

AUSTRALIA / JUDGMENT

Cope v Muralitharan [2022] NSWLEC 1733

Source: caselaw.nsw.gov.au · Research copy typeset by Esheria. Not court-issued or certified.

Land and Environment Court

New South Wales

Medium Neutral Citation: Cope v Muralitharan [2022] NSWLEC 1733

Hearing dates: 27 October 2022

Date of orders: 27 October 2022

Decision date: 27 October 2022

Jurisdiction: Class 2

Before: Douglas AC

Decision: The Court orders:

(1) The application is refused.

Catchwords: TREES (DISPUTES BETWEEN NEIGHBOURS) –trees growing near boundary of respondents' land – damage to driveway – is there genuine risk of injury

Legislation Cited: Trees (Disputes Between Neighbours) Act 2006

Pt 2 ss 7, 8, 10, 12, Pt 2A ss 14A, 14C, 14E

Cases Cited: Granger v Owners Corporation SP 18494 [2012] NSWLEC 1285

Grantham Holdings Pty Ltd v Miller [2011] NSWLEC 1122

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

Yang v Scerri [2007] NSWLEC 592

Category: Principal judgment

Parties: Jennifer Cope (Applicant)

Muralitharan Gnanasegaram (First Respondent)

Jenanthini Muralitharan (Second Respondent)

Representation: J Cope, self-represented (Applicant)

J Muralitharan, self-represented (Respondent)

File Number(s): 2022/250436

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, Ms Cope, owns a property in Baulkham Hills, while Mr and Mrs Muralitharan, the Respondents, are her east side neighbour. The Applicant built and occupied her dwelling in 2001, while the Respondents occupied their property in 2015.
2. Three *Cupressocyparis leylandii* (Leylands Cypress) are growing in the Respondents' front yard, separating the parties' properties in the absence of a fence. They are about 6.5 metres (m) in height with a canopy spread of about 2.0 m, and they are planted about 400mm from the common boundary.
3. Ms Cope lodged an application, pursuant to s 7 of Pt 2 of the Trees (Disputes between Neighbours) Act 2006 (Trees Act), claiming that roots of the trees have damaged her paved driveway, and are likely to cause further damage in future. The Applicant also claimed that the trees create a genuine risk of injury by blocking visual access to passing traffic and thus increasing the likelihood of a collision with another vehicle upon exiting her driveway.
4. Simultaneously, Ms Cope lodged an application, pursuant to s 14 of Pt 2A of the Trees Act, based on a claim that the trees severely obstruct views from her property.

The applicant's proposed orders

1. Under Pt 2 of the Trees Act, The Applicant proposes the following order:
 1. Removal of 3 *Cupressocyparis leylandii* trees including their root systems, which form a high hedge along the front boundary between the parties' properties in Baulkham Hills and are causing damage to the existing paved driveway and obstructing the installation of formwork for a proposed replacement concrete driveway.
1. The Applicant's proposed order under Pt 2A of the Trees Act is:
 1. Removal of 3 *Cupressocyparis leylandii* trees including their root systems, which form a high hedge along the front boundary between the parties' properties in Baulkham Hills, causing egress obstruction to our property.

The respondent's case

1. The Respondents provided a letter to the Court in response to the Applicant's claims which was filed on 17 October 2022. The Respondents resist the proposed order for removal of the trees but note that they "are happy for neighbours to cut the roots and prune the branches that were overhanging to their side". The Respondents also dispute the Applicant's claim that the trees are a significant obstruction to vision when drivers exit the Applicant's driveway in motor vehicles and claim that no motor vehicle accidents have occurred or been reported about the trees, at least for the duration of the Respondents' occupation.

The on-site hearing

1. Both parties were self – represented at the on-site hearing. Being located in small front yards open to the street, the trees and their impacts on the Applicant's property were easy to inspect.
2. I shall initially address the application under Pt 2 of the Trees Act.

Jurisdictional requirements – Pt 2

1. With respect to s 7 of Pt 2 of the Trees Act, 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. Ms Cope has satisfied the requirement under s 8 of the Trees Act: to serve notice to the respondent at least 21 days prior to the proceedings.
3. The Applicant 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. This is evidenced by a letter to the Respondents, dated 1 April 2022, clearly requesting removal of the trees, and letters displaying attempts to mediate the dispute with the assistance of a Community Justice Centre (CJC).
4. The next major test that is posed, by s 10(2) of the 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.
5. In her letter to the Respondent, the Applicant provided the following reasons for her tree removal request:
 1. The trees are overhanging into our property and preventing our ability to park 2 cars on our driveway. It should be noted that our boundary line is 20cm from the corner of our premises towards your (the Respondents') property.
 2. The trees are obstructing the safe exiting of cars out of our driveway.

3. The roots of the trees are lifting the pavers on our existing driveway. We are replacing the driveway with concrete and have been advised that the roots will need to be removed to lay the formwork and attempt to avoid future damage.
1. There is evidence of a small area of minor uplift of pavers at the edge of the driveway, close to the tree bases, which, in the absence of another reasonable explanation, I consider, on the balance of probabilities, has been caused by roots of at least one of these trees.
2. Though this damage is minor, the Court's decision in *Granger v Owners Corporation SP 18494* [2012] NSWLEC 1285 indicates that even relatively minor damage engages the Court's jurisdiction. Therefore, as a consequence, s 10(2)(a) of the Trees Act is engaged.
3. Whether the damage is minor or major is irrelevant in answering the jurisdictional tests in s 10(2), but it can be relevant in determining what orders, if any, should be made.

Discretionary matters – s 12

1. In contemplating an order following the engagement of s 10(2), the Court is required to consider relevant matters in s 12 of the Trees Act, as follows:

* The trees are located in the Respondents' front yard close to the common boundary (s 12(a)).

* Only minor pruning is required to clear any overhanging foliage that may be restricting the parking of 2 cars in the driveway. In their letter of 17 October 2022, the Respondents note they "are happy for neighbours to cut the roots and prune the branches that were overhanging to their side". This species of conifer is widely known to tolerate pruning and is often used in formal hedges where regular clipping is required. The advice the Applicant received from a Council officer or from a horticulturist about pruning being likely to kill the trees was thus poor and unreliable, and this is evidenced by the dense tight regrowth which the tree produced after pruning by the Respondents, and more recently, by the Council arborist. Having said this, many conifers do struggle to regrow after heavy pruning, but this species is a known exception (s 12(b2)).

* The Respondents note the significance of the trees in providing a fence, privacy, shade during summer, "a landscaping feature to our property", and habitat for native birds. Being conspicuous in the front yard, the trees also provide intrinsic value to public amenity (s 12(b3),(d),(f)).

* Subsection 12(i) considers anything, other than the tree, that has contributed, or is contributing, to any damage or likelihood of damage, including any act or omission by the applicant and the impact of any trees owned by the applicant. As noted at [56] of *Robson v Leischke* (2008) 72 NSWLR 98; [2008] NSWLEC 152 (Robson), "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". There is no remedy available under the Trees Act arising from the encroachment of branches or roots across boundaries unless they also cause damage. As any encroaching foliage could have easily been cleared by pruning, the Court considers this under s 12(i), as a

"failure of an applicant to maintain their own property".

* Subsection 12(i) also considers the "Age and nature of the structure", which was submitted by the Respondents as an influence on the condition of the paved driveway. This is a reasonable claim, but I remain satisfied that tree roots are largely responsible for the minor uplift.

Findings

1. The damage to the Applicant's pavers as a result of the Respondents' trees is very minor. It does not appear to have any impact on the use of the driveway, nor result in any danger such as trip hazards. I am thus not satisfied that genuine damage is likely in the near future where, in a guidance decision published in *Yang v Scerri* [2007] NSWLEC 592, the 'near future' is deemed to be a period of about 12 months from the date of the determination. In any case, the Applicant repeatedly noted that the driveway is soon to be replaced with a concrete surface.
2. Further, I am not satisfied that the trees are "obstructing the safe exiting of cars out of (the Applicant's) driveway" to an extent that is likely to cause a genuine risk of injury. The site is a quiet outer suburban area with relatively low traffic flows. As described in the Respondents' letter of 17 October 2022, the Applicant has full vision of oncoming traffic approaching from the right but may be restricted by the trees from full visibility of cars approaching from the left on the far side of the road. This situation is not unusual in urban areas and is often encountered with much busier roads and faster traffic than is likely to be found here. The Applicant described the dangers of reversing into oncoming traffic without full visibility, but such danger could be mitigated by reversing vehicles into the driveway and driving out forwards. Risk can also be readily mitigated by pruning the trees, as encouraged by the Respondents.
3. Consequently, as the damage to pavers as a result of the trees is so minor, and because any risk of injury caused by the trees may largely be mitigated by pruning of encroaching foliage and a simple change in behaviour when parking vehicles, any imperative to make orders is far exceeded by the benefits that the trees provide to the Respondents, and to the broader community.
4. Therefore, the application under Pt 2 of the Trees Act is refused.

Jurisdictional requirements – Pt 2A

1. Ms Cope has applied to the Court under Pt 2A of the Trees Act, seeking removal of the same three Leylands Cypress trees, so as to remedy, restrain or prevent a severe obstruction of any view from a dwelling.
2. The Court's jurisdiction under Pt 2A of the Trees Act is limited. 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].

Do the trees form a hedge?

1. The first test is s 14A(1) of the Trees Act, that is, are the trees a hedge for the purpose of the Act?
2. Section 14A(1) states:
 - (1) This Part applies only to groups of two 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).
1. The trees were planted and rise to a height of about 6.5 m, and thus s 14A(1) of the Trees Act is engaged.
2. 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, and s 14E(1)(b) requires that the applicant has given notice in accordance with 14C (if this requirement to give notice has not been waived by the Court).
3. These requirements are effectively identical to those at s 10(1)(a) and s 10(1)(b) respectively, of Pt 2 of the Trees Act, which the Applicant has already satisfied. Therefore, s 14E(1)(a) and s 14E(1)(b) of the Trees Act are engaged.
4. Next, the jurisdiction requires assessment of the severity of the obstruction of all or any of the views from the applicant's dwelling as a consequence of any or all of the trees in the hedge.
5. Section 14E(2)(a)(ii) states:
 - (2) The Court must not make an order under this Part unless it is satisfied that:
 - (a) the trees concerned
 - ...
 - (ii) are severely obstructing a view from a dwelling situated on the applicant's land
1. The issue on which the Ms Cope based her application under Pt 2A was the hedge severely obstructing views of the adjacent road from her front yard, but this does not engage the jurisdiction of the Trees Act, because s 14E(2)(a)(ii) is limited to hedges which are "severely obstructing a view from a dwelling situated on the applicant's land".
2. There are no views of the hedge available from the dwelling and thus s 14E(2)(a)(ii) is not engaged, and I have no jurisdiction to make orders. Consequently, this application under Pt 2A of the Trees Act is also refused.

Conclusion

1. Overall, the onus is on the applicant to satisfy the requirements of the Trees Act in proving her case and Ms Cope has failed to do this. Under Pt 2, the Applicant has not provided appropriate or sufficient evidence to substantiate, on the balance of probability, that minor damage to paving justifies intervention with the trees, nor that the trees present a risk of injury that cannot be readily mitigated by minor pruning and simple behavioural changes.
2. The Pt 2A application also fails as the Applicant was considering severe obstruction of views from her front yard, but this is outside the jurisdiction of the Trees Act, which is limited to severe obstruction of a view from a dwelling.
3. Onsite, I advised the parties that this species has the potential to grow very tall and large, and, should excavation be undertaken by the Applicant for the construction of a concrete driveway, the associated root severing may destabilise the trees, and increase the risk of uprooting.

Orders

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

J Douglas

Acting Commissioner of the Court

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.

Decision last updated: 24 January 2023

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.caselaw.nsw.gov.au/decision/185e1772ab759f078b184044>

CASE PAGE <https://chat.esheria.ai/case-law/australia/cope-v-muralitharan-2022-nswlec-1733-2022>

Prepared on 28 October 2026 · Esheria