

AUSTRALIA / JUDGMENT

Freckleton v Carrington

[2024] NSWLEC 1849

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Land and Environment Court New South Wales

Medium Neutral Citation: Freckleton v Carrington [2024] NSWLEC 1849 Hearing dates: 13 December 2024 Date of orders: 13 December 2024 Decision date: 13 December 2024 Jurisdiction: Class 2 Before: Galwey AC Decision: The Court orders:

- (1) The Pt 2 application is refused.
- (2) The Pt 2A application is refused.
- (3) The exhibits are returned other than Exhibit A. Catchwords: TREES (DISPUTES BETWEEN NEIGHBOURS) – Pt 2 application – whether trees have damaged or are likely to damage property – Pt 2A application – neighbouring hedge – bamboo – obstruction of views and sunlight – whether the obstruction is severe Legislation Cited: Trees (Disputes Between Neighbours) Act 2006, Pt 2, ss 7, 9, 10; Pt 2A, ss 14A, 14B, 14D, 14E, 14F Cases Cited: Smyth v Hayim [2012] NSWLEC 1318 Yang v Scerri [2007] NSWLEC 592 Category: Principal judgment Parties: Anthony Freckleton (Applicant) Genevieve Carrington (Respondent) Representation: Counsel: A Freckleton (Self-represented) (Applicant) E Young (Respondent)

Solicitors: Antcliffe Scott Pty Ltd (Respondent) File Number(s): 2024/327918 Publication restriction: Nil

Judgment

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

Background

1. COMMISSIONER: Anthony Freckleton and Genevieve Carrington are neighbours on the upper slopes of Balgowlah Heights. Both properties face east towards North Harbour and Manly. Ms Carrington has two rows of bamboo in her front garden near the common boundary dividing their properties. Mr Freckleton claims the bamboo obstructs, or will obstruct, views from his dwelling, and will damage his property.

2. The final hearing in these proceedings took place onsite, allowing the Court to inspect the trees, both properties and all relevant issues. Mr Freckleton was self-represented; Mr Young, of Counsel, represented Ms Carrington.

The trees

1. Ms Carrington has two rows of slender weavers bamboo (*Bambusa textilis* var. *gracilis*) in a narrow garden bed in front of her dwelling, adjacent to the common boundary shared with Mr Freckleton. The two rows were planted separately and, for the purpose of this decision, I refer to them as Hedge 1 and Hedge 2.
2. Hedge 1 was planted first. It is very close to the common boundary. It was pruned during the weekend before the onsite hearing – some bamboo culms reached almost to the height of Mr Freckleton's double-storey eaves before pruning, but the hedge was around 2.5 metres in height at the hearing.
3. Hedge 2 was planted recently in a narrow bed. It is slightly more than 2.5 metres in height.
4. Trees covered by the Trees Act include bamboo. The bamboo is planted to form hedges and is more than 2.5 metres tall, so Pt 2A of the Trees Act applies to the bamboo: s 14A(1).
5. Each hedge is only a few metres long.
6. Ms Carrington declared her intention for each hedge. She will remove Hedge 1 shortly. She intends to grow bamboo in Hedge 2 to the top of her upper-storey bedroom window. I estimate this to be a height of around 5 metres above ground level.

Orders sought in the application

1. Mr Freckleton has applied to the Court pursuant to both s 7 (Pt 2) and s 14B (Pt 2A) of the Trees (Disputes Between Neighbours) Act 2006 (the Trees Act). He seeks orders for Ms Carrington to remove the bamboo from her property and he wants any replacement planting restricted to a maximum height of 2.5 metres. These are orders the Court can make at s 9 (Pt 2) and s 14D (Pt 2A) of the Trees Act if the Court is satisfied of the relevant jurisdictional tests.

Notice of Motion

1. Mr Freckleton filed a Notice of Motion on 26 November 2024 seeking to amend the orders as follows:
 1. Remove the bamboo hedge and Orders to not plant another bamboo hedge in the front yard in perpetuity.
 2. Any other hedge should not exceed 1.8 metres in height along the boundary fence in the front of the property, between No. 21 and 19 Fisher Street, Balgowlah Heights
 3. Maintain all hedge plants to a maximum height of 1.8 metres at all times.

1. Mr Freckleton explained during the onsite hearing that the Court assisted him to prepare the Notice of Motion. If that were the case, the Court's assistance would have been limited to the process rather than its content.
2. Mr Freckleton asked that these orders apply to a row of camellias along the common boundary to the east of the bamboo and to the height of all hedge plantings within Ms Carrington's front setback.
3. As Mr Young rightly pointed out, these other trees were not in Mr Freckleton's application and cannot be considered in this decision. A single palm tree near the bamboo is not part of either hedge, so is not considered in this decision. It is not within the Court's jurisdiction to include orders to maintain all hedges at a specified height when those hedges are not included in the application and when the Court has not been presented with evidence as to the extent to which they obstruct views or sunlight.
4. For these reasons, I made the following order during the onsite hearing:

1. The Notice of Motion is refused.

Reasonable effort to reach agreement

1. Mr Freckleton wrote several letters to Ms Carrington outlining his concerns about the bamboo. I am satisfied he made a reasonable effort to reach agreement and that the timeframe for the hearing allowed for the required notice of the application: s 10(1) and s 14E(1) of the Trees Act.

The Part 2 application

No damage caused or likely to be caused

1. Mr Freckleton stated that Hedge 1 grew tall enough, and was flexible enough, that parts of bamboo came into contact with his dwelling and caused damage. When asked to point out the damage during the onsite hearing, he conceded that no damage has occurred, but submitted that such damage is likely when the bamboo regrows to its former height. I have no reason to doubt Ms Carrington's stated intention to remove Hedge 1, so it is unlikely that it will cause damage in future. Hedge 2 is further from the boundary and is currently around 2.5 metres tall. I am not satisfied that bamboo in Hedge 2 is likely to contact and damage Mr Freckleton's dwelling within the near future, being a period equivalent to the next 12 months as per the principle at [14] in *Yang v Scerri* [2007] NSWLEC 592.
2. Because the bamboo has not caused damage, and is not likely to do so in the near future, the Court cannot make any orders in the Pt 2 application: s 10(2)(a) of the Trees Act.

The Part 2A application

No severe obstruction of sunlight

1. Ms Carrington's bamboo along the common boundary is behind, or further to the west than, the front of Mr Freckleton's dwelling. Sunlight to the large east-facing windows at the front of his dwelling is therefore unaffected by the bamboo.
2. Both upstairs and downstairs in Mr Freckleton's dwelling, living rooms have north-facing windows near the dwelling's north-eastern corner. Mr Freckleton submitted that his grandchild enjoys playing in the sunlight in the upstairs living area.
3. Mr Freckleton submitted that the bamboo obstructed sunlight to these windows throughout the day, and throughout the year. He provided no shadow diagrams to support this claim. Common knowledge of the sun's movements tells me that sunlight to these windows could be obstructed by the bamboo, even when at its full height, only during the afternoon and only during winter.
4. At its current height, the bamboo does not obstruct sunlight to these windows. Before it was pruned, bamboo in Hedge 1 may have obstructed some afternoon sunlight. When bamboo in Hedge 2 grows to the height that Ms Carrington intends, it will obstruct sunlight to a similar degree. However, it is not just any sunlight obstruction that allows the Court to make orders – the trees must be severely obstructing sunlight to a window: s 14E(2)(a)(i) of the Trees Act. After considering the meaning of 'severe' at [19] in *Smyth v Hayim* [2012] NSWLEC 1318, Fakes C concluded that: "Thus the Act sets a high bar for the level of obstruction caused by the trees the subject of the application." When I consider the amount of overall sunlight available to these rooms, both upstairs and downstairs, and the relatively limited obstruction that Hedge 1 caused and that Hedge 2 might cause in future, I do not find the obstruction to be severe. It follows that no orders can be made on this element of the application.

No severe obstruction of a view

1. At its current height, the bamboo does not obstruct any view from Mr Freckleton's dwelling. Before it was pruned, culms of Hedge 1 grew up into the view, but Mr Freckleton's photographs of this show the obstruction was not severe. That is, the bamboo is not severely obstructing a view from Mr Freckleton's dwelling: s 14E(2)(a)(ii) of the Trees Act.
2. Mr Freckleton reiterated several times during his submissions that he and his family just want to retain the situation as it was when they purchased their property. But as Mr Young pointed out, the Trees Act does not enshrine a right to freezing the surrounding landscape. Plants grow and landscapes change. The Trees Act only provides a means for remedying, restraining or preventing a severe view obstruction of sunlight or of a view: s 14D(1).
3. Assuming Hedge 2 reaches the height intended by Ms Carrington, and forms a dense screen as bamboo can, it will obstruct part of the northern view through the north-facing living room windows, upstairs and downstairs. If that were the only view, the obstruction might become severe. But the Court is required to consider a range of matters at s 14F of the Trees Act, including:

- (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,
1. Mr Freckleton's living rooms on both levels are designed to have expansive views to the east. Mr Freckleton submitted that he and his family like to watch the district lights to the north at night. I noted that similar suburban areas could be seen through the front windows and also to the northeast through the northern windows. Additionally, the eastern view takes in water, bushland and an expansive sky view. The nature and extent of the remaining view reduces the impact of any future view obstruction caused by the bamboo.
 2. Mr Freckleton submitted that the bamboo will also obstruct the view from a window at the living room's north-western corner and from the master bedroom's window. These narrow view corridors between the two dwellings are through windows in locations other than principal living areas; therefore, any view obstruction there will have a minor impact on the dwelling's occupants.
 3. For these reasons, and in light of s 14F, subss (q) and (r), I find that Mr Freckleton's interests in preventing a future view obstruction would not be enough to warrant interfering with the trees: s 14E(2)(b) of the Trees Act.

Conclusion

1. For reasons given above, the Court cannot make orders under either the Pt 2 or Pt 2A application. Evidence and submissions in these proceedings extended to other matters including the nature of communication between the parties, intended ill will, the potential for roots to cause damage, privacy and overlooking, the erection and subsequent removal of a trellis, and the impacts of changes to the front of Mr Freckleton's dwelling. Consideration of these matters was unnecessary within this judgment as they were not relevant to my reasons for this decision.

Orders

1. The Court orders:
 1. The Pt 2 application is refused.
 2. The Pt 2A application is refused.
 3. The exhibits are returned other than Exhibit A.

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D Galwey

Acting Commissioner of the Court

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Prepared on 26 October 2026 · Esheria