

AUSTRALIA / JUDGMENT

Ermis v Boutros [2025] NSWLEC 5

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Land and Environment Court New South Wales

Medium Neutral Citation: Ermis v Boutros [2025] NSWLEC 5 Hearing dates: 04 February 2025 Date of orders: 04 February 2025 Decision date: 04 February 2025 Jurisdiction: Class 2 Before: Pain J Decision: See below in [23]. Catchwords: APPEAL – s 56A appeal of acting commissioner decision refusing part of Trees (Disputes Between Neighbours) Act 2006 application for pruning of various trees Legislation Cited: Land and Environment Court Act 1979, s 56A Trees (Disputes Between Neighbours) Act 2006, Pts 2, 2A, ss 7, 10, 12, 14B, 14E, 14F Cases Cited: Brimbella Pty Ltd v Mosman Municipal Council (1985) 79 LGERA 367 Ermis v Boutros [2024] NSWLEC 1521 ISPT Pty Ltd v Valuer General; (2009) 165 LGERA 25; [2009] NSWCA 31 SDHA Pty Ltd v Waverley Council (2015) 209 LGERA 233; [2015] NSWLEC 65 Category: Principal judgment Parties: Memduh Volkan Ermis (First Appellant) Ayzin Ermis (Second Appellant) Simon Boutros (First Respondent) Cecilia Boutros (Second Respondent) Representation: M V Ermis (Self-represented) (First Appellant) A Ermis (Self-represented) (Second Appellant) S Boutros (Self-represented) (First Respondent) C Boutros (Self-represented) (Second Respondent) File Number(s): 2024/00354685 Publication restriction: No

EX TEMPORE JUDGMENT

1. Mr and Mrs Ermis (the Appellants) have commenced a s 56A appeal under the Land and Environment Court Act 1979 (LEC Act) alleging numerous errors by Acting Commissioner (AC) Galwey in Ermis v Boutros [2024] NSWLEC 1521 in relation to their application under Pts 2 and 2A of the Trees (Disputes Between Neighbours) Act 2006 (Trees Act). They sought various orders in relation to pruning several trees on their neighbours' land belonging to Mr and Mrs Boutros (the Respondents). The AC conducted a hearing including a site inspection in the presence of the parties and observed the trees in issue. Both parties represented themselves before the AC and today at the appeal hearing.
2. Before the AC Mr and Mrs Ermis sought orders in relation to 14 trees, being three in the front and 11 at the rear of the Boutros' property. The front trees include two Bangalow palms. The rear trees include at T5-T13 as numbered in the evidence several cypress pines. The Part 2A application concerning obstruction of sunlight and views was dismissed by the AC. The Part 2 application concerning damage and injury was granted in part with orders made requiring pruning of trees T5-T13 inter alia. No orders were made requiring the pruning of the Bangalow palms.

3. An appeal under s 56A must be made in relation to a question of law generally to be identified in the reasoning (or possibly absence of reasoning) of the AC. The merit assessment of a commissioner or acting commissioner cannot be the subject of an appeal under s 56A. The appellants were advised at the outset of the appeal hearing that the relief sought in the appeal of orders for the pruning of a number of trees were unlikely to be made given that the nature of the appeal does not include consideration of merit matters, and in light of s 56A(2)(a) concerning remitter of a matter to a commissioner or acting commissioner if an appeal is upheld.
4. For reasons which follow I consider the appeal should be dismissed.
5. Principles relevant to s 56A appeals include that a fine-tooth comb approach is not warranted and the Court must not engage in an 'overly critical examination' for error, *Brimbella Pty Ltd v Mosman Municipal Council* (1985) 79 LGERA 367, 368. The judgment must be read fairly and as a whole, and in light of the matters as presented by all parties.
6. While the appeal is confined to questions of law, it is not limited to errors of law, *ISPT Pty Ltd v Valuer General* (2009) 165 LGERA 25; [2009] NSWCA 31 [3] (Allsop P). The appeal 'must identify a question of law explicitly or implicitly decided at first instance', and '[t]hat question must also be sufficiently material that a wrong answer vitiates the decision', *SDHA Pty Ltd v Waverley Council* (2015) 209 LGERA 233; [2015] NSWLEC 65. The Appellants bear the onus of proving any relevant error.
7. The exhibits before the AC being the tree dispute application (Exh A), details in relation to Mr and Mrs Ermis' claim under Part 2 (Exh B), details in relation to Mr and Mrs Ermis' claim under Part 2A (Exh C), and numerous photos (numbering 33) tendered before the AC (Exh E) were referred to by the Appellants before me.

Trees (Disputes Between Neighbours) Act 2006

1. The Trees Act provides: Part 2 Court orders—trees that cause or are likely to cause damage or injury
7 Application to Court by affected land owner 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. ... 10 Matters of which Court must be satisfied before making an order
 - (1) The Court must not make an order under this Part unless it is satisfied:
 - (a) that the applicant has made a reasonable effort to reach agreement with the owner of the land on which the tree is situated, and
 - (b) if the requirement to give notice has not been waived, that the applicant has given notice of the application in accordance with section 8.

- (2) The Court must not make an order under this Part unless it is satisfied that the tree concerned:
- (a) has caused, is causing, or is likely in the near future to cause, damage to the applicant's property, or
 - (b) is likely to cause injury to any person. ... 12 Matters to be considered by Court Before determining an application made under this Part, the Court is to consider the following matters:
 - (a) the location of the tree concerned in relation to the boundary of the land on which the tree is situated and any premises,
 - (b) whether interference with the tree would, in the absence of section 6 (3), require any consent or other authorisation under the Environmental Planning and Assessment Act 1979 or the Heritage Act 1977 and, if so, whether any such consent or authorisation has been obtained, (b1) whether interference with the trees would, in the absence of section 25 (t) (Legislative exclusions) of the Native Vegetation Act 2003, require approval under that Act, (b2) the impact any pruning (including the maintenance of the tree at a certain height, width or shape) would have on the tree, (b3) any contribution of the tree to privacy, landscaping, garden design, heritage values or protection from the sun, wind, noise, smells or smoke or the amenity of the land on which it is situated,
 - (c) whether the tree has any historical, cultural, social or scientific value,
 - (d) any contribution of the tree to the local ecosystem and biodiversity,
 - (e) any contribution of the tree to the natural landscape and scenic value of the land on which it is situated or the locality concerned,
 - (f) the intrinsic value of the tree to public amenity,
 - (g) any impact of the tree on soil stability, the water table or other natural features of the land or locality concerned,
 - (h) if the applicant alleges that the tree concerned has caused, is causing, or is likely in the near future to cause, damage to the applicant's property:
 - (i) anything, other than the tree, that has contributed, or is contributing, to any such damage or likelihood of damage, including any act or omission by the applicant and the impact of any trees owned by the applicant, and (ii) any steps taken by the applicant or the owner of the land on which the tree is situated to prevent or rectify any such damage,
 - (i) if the applicant alleges that the tree concerned is likely to cause injury to any person:

- (i) anything, other than the tree, that has contributed, or is contributing, to any such likelihood, including any act or omission by the applicant and the impact of any trees owned by the applicant, and (ii) any steps taken by the applicant or the owner of the land on which the tree is situated to prevent any such injury,
- (j) such other matters as the Court considers relevant in the circumstances of the case. ... Part 2A Court orders—high hedges that obstruct sunlight or views 14B Application to Court by affected land owner An owner of land may apply to the Court for an order to remedy, restrain or prevent a severe obstruction of:
 - (a) sunlight to a window of a dwelling situated on the land, or
 - (b) any view from a dwelling situated on the land, if the obstruction occurs as a consequence of trees to which this Part applies being situated on adjoining land. ... 14E Matters of which Court must be satisfied before making an order
- (1) The Court must not make an order under this Part unless it is satisfied:
 - (a) that the applicant has made a reasonable effort to reach agreement with the owner of the land on which the trees are situated, and
 - (b) if the requirement to give notice has not been waived, that the applicant has given notice of the application in accordance with section 14C.
- (2) The Court must not make an order under this Part unless it is satisfied that:
 - (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. 14F Matters to be considered by Court Before determining an application made under this Part, the Court is to consider the following matters:
 - (a) the location of the trees concerned in relation to the boundary of the land on which the trees are situated and the dwelling the subject of the application,
 - (b) whether the trees existed prior to the dwelling the subject of the application (or the window or part of the dwelling concerned where the dwelling has been altered or added to),
 - (c) whether the trees grew to a height of 2.5 metres or more during the period that the applicant has owned (or occupied) the relevant land,

- (d) whether interference with the trees would, in the absence of section 6 (3), require any consent or other authorisation under the Environmental Planning and Assessment Act 1979 or the Heritage Act 1977 and, if so, whether any such consent or authorisation has been obtained,
 - (e) any other relevant development consent requirements or conditions relating to the applicant's land or the land on which the trees are situated,
 - (f) whether the trees have any historical, cultural, social or scientific value,
 - (g) any contribution of the trees to the local ecosystem and biodiversity,
 - (h) any contribution of the trees to the natural landscape and scenic value of the land on which they are situated or the locality concerned,
 - (i) the intrinsic value of the trees to public amenity,
 - (j) any impact of the trees on soil stability, the water table or other natural features of the land or locality concerned,
 - (k) the impact any pruning (including the maintenance of the trees at a certain height, width or shape) would have on the trees,
 - (l) any contribution of the trees to privacy, landscaping, garden design, heritage values or protection from the sun, wind, noise, smells or smoke or the amenity of the land on which they are situated,
 - (m) anything, other than the trees, that has contributed, or is contributing, to the obstruction,
 - (n) any steps taken by the applicant or the owner of the land on which the trees are situated to prevent or rectify the obstruction,
 - (o) the amount, and number of hours per day, of any sunlight that is lost as a result of the obstruction throughout the year and the time of the year during which the sunlight is lost,
 - (p) whether the trees lose their leaves during certain times of the year and the portion of the year that the trees have less or no leaves,
 - (q) the nature and extent of any view affected by the obstruction and the nature and extent of any remaining view,
 - (r) the part of the dwelling the subject of the application from which a view is obstructed or to which sunlight is obstructed,
 - (s) such other matters as the Court considers relevant in the circumstances of the case.
1. Ground 1 alleges an error in relation to the Part 2A application being refused by the AC because, firstly, s 14F(o) requirements were not complied with by the AC. This subsection concerns access to sunlight throughout the year and the amount of loss of sunlight. That topic was explicitly addressed by the AC at [24]-[32] with the Applicants' (here Appellants')

position set out at [24]-[26]. It was agreed in the s 56A appeal that at [25] the AC correctly identified the Appellants' submissions as to the number of minutes per day the trees obstructed a door and several windows (living room, master bedroom) in mid-summer. The criticism on appeal was that this failed to address the requirement to consider the 'amount' of sunlight as referred to in subs (o) because the number of hours (here minutes) per day is separately specified in the subsection. The Appellants submitted that the AC should have referred to the amount of lost sunlight per day for each affected surface being a number of windows as a ratio (expressed as a percentage loss) which was referred to in the submissions before the AC and in this appeal but he failed to refer to these. The Appellants submitted the ratios (percentages) they identified showed that a high amount of sunlight was lost so that the AC's conclusions to the contrary were incorrect.

2. As identified above the AC's judgment must be read fairly and as a whole. At [28]-[32] the AC identified how he came to the conclusion that there is no severe obstruction of sunlight by the Respondents' trees. The AC identified at [30] that the Appellants' property is to the north of the Respondents' property and that only in mid-summer is any sunlight obstruction caused by the trees. He identifies that no shadow diagrams were provided by the Appellants to the AC. The basis for their assertion of a percentage affectation before the AC and in this appeal is unknown.
3. I have not heard considered argument about the statutory construction of subs (o) and whether evidence and/or reasons beyond the number of hours per day of lost sunlight must be provided in order to satisfy the subsection, given the reference to 'and number of hours per day' (emphasis added) in addition to 'the amount'. In various statutory contexts 'and' and 'or' can be considered interchangeable. It is open to conclude as a matter of statutory construction that evidence of number of hours per day may well be sufficient to satisfy the subsection.
4. Even if there was a failure by the AC to refer separately to a matter other than number of hours (here minutes), (my preliminary view is that the AC's approach was available given the terms of the subsection), there is no material error viewed in the overall reasoning of the judgment on this topic. The argument made by the Appellants was otherwise impermissibly addressing merit considerations.
5. Secondly, in ground of appeal 1, the Appellants allege that s 12(e) was not considered being the contribution of a tree to the natural landscape and scenic value of the land or locality [noting that s 12(e)'s equivalent in Pt 2A is s 14F(h)]. The AC did not refer in the judgment to the Appellants' submission that the cypress pines impact on surrounding soil which prevents them growing plants in their garden.

6. There is no explicit reference to s 12(e) by the AC. It is one of 14 matters which the Court must consider in s 12, if relevant, in addition to any other matters the Court considers relevant. The focus of s 12(e) is arguably the contribution of a tree to the land or its locality, which differs from the submissions of the appellants before me and before the AC. The submission was included in the lengthy Exh C provided by the Applicants (Appellants) to the AC, being topic 25 addressed by them.
7. There is no obligation on the AC to refer to every argument put by a party provided that the substantive matters raised are addressed and the AC's reasoning in relation to these is identified. The Appellants have not demonstrated that s 12(e) as they submitted before the AC was a matter fundamental to the matters before the AC. No error of law is demonstrated in this regard.
8. Thirdly, ground 1 alleges failure to apply s 14E(2)(ii) (severe obstruction of views). It was difficult to discern a question of law from the Appellants' arguments, these being largely a criticism of the merits assessment undertaken by the AC in concluding that there was no severe obstruction of views. The topic is dealt with explicitly in the judgment at [31] which states The alignment of the cypress trees is such that they obstruct a small part of the outlook from the back of the Ermises' dwelling. Due to the topography here, their outlook is of sky above roof tops. The trees obscure the roof of a school to their southwest, and a small part of their total sky view. This is not a severe obstruction of a view from their dwelling. Although the Ermises also complained of impacts to the view from their garden, the Trees Act specifically provides jurisdiction for obstruction of a view only from a dwelling.
1. This paragraph shows that the AC was aware that he had to consider views from the dwelling and did so. The evidence before the AC included the photographs in Exh E and he had the benefit of a site inspection. That he did not specify view impacts from particular windows or locations in the house as the Appellants submitted in this appeal should have been done is not an error of law and does not give rise to any question of law, rather that is a matter of merit, and also an unfairly detailed criticism of the judgment.
2. The submission was also made in this ground that the AC should have gone into the Appellants' house during the site inspection. The Appellants accepted before me that the AC was not asked by them to inspect inside their dwelling. The AC was under no obligation to expand on the site inspection beyond what the parties requested him to undertake. In these circumstances no error of law on the part of the AC arises.
3. The Appellants are not successful on these three aspects of ground 1.
4. Ground of appeal 2 deals with Part 2 of the Trees Act. Firstly it is alleged that the AC failed to properly apply s 10(2), concerning injury or damage to the Bangalow palms in the front of the Respondents' property (orders made by the AC require pruning of the rear cypress trees only). The evidence before the AC included numerous photographs in Exh E. Ten, which showed palm fronds on the Appellants' land, were referred to in this appeal. This topic was dealt with explicitly at [8]-[23] by the AC with his conclusion about pruning of the cypress

piners at [19]. He refers to other trees which must include the Bangalow palms at [21] which he considered were unlikely to cause injury inter alia. While the Appellants take issue with his conclusions, essentially making in this appeal submissions similar to those before the AC, no failure in reasoning which amounts to a question of law has been demonstrated. There is no basis to find that s 10(2)(a) and/or (b) of the Trees Act was disregarded by the AC. The submissions were otherwise seeking to impermissibly deal with merit matters.

5. Secondly, s 12(i)(ii) of the Trees Act provides that the Court must consider any steps taken by the owner of land on which a tree is situated to prevent any injury. The ground of appeal alleges that no steps have been taken by the Respondents to prevent any injury since the Bangalow palms were planted such as pruning of these and this was a matter the AC failed to address. The AC referred at [14]-[17] to the Respondents' submission that they refuted the Appellants' submission that the palm fronds were likely to cause damage or injury and that most fronds fell within their property, that they had lodged a tree permit application with the relevant local council seeking permission to remove all 14 trees which was refused and that they had obtained a report from a tree lopper. The AC found this report showed the Respondents had made some effort towards responsible tree management and that the report identified no significant issues with the trees. At [22] the AC stated that he had considered s 12 of the Trees Act, which is a sufficient reference in the context of what was before the AC. When the judgment is read fairly and as a whole no question of law arises in relation to this ground of appeal.
6. It follows that the appeal should be dismissed.

Orders

1. The Court orders that appeal no 2024/354685 is dismissed.

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