

AUSTRALIA / JUDGMENT

Cuschieri v Fishburn

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: Cuschieri v Fishburn [2021] NSWLEC 1185 Hearing dates: 14 April 2021 Date of orders: 14 April 2021 Decision date: 14 April 2021 Jurisdiction: Class 2 Before: Galwey AC Decision: The Court orders that:

- (1) The application is refused. Catchwords: TREES (DISPUTES BETWEEN NEIGHBOURS) – damage – termite damage not caused by trees – maintenance – neighbouring hedge – obstruction of sunlight – whether the obstruction is severe Legislation Cited: Trees (Disputes Between Neighbours) Act 2006, Pt 2 s 7, s 10(1)(a), s 10(2)(a), Pt 2A s 14B, s 14E(1)(a), s 14E(2) Cases Cited: Dooley v Nevell [2007] NSWLEC 715 Hendry v Olsson [2010] NSWLEC 1302 Category: Principal judgment Parties: Rosette Mary Cuschieri (Applicant) Graham Robert Fishburn (First Respondent) Kathy Delma Fishburn (Second Respondent) Representation: Counsel C Guirguis (Solicitor) (Applicant) G Fishburn (Litigant in Person) (Respondents) Solicitors: Coutts Lawyers and Conveyancers (Applicant) File Number(s): 2020/330689 Publication restriction: No

Judgment

This decision was given as an extemporaneous decision. It has been revised and edited prior to publication. Background to the application Rosette Cuschieri ('the applicant') has applied to the Court seeking orders pursuant to both s 7 (Pt 2) and s 14B (Pt 2A) of the Trees (Disputes Between Neighbours) Act 2006 ('the Trees Act'). The three trees in her application are on the neighbouring property belonging to Kathy and Graham Fishburn ('the respondents'). The main issues identified in Ms Cuschieri's Pt 2 application are: damage caused by termites, overshadowing causing dampness, and branches damaging her shed. She seeks orders for removal of the trees and for compensation of \$2,000 for damage to her dwelling. In her Pt 2A application, Ms Cuschieri claims the trees obstruct sunlight to her dwelling, and seeks orders for them to be pruned to 2.5 metres in height. The hearing took place onsite allowing observations of the trees, both properties and the surrounding environment. The applicant made reasonable effort Under both parts of the Trees Act (at ss 10(1)(a) and 14E(1)(a)) the Court must be satisfied that the applicant has made reasonable effort to reach agreement with the trees' owners. Ms Cuschieri tried discussing the trees with the respondents. She has written to the respondents, but says she received no response. I have no reason to doubt her efforts have been reasonable. The trees The trees in Ms Cuschieri's application are two photinias, several metres tall, and a small unidentified tree approximately three metres tall. They are planted close to the common boundary. The first photinia is close to the rear of the Fishburns' dwelling, with the other two trees planted in a row

along the boundary. The photinias are little more than a metre from Ms Cuschieri's dwelling, with only a narrow concrete path between it and the boundary fence. Pt 2 application – damage

Ms Guirguis submitted that the termite damage suffered by Ms Cuschieri's dwelling directly resulted from the presence of the trees. Timber within the walls of Ms Cuschieri's bathroom and laundry was badly damaged by termites, as is clearly shown in photographs. Ms Cuschieri spent \$13,000 repairing the bathroom and laundry. The contractor attributed \$2,000 of this work to repairing termite damage. Ms Cuschieri attributes the termite damage to the three neighbouring trees. Ms Guirguis submitted that the trees are 'termite susceptible'. A pest report from Rentokil, dated 14 April 2020, has a checkbox ticked "Yes" for: "Was evidence of trees/stumps susceptible to termites found within the property grounds?" Another checkbox is ticked "Yes" for: "Was evidence of trees/stumps susceptible to termites found within the neighbouring yards and council area within 80 metres of the property?" The applicant relies on this as evidence. The Court cannot make orders on this basis. At s 10(2)(a) of the Trees Act, the Court must not make an order under Pt 2 unless it is satisfied that the tree concerned has caused, is causing, or is likely in the near future to cause, damage to the applicant's property. Firstly, it has not been shown that termites were ever present in the three subject trees. Numerous trees growing on the council reserve to the rear of these properties could have termite nests. The applicant was not able to show me any signs of termites in the respondents' trees. I could not be satisfied that the respondents' three trees are related to the damage in any way. Secondly, the damage was caused by termites, not by trees. The jurisdiction of the Trees Act is limited to damage caused by trees. In *Dooley v Nevell* [2007] NSWLEC 715 the Court made a jurisdictional finding at [19]-[23], concluding: "23 The consequence of this is that the Court does not have the power under the Act to make orders in response to property damage or risk of injury to persons where that property damage or risk of injury has or would arise from a tree attracting or hosting an animal, bird or insect." A further element of Ms Cuschieri's Pt 2 claim relates to dampness on the western side of her dwelling. The trees contribute to shading of this area. Mr Fishburn pointed out that the path between Ms Cuschieri's dwelling and the fence has no drainage installed. He also pointed out the limited sunlight the path would receive regardless of the trees. The dwelling and its eave are close to the boundary fence, with little access for sunlight to reach the path. Ms Cuschieri has an awning outside her laundry door further shading part of the path. Trees are unlikely to be the principal cause of dampness in this area. In *Hendry v Olsson* [2010] NSWLEC 1302, the Court found at [14] that mould or slippery surfaces resulting from overshadowing by trees might be avoided by reasonable maintenance. I cannot see any damage resulting here from overshadowing. If I assumed that mould on the path resulted from overshadowing, I would still not make orders on this basis. The final element of the Pt 2 application relates to branches of the third tree rubbing on a shed roof. They are only very small branches that are unlikely to cause significant damage, and could easily be removed. There is nothing to justify orders from the Court. As a result, the Pt 2 application is refused. Pt 2A application – obstruction of sunlight

The trees are close to the boundary. Mr Cuschieri has pruned overhanging branches to limit the overhang. The trees cast afternoon shadow onto the laundry and bathroom windows on the dwelling's western side. Other factors limiting access to sunlight include the western aspect of these rooms, the roof eave, and an awning over the laundry door. The windows are small. The

bathroom window is frosted. I do not doubt that the reduction in sunlight to these windows bothers the applicant, but the obstruction cannot be regarded as severe, which is the jurisdictional threshold at s 14E(2) of the Trees Act. Furthermore, photos filed by the Fishburns show the tree closest to these windows was already well above fence height in 2001. The Cuschieris moved into their property in 2002. Although the extent of obstruction has increased in the meantime, it appears that it was present when they moved into their property. For the above reasons I will not make orders under the Pt 2A application. The proximity of the trees to the Cuschieri's dwelling is clearly of concern to them. They must prune the trees on their side regularly to prevent further overshadowing, a task of some undertaking. I note that Mr Fishburn verbally committed to pruning the trees to maintain them at a height of 4.5 metres, as he believes they were that height in 2002.

Orders

As a result of the foregoing, the Court orders that: The application is refused.

..... D Galwey 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: 16 April 2021

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/178d3f0c86ace418a2e6d8fd>

CASE PAGE <https://chat.esheria.ai/case-law/australia/cuschieri-v-fishburn-2021>

Prepared on 27 October 2026 · Esheria