

AUSTRALIA / JUDGMENT

King v Moore [2023] NSWLEC 1654

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Land and Environment Court New South Wales

Medium Neutral Citation: King v Moore [2023] NSWLEC 1654 Hearing dates: 26 October 2023 Date of orders: 26 October 2023 Decision date: 26 October 2023 Jurisdiction: Class 2 Before: Galwey AC Decision: The Court orders:

- (1) The application is refused.
- (2) The exhibits are returned, other than Exhibit A. Catchwords: TREES (DISPUTES BETWEEN NEIGHBOURS) –Pt 2A application – palms – obstruction of views – whether the palms form a hedge – whether reasons to interfere with the trees outweigh reasons to avoid interference Legislation Cited: Trees (Disputes Between Neighbours) Act 2006, ss 14A, 14B, 14E Cases Cited: Arnold v Persson [2022] NSWLEC 1270 Category: Principal judgment Parties: Natasha Nicole King (Applicant) Taki Moore (Respondent) Representation: Counsel N King (Self-represented) (Applicant) T Moore (Self-represented) (Respondent) File Number(s): 2023/265789 Publication restriction: No

Judgment

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

Background

1. COMMISSIONER: Natasha King (the applicant) has applied to the Court pursuant to s 14B (Pt 2A) of the Trees (Disputes Between Neighbours) Act 2006 (the Trees Act) seeking orders for the removal of a row of Bangalow palms (the trees) on the neighbouring Queenscliff property belonging to Taki Moore (the respondent). The hearing took place onsite, allowing the Court to inspect the trees and both properties.

The trees

1. Mr Moore obtained a report from arborist Robert de Jong, who described the 15 Bangalow palms (*Archontophoenix cunninghamiana*) as 4–8 metres tall, with 10 of the trees in good condition. Mr de Jong recommended removal of the other 5 trees because they are in poor condition.

Jurisdictional hurdles

1. Certain tests must be met before the Court can make any orders. 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.

Reasonable effort

1. Ms King has written to Mr Moore on several occasions. I am satisfied that she made a reasonable effort to reach some agreement about the trees with Mr Moore (s 14E(1)(a) of the Trees Act).

The view obstruction

1. Ms King submitted that she bought her unit for its views over Queenscliff beach and the surrounding landscape. When Mr Moore's dwelling was constructed, view retention was considered, so that Ms King retained much of her view. Ms King provided photographs that show the otherwise uninterrupted view of the beach before the palms grew taller than Mr Moore's dwelling.
2. The trees were planted by previous owners of Mr Moore's property. They form a row on Mr Moore's property along the common boundary. They have grown up into Ms King's view so that they are now of a height where they obstruct most of her view. Only small glimpses of the beach can be seen between palm fronds. This is the principal view from her kitchen, living area and balcony. I consider the degree of the view obstruction to be severe, which satisfies the test at s 14E(2)(a)(ii) of the Trees Act.

Whether the trees form a hedge

1. The Court's jurisdiction under Pt 2A of the Trees Act is restricted at s 14A(1): 14A Application of Part
 - (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).
- (2) ...
1. A palm has a single growing point at the top of its stem. While individual fronds can be removed without damage to a palm, it cannot be reduced in height. This is different to trees that can be reduced in height and otherwise shaped – picture cypress or lilly pillies. The Trees Act, perhaps intentionally, has not included a definition of the word 'hedge'. Though used in the Act as a noun, the word is also a verb – to 'hedge' a row of trees is to prune it, controlling its height, spread and form, thus forming a hedge. Palms cannot be pruned in this way – they cannot be hedged. I am aware that palms have been considered in other Pt 2A matters, but I am reluctant here to call this row of palms a hedge, even though, as Ms King pointed out, they were planted in a straight row and their fronds form a relatively continuous canopy.

Balance of interests

1. Had I accepted Ms King's argument that the palms form a hedge, I remain disinclined to make orders for a further reason. As per s 14E(2)(b) of the Trees Act, the reasons to interfere with the trees must outweigh those for avoiding interference. Unlike a dense screen formed by a hedge, the canopy formed by these palms will get higher over time, with the palms' clear stems left beneath. In a few years it is likely that much of Ms King's beach view will once again be available, although some sky above would be obstructed. A similar situation arose in *Arnold v Persson* [2022] NSWLEC 1270, an application which was also refused. Tree canopy brings inherent benefits, including cooling and shading. In this case, I find the benefits outweigh the temporary nature of the view obstruction, so I would not make any orders.

Other matters

1. Despite these findings, the current situation could be made more tolerable for Ms King if some of the trees were removed. Mr de Jong recommended the removal of 5 unhealthy trees – removing an additional one, two or more trees might allow Ms King some view of the beach. Mr Moore remarked during the hearing that the palms no longer screen the lower units behind them, so that their privacy might benefit from removal and replacement of the trees. This is a matter for Mr Moore, as the Court will not order any interference.

Orders

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

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: 06 November 2023

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