14F(c)) and that the trees contribute to local biodiversity, privacy, landscaping, and shade (s 14F(g) and (l)), but contended that a gum tree in a reserve north of the Balls’ trees would not block his beach view if the proposed orders were made (s 14F(m)). The valuable nature of a water view and the dwelling locations from which obstruction occurs were reiterated with respect to s 14F(q)) and s 14F(r)), respectively.

A Tree identification assessment table at p4 of the Kenworthy report noted 2 Bottlebrush trees and 14 Bangalow palms, most of which were listed as being 6.5-7m taller than the Balls’ roof ridgeline. Mr Buffier reproduced the table as Attachment 3 in Exhibit D.

Amended proposed orders

The applicant’s proposed orders for Row 1:

T20 – Clump of 3 Bangalow palms – remove 2 of 3 trunks.

T21 – Clump of 3 Bangalow palms – remove all 3 trunks.

T22 – Clump of 3 Bangalow palms – remove 2 of 3 trunks

T22 – Single Bangalow palm – remove

T41 – Kentia palm – no action

T42 – Species uncertain – no action

T43 – Species uncertain – no action

T44 – Species uncertain – prune and maintain below 3 metres

Proposed orders for Row 2:

T14 – Large Bottlebrush tree – Trim to practical height – remove 2 of 3 trunks.

T16 – Species uncertain – West of path – remove.

T17 – Single Bangalow palm – east of path – remove.

T18 – Species uncertain – remove.

T19 – Species uncertain – remove.

T49 – Pair of smaller palms – no action.

T50 – Clump of 3 Bangalow palms – remove 2 of 3 trunks

Proposed orders for Row 3:

T29 – Large single Bangalow palm – remove.

T30 – Large single Bangalow palm – remove.

T30A – Newly identified tree for hedge – no action.

T31 – Large single Bangalow palm – remove.

T48 – Species uncertain – no action

The hedges identified above are to be maintained by pruning in November each year to a height of 3 metres.

The respondents' submissions

In Exhibit 2, Mr Ball said the property had been owned by his wife's family since about 1974 and was purchased and occupied by Mr and Mrs Ball in 2000. After a large Banksia robusta located in the eastern corner of the rear yard died soon after and some Eucalyptus trees succumbed to poisoning, the Balls' "found the rear yard unbearably hot" and planted the palms "to reduce the heat by shading" and re-establish privacy from overlooking buildings, previously provided by the large Banksia.

Mr Ball submitted that properties in Pacific Drive were then largely holiday rentals, the occupants of which engaged in regular parties which occasionally included beer bottles being thrown into their yard and onto their dwelling roof, and light illuminating the rear yard and shining through the respondents' bedroom window. Although most of these Pacific Drive properties are now owner occupied, "our strategic plantings of palms, Bottlebrush and other species as a canopy over a whole garden has protected our property from the light and noise disturbance we used to face" and reestablished a high degree of privacy.

Mr Ball claimed, "experience as a horticulturist" and that he and Mrs Ball previously ran a nursery and said, "[w]e also have a keen interest in horticulture and in creating and nurturing our beautiful and tranquil rear garden" and "spend much of our day in the rear yard". Mr Ball noted, "the palms and bottlebrush tree have also created a rainforest effect and provide shelter and food for a multitude of fauna" (listed at Attachment 3) and expanded on the importance of the Bottlebrush. Mr Ball contended that on a day forecast to reach 22 degrees, the fully exposed front yard was 29 degrees while the back yard was 19 degrees.

The respondents contended the Court will not be satisfied the application meets the jurisdictional tests in section 14A(1) of the Trees Act because "none of the alleged three rows of trees for which orders are sought ... are planted so as to form a hedge". The respondents cited the decision of Wisdom v Payn [2011] NSWLEC 1012 (Wisdom); at [45], where the Court found,

> *"We reject this proposition. We are satisfied that the words forming a hedge mean that there must be a degree of regularity and arrangement, in a linear fashion, of the trees being considered. Whilst such an arrangement may be more than one tree deep and does not need to be in a perfectly straight line, the impression that is given by the planted arrangement of the trees must be one that, in an ordinary English language understanding of the word, would be perceived to be a hedge."*

The respondents referenced Black v Jeihooni (No 2) [2024] NSWLEC 13 (Black), an appeal against a decision by Sheriden AC, heard by Pain J in February 2024. At [42], her Honour noted, "[t]here Is no definition of 'planted .., so as to form a hedge' in section 14A(1) of the Trees Act" and "in the absence of a statutory definition of hedge there is not a lot of context to consider".

At [44], Black considered the "many variables" related to hedges identified by Chief Judge Preston in Johnson v Angus (2012) 190 LGERA 334; [2012] NSWLEC 192 (Johnson); at [41]:

> *"41 But the criterion of sufficient proximity does not exhaust the relevant criteria to be considered in determining whether trees are planted so as to form a hedge. Section 14A(1)(a), construed in its own terms and in the context of Part 2A, does not so circumscribe the criteria that may be considered in determining whether the trees are planted so as to form a hedge. Other criteria are relevant, including the species of trees planted; whether the trees are all of one species or different species and, if different species, the similarity or dissimilarity and compatibility or incompatibility of the different species in terms of morphology (the form and structure of the trees), function and growth of the trees; the planting arrangement of the trees, such as whether the trees are planted in a linear, curvilinear, or another spatial relationship conducive to the trees forming a hedge."*

In Black; at [48], the distance between the trees and the relationship of the foliage were both considered appropriate matters in the determination of whether trees form a hedge for the purpose of the Trees Act.

In response to the appellant's claim that a respondent's subjective planting intention was inconsistent with the statutory context of "so as to form a hedge", in Black; at [50], Pain J noted that Preston CJ "thoroughly considered the phrase "so as to form a hedge" in the context of the Trees Act in Johnson; at [24] and [37], as follows:

> *"24 The phrase 'trees that are planted' is followed by the adverb clause of purpose 'so as to form a hedge'. The subordinating conjunction 'so as' indicates a relationship of purpose between the phrases 'trees that are planted' and 'to form a hedge'. The idiom 'so as to' means 'in order to' or 'with the result or purpose of' (Macquarie Dictionary). The idiom 'so as to' is always followed by the infinitive of a verb. In this case, the idiom is followed by the infinitive of the verb 'form'. The meanings of the transitive verb 'to form' include 'to make or produce; to serve to make up, or compose; serve for, or constitute' and 'to place in order; arrange; organise' (Macquarie Dictionary).*

...

37 ...The earlier grammatical analysis establishes that s 14A(1)(a) requires that the trees that are the subject of the application under s 14B of the Trees Act be 'trees that are planted ... so as to form a hedge'. As I have explained earlier, this requires that the trees, at the time of planting, be

planted so as to form a hedge and, having been so planted, the trees continue that state of affairs of being planted so as form a hedge. The requirement of being planted so as to form a hedge is to be understood as requiring that the trees be planted in order to form, or with the result or purpose of forming, a hedge."

Consequently, in Black; at [51], Pain J found the submission that the subjective intention of a landowner can never be relevant (to whether trees form a hedge), "is not accepted and is inconsistent with the findings in Johnson v Angus".

The respondents submitted the following "Additional Comments":

> *"Trees T20-T23*

The trees as listed do not have regular spacings but in any event are part of planting with other palms and should not be isolated so as to artificially create a 'hedge'.

...

Trees T14, T16, T17, T18, T19, T22, T23

T14 is the Callistemon. It was planted well before any of the other trees and by previous owners (see Mr Ball's statement). It was accordingly not planted so as to form a hedge.

The other listing of the trees omits other trees which form part of a copse: T49, T50, T53, T52, T51, T21, T20. The [sic] are in plan and visually on site of [sic] a unique landscape matrix setting that Ms Thorvaldson describes in the paragraphs 8.2 to 8.4 of her report. They are not planted to form a hedge.

...

Trees T20-T23

These trees planted in the centre of the respondents' garden have no relationship or bearing to a linear shape, they have different spacings, there are other trees in the same beds. It is submitted an argument that these trees are planted so as to form a hedge is not tenable."

For the reasons why none of the trees in the proposed orders are planted so as to form a hedge, the respondents relied on para 8.2 – 8.4, and para 8.6 – 8.10 of the Haege-Thorvadson report, as follows:

> *"8.2 The landscape typology and vegetation growing on the respondents site is horticulturally diverse, unique, thoughtfully considered and maintained consistently to a high standard to achieve a landscape outcome and deliberate outdoor setting with comfort-conditions that provide outdoor shelter from wind, privacy, shade, purposeful microclimate cooling and warming of varied landscape spaces, native habitat creation and attraction, biodiversity, amenity and human oriented function.*

8.3 The gardens are arranged in formed garden beds with placed dry-stone rock low walls and arranged purposefully to provide overhead dappled shade to be able to grow an assorted understory of shrubs. The result is a series of well-proportioned garden 'rooms' with distinct functions and carefully orchestrated light and shade to allow for the understory plantings, as well as amenity functions such as drying line area allowing morning sun and an outdoor sitting and BBQ area with deep afternoon shade, with close proximity to the house.

8.4 As a Fellow of the Australian Institute of Landscape Architecture, registered landscape architect, and registered horticulturist, I find this garden setting and diversity, its design and understory plant palette a fine and established example of advanced horticultural skill and continued experienced tending over many years to achieve.

...

8.6 Are the palms a hedge? It is my opinion that the palms were not planted so as to form a hedge.

8.7 Most of the palms, being mature are however taller than 2.5 metres and are planted closely together.

8.8 Some of the palms to be appear to be in a linear form in that the formation of the garden beds albeit mostly curvilinear in shape and the straight lot boundary edges have resulted in some of the palms appearing in a linear arrangement. Per my description of landscape in Chapters 8.1 to 8.5 above, the purpose of the planting in my opinion was not for a hedge.

8.9 The form of Alexander and Bangalow palms are typically not a species selected for the purposes to create a hedge, in that the form of these species of palm is of a slender single stem with growth only at the tip or crown. That is; the palms are not shrub-like or bushy with secondary branching, and do not have leaves at lower levels on the plant, resulting in being able to see under the palm crown (fronds), through typically slender, vertical and singular stems (trunks).

8.10 The Alexander and Bangalow palms cannot be readily pruned as a hedge. Hedges tend to be planted with the intent of hedging or shaping, these species of palms cannot be readily pruned or shaped (other than to remove dead fronds or spent seeds on the other underside of the crown). The respondents' palms do not have dead fronds persisting on the underside of their crown and have been maintained. It can be seen that the palms have been consistently maintained over their life by the overall condition of the palms and ground and soil around the palm root crown bases. The other visual indication if a palm has been maintained over its life is via the visual appearance on the trunk of the ridges that are at the attachment points of former fronds."

Findings

The first jurisdictional question, whether a palm is a tree, is considered at s 3(1) of the Trees Act. The definition of a tree includes “any woody perennial plant, any plant resembling a tree in form and size, and any other plant prescribed by the regulations.” Therefore, a palm is a tree for the purpose of the Trees Act

Do the trees form a hedge?

Section 14A(1) considers whether the trees form a hedge for the purpose of the Trees Act.

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).

Upon initially viewing the respondents’ back yard, I could not discern any hedges within the densely planted landscape. The vegetation was mainly planted in stone edged garden beds of varied shapes which aligned with adjacent paving, stairs, and paths traversing the slope to the aviary in the southeast corner and a clothesline to the southwest.

The applicant’s team appeared to struggle to discern and clarify which trees the hedges comprised, which were selected subsets from the overall palette of trees that were the most obstructive of Mr Buffier’s view and considered closest to a linear arrangement, in keeping with Wisdom; at [45].

In selecting trees for the hedges, the applicant omitted adjacent trees that failed to conform to the linear or curvilinear patterns in which the nominated trees had allegedly been planted to form a hedge. In Row 1, Kentia palms were included along with adjacent Bangalow palms, notwithstanding they have a distinctly different potential height, canopy spread, and appearance, and no orders were proposed for the Kentia palms. At least one alleged hedge also included trees from separate garden beds divided by a path or steps and thus included a wide gap and inconsistent spacing.

At 8.11 and 8.12, the Haege-Thorvadson report noted, “[the] applicant (within Attachment 4) singles out several palms as a hedge but disregards other palms that are within the formed garden beds and appearing as copses (agglomerations) of palms to create the landscape typologies described above. The applicant's claim states there are three hedges, which in my opinion is not correct...I have taken regard to vegetation in the rear of the respondents’ property. I do not believe that there are three hedges as the applicant claims.” The Haege-Thorvadson report claimed there was one hedge, but it was a row of Dracaena’s that was not raised in the application.

Row 1 was closest to displaying a “hedge like arrangement”, as the nominated trees extended in a line roughly parallel to the respondents’ eastern boundary. By way of explanation, at 8.8, the Haege-Thorvadson report said, “[s]ome of the palms appear to be in a linear form in that the formation of the garden beds albeit mostly curvilinear in shape and the straight lot boundary edges have resulted in some of the palms appearing in a linear arrangement”. Row 1 also featured omitted trees (see Haege-Thorvadson report, at 8.11).

While the trees may have appeared as a homogeneous obstruction, the vegetation mimicked a natural form with three distinct layers and included a relatively wide variety of species. In the absence of access to the respondents’ property, the Tree identification assessment table, at p4 of the Kenworthy report, listed 14 Bangalow palms and one Bottlebrush tree (T14) as the cause of the view obstruction. The Haege-Thorvadson report noted 5 species of palm, Dracaena marginata, which was used extensively, one Yucca, and 2 Bottlebrush trees. The Bangalow palms included clusters of three palms planted together mixed with individual palms.

For alleged hedge/ Row 2, which included a large Bottlebrush tree (T14) along with palms, I concurred with the Haege-Thorvadson report, at 8.27 and 8.28, which said:

> *“8.27 Whilst the palms and the Bottlebrush are native species, the Bottlebrush T14 has a distinctly different form to the palms in the adjacent garden bed (T16 T17, T18, T 19, T 22, T 23), and in my opinion performs a different function being to provide canopy cover and shade to the aviary and to attract bird life and wildlife. For these four reasons it is my opinion that T14 does not form part of a hedge nor was it planted so as to form a hedge.*

8.28 The applicant claims to group the Bottlebrush tree T14 together with palms, however there is separation not only in species, freeform, and purpose but also a physical separation by a set of stairs and separated low stone walled garden beds between the copse of palms. The Bottlebrush T14 appears to be older in age than the palms.”

Along with 4 sound reasons at 8.24-8.27 of the Haege-Thorvadson report to substantiate why the large Bottlebrush tree is not part of a hedge, the fact the Bottlebrush was present alone prior to the Balls’ occupation, prevents it being part of a hedge for the purpose of the Trees Act. A single tree cannot be a hedge, nor can it be joined to a hedge planted nearby in the future. In Johnson; at [43]”, his Honour stated:

> *“Thirdly, the Johnsons' submission fails to address the fundamental factual finding of the Commissioner, which prevented the Turpentine from being able to be described as being planted so as to form a hedge. The Commissioner found that the Turpentine was perhaps 60 or even 70 years old, while the palms were perhaps 15 or 20 years old. As a consequence, the Turpentine, even if it were to have been planted, was planted some 45 to 55 years before the palms were planted and hence could not have been planted so as to form a hedge with the palms (paras 28 and 30). If the Turpentine cannot be said to be planted so as to form a hedge, it does not satisfy the requirement in s 14A(1)(a) of the Trees Act. It cannot later acquire the status of being planted so as to form a hedge by the palms being planted to form a hedge in proximity to the Turpentine (Emphasis added)”*

Applying the applicant's hedge determination criteria (including selective omissions and bridging of paths) to the population of trees in the respondents' rear yard, I saw various other relatively straight or curved rows of trees that may be said to form hedges, including some with more uniformity of species and/or spacing than the nominated rows. However, there were none I considered to be hedges that satisfied the Trees Act.

I find the omission of trees and bridging of paths in the selection of hedge trees to optimise the selected trees' linear arrangement undermines the credibility of the applicant's hedge determination process. I was unconvinced that the nominated rows had the appearance of hedges. Further, the applicant submitted insufficient justification of why the respondents would have grouped the nominated trees into rows and planted them as 'hedges', rather than planted for the reasons in Mr Ball's Statement, which were consistent with the garden's appearance.

I found it improbable and implausible that the nominated trees formed hedges. The applicant provided no persuasive submissions to advance his claim beyond possible. In Smith & Hannaford v Zhang & Zhou [2011] NSWLEC 29 at [62], Craig J said, "something more than a theoretical possibility is required in order to engage the power under the Trees (Disputes between Neighbours) Act to make an order to remedy, restrain or prevent damage". Similarly, "more than a theoretical possibility" is required to persuade the Court the nominated trees were planted "so as to form a hedge", at s 14A(1)(a) of the Trees Act.

Therefore, based on evidence adduced from my site inspection and the parties' submissions, I am more persuaded by the respondents' contention that the trees are not hedges currently and that there is insufficient evidence to substantiate the applicant's contention that the trees were "planted so as to form a hedge". Conversely, the evidence of Mr Ball and Ms Haege-Thorvadson was consistent and compelling.

Mr Ball submitted credible reasoning about the objectives of his planting and the densely planted multi-layer garden reflects the resulting achievement of these aims, through ongoing maintenance. I found no meaningful indication that the trees were planted so as to form a hedge. Rather, I concur with Ms Haege-Thorvadson, at 8.4, "I find this garden setting and diversity, its design and understory plant palette a fine and established example of advanced horticultural skill".

There are many past cases where an applicant has failed to persuade the Court that trees form a hedge, thus failing to engage s 14A(1)(a) of the Trees Act (see Hickey v Inman [2022] NSWLEC 1491 and Wein v Reeves [2022] NSWLEC 1019). Additionally, the Trees Act provides no remedy for severe obstruction of a view or sunlight to a window by individual amenity trees or groups of amenity trees (see Waugh v Payne [2026] NSWLEC 1064).

Significantly, in Johnson; at [37], satisfaction of:

> *"... s 14A(1)(a) requires that the trees that are the subject of the application under s 14B of the Trees Act be 'trees that are planted ... so as to form a hedge'. As I have explained earlier, this requires that the trees, at the time of planting, be planted so as to form a hedge and, having been so planted, the trees continue that state of affairs of being planted so as form a hedge. The requirement of being planted so as to form a hedge is to be understood as requiring that the trees be planted in order to form, or with the result or purpose of forming, a hedge."*

Johnson, the initial appeal under Pt 2A of the Trees Act where Preston CJ interpreted the language of the recently introduced legislation, is a key binding precedent for Commissioners and Judges. In Black, Pain J reiterated the requirement for findings to be consistent with Johnson when the circumstances are similar.

As his Honour states; at [38] of Johnson:

> *"If trees are not planted at all, but rather are self-sown, or are not planted for the purpose of forming a hedge, but rather for some other purpose, then Part 2A will not apply to the trees. In either of these circumstances, it will not matter whether the trees, as events have happened, have in fact grown so as to form a hedge. Part 2A will not apply to the trees."*

In this case, neither arm of this requirement was satisfied as there were currently no hedges for the purpose of the Trees Act, nor was there compelling evidence of any intention by the respondents to plant hedges. Consequently, s 14A(1) of the Trees Act is not engaged.

If I was wrong, and one or more of the applicant's nominated rows was a hedge that satisfied s 14A(1), the next test is at s 14C of the Trees Act, requiring the application for orders to be given to owners of affected land, and to Port Stephens Council (Council), with at least 21 days' notice. The applicant provided evidence of service of the application documents on the respondents and on Council and the Court provided the required notice prior to the final hearing. Thus, s 14C of the Trees Act is engaged.

Did the applicant make a reasonable effort to reach agreement?

Section 14E(1)(a) of the Trees Act requires that the applicant makes a reasonable effort to reach agreement with the owners of the land on which the trees are situated. In the absence of communication from the applicant between early 2024 and the commencement of proceedings in late October 2025, the respondents disputed whether this requirement had been met.

In Robson v Leischke (2008) 72 NSWLR 98; [2008] NSWLEC 152 (Robson), an appeal of a decision under Pt 2 of the Trees Act, Preston CJ provided guidance about the 'reasonable effort' required to satisfy the Trees Act. The requirement under s 14E(1)(a) of Pt 2A is the same as that under s 10(1)(a) of Pt 2 of the Trees Act. At [192]-[195] of Robson, his Honour says:

> *"Reasonable effort to reach agreement*

...

192 The Trees (Disputes Between Neighbours) Act 2006 does not prescribe any particular means by which an applicant must make a reasonable effort to reach agreement with the tree landowner. The New South Wales Law Reform Commission had recommended in its report a process whereby the affected landowner would write a letter before taking any court action to the tree landowner telling them what problems the tree is causing and asking them to abate the problem and, if the affected landowner has suffered damage, asking the tree landowner to pay the amount needed to compensate for the damage caused: see para 2.45, p 33. Through this mechanism, the affected landowner could negotiate. If the tree landowner did not respond to the notice within the specified time, the affected landowner could then apply to the Local Court for an order: para 2.46, p 33.

193 The Trees (Disputes Between Neighbours) Act 2006 did not adopt the

procedural requirement of giving notice before commencing legal action, either as a precondition to taking action or as the means by which the applicant must make a reasonable effort to reach agreement. The notification requirement under s 8 of the Trees (Disputes Between Neighbours) Act 2006 is of lodging of the application and the terms of any order sought. Of course, such notification may prompt discussions between the parties, but it serves a different function to the Law Reform Commission's recommendation of giving notice before taking court action.

194 The Trees (Disputes Between Neighbours) Act 2006 does not specify any

particular time at which the applicant must make a reasonable effort to reach

agreement with the tree landowner, other than fixing the end point by requiring

that the Court cannot make an order under the Act unless it is satisfied that the

applicant has made a reasonable effort to reach agreement with the tree

landowner. Hence, although it would be preferable for an applicant to make a

reasonable effort to reach agreement with the tree landowner before making

application to the Court, so as to avoid court action, there is no requirement to do so and a reasonable effort to reach agreement can be made after making the application at any time up until the Court determines the application.

195 The language in s 10(1)(a) of the Trees (Disputes Between Neighbours) Act 2006 that the applicant has made "a reasonable effort to reach agreement" is less demanding than the language used in provisions of other statutory enactments which require parties to make reasonable attempts to reach agreement in relation to matters claimed in the court originating process..."

Consequently, the requirement to make ‘a reasonable effort to reach agreement’ does not prescribe an applicant’s conduct or whether they attempt to compromise. “The notification requirement under s 8 of the Trees (Disputes Between Neighbours) Act 2006 is of lodging of the application and the terms of any order sought (Robson; at [193])”. The Trees Act “does not specify any particular time at which the applicant must make a reasonable effort to reach agreement with the tree landowner (Robson; at [194]).”

In 2024, the applicant’s solicitor wrote to the Balls’ and Mr Buffier made a personal visit. Mr and Mrs Ball did not refute Mr Buffier’s claim that they refused to engage with requests to prune or remove their trees. Thus, an application under the Trees Act was foreseeable. Therefore, regardless of the time delay between the applicant’s letter and visit, and the application, I am satisfied Mr Buffier made a reasonable effort to reach agreement such that s 14E(1)(a) of the Trees Act is engaged. Section 14E(1)(b) is also engaged by the prior satisfaction of s 14C.

Is the view obstruction severe?

Section 14E(2) 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.

If the Court is satisfied an obstruction is severe, it must consider s 14E(2)(b); this in turn requires consideration of a range of matters under s 14F. If orders are appropriate, the Court then relies on the discretion in the making of orders enabled by s 14D of the Trees Act.

The Court often takes guidance from the first three steps of the four-step ‘view sharing’ principle in Tenacity Consulting v Warringah (2004) 134 LGERA 23; [2004] NSWLEC 140 (Tenacity). Considering the first step of Tenacity; at [26], as submitted by the applicant, “[w]ater views are valued more highly than land views” … and “[w]hole views are valued more highly than partial views, eg a water view in which the interface between land and water is visible is more valuable than one in which it is obscured”. Relative to views of water at Fingal Bay beach in photographs from the applicant’s top floor 2012, the same view is now significantly obstructed by the Balls’ trees.

Therefore, given the visual appeal of the beach’s colour and movement and guidance from the first step of Tenacity, on initial consideration, I am satisfied that Mr Buffier’s view of Fingal Bay beach is severely obstructed.

However, the Balls' trees are relatively distant from the first floor of the applicant's dwelling such that Fingal Bay beach is a sliver of Mr Buffier's available view, not the whole view, which spans nearly 180 degrees. As submitted by the respondents, at [26]; Haindl v Daisch [2011] NSWLEC 1145 (Haindl), says:

> *"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 obstruction of the view from a particular viewing location on some incremental, slice by slice basis."*

The Court has consistently applied this principle from Haindl; at [26]. At 8.49-8.50, the Haege-Thorvadson report noted, "[t]he applicants existing views consist of far distance forested ridgeline and sky views, the opposite shoreline of Fingal beach, Fingal Bay water views, and the native vegetation of Barry Nature Reserve as well as views down onto the rear gardens of houses both on Marine Drive and Pacific Drive. The prominent landform features of Fingal Summit and Green Hill within Tomaree National Park are both visible as are the blue waters of Fingal Bay.

The applicant's 'Evidence Matrix', regarding the severity of the view obstruction, under s 14E(2)(a)(ii), includes, "5. Extent of impact – assess whole property; cannot 'slice up a view'. Here, the impact is on views from upper and lower levels, no location where view can still be appreciated".

This appears to misinterpret "slice up a view", presuming it is used in the context of Haindl; at [26], which considers the proportion and characteristics of an applicant's nominated view relative to the extent and characteristics of the total available view, not the proportion of obstructed viewing locations relative to total potential viewing locations.

Contrary to the applicant's contention; at [34], that "they are views directly over the rear boundary (not a side boundary)", the views are not only across the rear boundary. While the view over the property of Mr Johnson and Ms Hume passes over Mr Buffier's rear boundary, the Balls' property is to the west, diagonally opposite Mr Buffier's property. Therefore, much of the applicant's view is over his western side boundary. Additionally, as noted in the Haege-Thorvadson report, views of Fingal Bay beach from the ground floor are significantly obstructed by a Murraya paniculata hedge, about 2.5m tall, along Mr Buffier's western side boundary.

In Exhibit D, at 13, Mr Buffier said, "By 2023, the tree growth in both properties was responsible for a loss of some 80% of our water view". This is "slicing up a view", as applied in Haindl, at [26], as the alleged 80% water view loss is based only on the Fingal Bay beach 'slice' and ignores water (and landscape) views across other areas of the applicant's broad total available view.

Further, contrary to the applicant's claim that pruning of Mr Ball's Bottlebrush and removal of his palms would restore beach views to a similar situation as in photographs from 2012, I concur with the respondents' contention, as detailed in the Haege-Thorvadson report, that obstructions other than the Balls' trees would compromise the applicant's view improvement arising from the proposed orders. Residual view obstructions would include the Eucalyptus trees of Barry Nature Reserve, notwithstanding that the Eucalyptus trees may provide filtered views. An alleged hedge

of palms along the western side of Mr Johnson and Ms Hume's property is also a separate obstruction. With 2025/00420086 Buffier v Johnson unresolved, a presumption these palms are removed is not reasonable.

Consequently, as the relative severity of the view obstruction is mitigated by the considerations above at [82]-[88], I find the severity of obstruction of the overall view to be moderate, thus insufficient to engage s 14E(2)(a) of the Trees Act.

Had the view obstruction been severe and s 14E(2)(a) of the Trees Act was engaged, under s 14E(2)(b), the Court must determine if "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".

The applicant's proposed orders require removal of a large proportion of the garden's palm canopy, which would likely heavily compromise the shade, privacy, habitat, and temperature modification provided by the trees and many understory plants may perish. In consideration of s 14F(g) and s 14F(l), Mr Buffier acknowledged the contribution of the respondents' trees to local biodiversity, privacy, landscaping, and shade.

Had the obstruction of the applicant's available view been found to be severe, it can only be deemed marginally severe. Therefore, considering s 14E(2)(b) of the Trees Act, the severity and nature of the obstruction is insufficient for the applicant's interest in having the obstruction removed, remedied or restrained to outweigh the likely profound impact on local biodiversity, privacy, landscaping, shade and heat mitigation, that suggest the undesirability of disturbing or interfering with the trees by making an order under this Part.

Conclusion

Based on the adduced evidence from my site assessment and the parties' submissions, I am not satisfied that the applicant has proven, on the balance of probability, that any of the 3 nominated rows of trees in the respondents' property currently form a hedge, nor that the Balls' originally intended to plant any hedges.

Considering his Honour's interpretation of the language of Pt 2A of the Trees Act in Johnson; at [37]-[38], engagement of s 14A(1) requires both these conditions to be satisfied. Although in Black; at [51], Pain J said, "[t]he subjective intention of the person who planted trees is not necessarily definitive of the question of whether trees form a hedge but can permissibly form part of the factual matrix the Court considers in its determination..." in Johnson; at [38], his Honour said, "If trees are not planted at all, but rather are self-sown, or are not planted for the purpose of forming a hedge, but rather for some other purpose, then Part 2A will not apply to the trees ..."

Therefore, the Court has no power to make orders and the application is refused.

Though I found the obstruction of the applicant's view of Fingal Bay beach by the Balls' trees to be severe, because the Fingal Bay beach view was a mere sliver of the applicant's total available view that also contained broad vistas of water and land/ water interface, the relative severity of the view obstruction was devalued with consideration of the consistently followed determination in Wisdom, at [46]. I was satisfied that large Eucalyptus trees, with 13 year's additional growth since the photographs of 2012, and the Johnsons' palms would also continue to obstruct the view, regardless of removal of the Balls' trees. Consequently, I found the overall view obstruction to be moderate.

Even if I found the view obstruction to be severe and s 14E(2)(a) was engaged, at s 14E(2)(b) of the Trees Act, the Court must balance the parties' interests with consideration of relevant elements in s 14F. As the height of a palm cannot be significantly reduced by pruning without killing the palm, Mr Buffier's proposed orders require removal of a large proportion of the garden's upper canopy of Bangalow palms, likely resulting in the loss of a myriad of important benefits for the respondents and a highly functioning ecosystem.

Consequently, s 14E(2)(b) of the Trees Act is not engaged because the severity and nature of the obstruction is insufficient for the applicant's interest in having the obstruction removed, remedied or restrained to outweigh these other matters that suggest the undesirability of disturbing or interfering with the trees by making an order under this Part.

Part 2A of the Trees Act is a limited jurisdiction that does not preclude property owners from creating a landscape garden with a canopy of trees for privacy, shade and other benefits. The fact that trees grow to obstruct a neighbour's view does not necessarily make those trees a hedge that satisfies the requirement at s 14A(1)(a) of the Trees Act.

Orders

The orders of the Court are:

The application is refused.

J Douglas

Acting Commissioner of the Court

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