

AUSTRALIA / JUDGMENT

Sader v Hunt [2025] NSWLEC 1026

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Land and Environment Court

New South Wales

Medium Neutral Citation: Sader v Hunt [2025] NSWLEC 1026

Hearing dates: 15 January 2025

Date of orders: 20 January 2025

Decision date: 20 January 2025

Jurisdiction: Class 1

Before: Horton C

Decision: The Court orders that:

(1) The application is dismissed.

Catchwords: TREES (Disputes between neighbours): whether reasonable effort made – whether obstruction is severe – whether powers of the Court enlivened

Legislation Cited: Trees (Disputes between Neighbours) Act 2006, Pt 2A, ss 14A, 14B, 14C, 14D, 14E, 14F

Cases Cited: Robson v Leischke (2008) 72 NSWLR 98; [2008] NSWLEC 152.

Tenacity Consulting v Warringah Shire Council (2004) 134 LEGRA 23; [2004] NSWLEC 140

Category: Principal judgment

Parties: Nathalie Sader (Applicant)

Nathan Hunt (Respondent 1)

Andrea Hunt (Respondent 2)

Representation: Counsel:

B Gallifuoco (Applicant)

J Hunt (Agent)

Solicitors:

Sage Solicitors (Applicant)

J Hunt (Agent)

File Number(s): 2024/412460

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Judgment

1. COMMISSIONER: An application has been made under Part 2A of the Trees (Disputes between Neighbours) Act 2006 (Trees Act), seeking orders for the removal of trees on a property in the southern Sydney suburb of Illawong.
2. The applicant, Ms Sader, believes three groups of trees at No 8 Peru Place obstruct either sunlight or views, or both sunlight and views, from various locations around her property at No 7 Peru Place, Illawong.
3. It is helpful to briefly describe the houses in Peru Place are set high on steeply sloping terrain, with views generally to the west and north to the Georges River and beyond. The Applicant's property overlooks an adjoining property at 8 Peru Place, on which the trees are located.
4. The grouping of the trees on No 8 Peru Place is useful to set out here as follows:
 1. Group 1: A murraya hedge planted along the south western boundary of the shared boundary.
 2. Group 2: A large clump of vegetation identified as Bamboo Palm and Bamboo, also planted along the south western boundary of the shared boundary.
 3. Group 3: A hedge comprising Cupressus and bamboo planted along the eastern boundary of the adjoining land at No 8 Peru Place.
1. Ms Sader seeks orders as follows:
 1. Within 30 days of the date of the date of these orders, the respondents, at their expense, shall prune and thereafter maintain the hedges as follows:
 - a. The Murraya hedge on the south western boundary of 8 Peru Place, Illawong is to be pruned to a height of 2.5m;
 - b. In respect of the hedge comprising Bamboo and Palms along the southern boundary of 8 Peru Place, Illawong:
 - i. The Bamboo is to be pruned to a height of 2.5m; and
 - ii. The Palms are to be sufficiently thinned to provide solar access to 7 Peru Place, Illawong; and

- c. The hedge, comprising Cupressus and other species, located on the eastern boundary of 8 Peru Place, Illawong is to be pruned to a height of 2.5m

2. The pruning works in Order 1 AQF Level 3 qualified arborists or qualified horticulturalists (the contractor), with all appropriate insurances.

- 3. Should access be required to the applicant's property to undertake these pruning works, the applicant shall grant all reasonable access upon receipt of at least 72 hours emailed notice from the respondent's along with a copy of the Contractors insurance Certificates of Currency.
- 4. Should any of the hedges be replaced in future, any alternative planting shall be maintained at or not exceeding the heights set out in Order 1.
- 5. All pruning works shall comply with the Safe Work Australia Guide to Managing Risks of Tree Trimming and Removal Works, 2016 and shall be undertaken during reasonable daytime working hours.
- 6. Such further or other orders as the Court sees fit.

- 1. That said, during the hearing, the Applicant amended the application before the Court in two respects:

- 1. Firstly, the Applicant does not press for any orders in respect of Group 1.
- 2. Secondly, while a diagram identifying the stand of trees in Group 3 (Exhibit B) suggest it comprises the Cupressus hedge to the east of a pool cabana, and bamboo to the south of that, the Applicant also seeks to extend Group 3 to include the bamboo to the north of the pool cabana.

- 1. The proceedings commenced onsite. The Court was first taken to certain viewpoints on the ground and first floor of No 7 Peru Place, after which the Court was taken to the private open space of No 8 Peru Place.

Framework for this decision

- 1. Part 2A of the Trees Act deals with high hedges that obstruct sunlight or views. Section 14A sets out the application of the Part in the following terms:

- (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).

...

- 1. Section 14B of the Trees Act provides that the land owner may apply to the Court for an order to remedy, restrain or prevent a severe obstruction of the following kinds:

- (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.

1. A Tree Dispute Application was filed by Ms Sader with the Court on 6 November 2024 (the Application) (Exhibit A), supported by a bundle of documents.
2. Section 14C of the Trees Act requires an applicant seeking an order or orders from the Court to give at least 21 days notice to the lodging of an application, and the terms of any proposed order, to the owner of the land on which the trees are located, and any other relevant authority.
3. On 4 June 2024, solicitors for Ms Sader sent such a Notice to the owners of No 8 Peru Place (Exhibit A, Tab 2). The Notice was attached to correspondence sent via email.
4. The Court has wide powers to make orders of a kind set out at s 14D of the Trees Act, which is in the following terms:

14D Jurisdiction to make orders

- (1) The Court may make such orders as it thinks fit to remedy, restrain or prevent the severe obstruction of:

- (a) sunlight to a window of a dwelling situated on the applicant's land, or
- (b) any view from a dwelling situated on the applicant's land,

if the obstruction occurs as a consequence of trees that are the subject of the application concerned.

- (2) Without limiting the powers of the Court to make orders under subsection (1), an order made under that subsection may do any or all of the following:
 - (a) require the taking of specified action to remedy the obstruction of sunlight or of a view,
 - (b) require the taking of specified action to restrain or prevent the obstruction of sunlight or of a view,
 - (c) require the taking of specified action to maintain a tree or trees at a certain height, width or shape,
 - (d) require the removal of a tree or trees and the replacement of the tree or trees with a different species of tree,
 - (e) require the making of an application to obtain any consent or other authorisation referred to in section 6 (1) (a),

- (f) authorise the applicant concerned to take specified action to remedy, restrain or prevent the obstruction of sunlight or of a view,
 - (g) authorise land to be entered for the purposes of carrying out an order under this section (including for the purposes of obtaining quotations for the carrying out of work on the land),
 - (h) require the payment of costs associated with carrying out an order under this section.
- (3) However, the power to make an order under subsection (1) does not extend to an order that requires the payment of compensation.
1. That said, s 14E(1) of the Trees Act precludes the making of an order unless the Court is satisfied, firstly, that the applicant has made a reasonable effort to reach agreement with the owner of the land on which the trees are located (subs (1)(a)), and secondly, if the applicant has given notice of a kind at [11] (subs (1)(b)).
 2. Likewise, s 14E(2) precludes the making of an order unless the Court is satisfied that, firstly, the trees concerned, are severely obstructing sunlight to a window of a dwelling located on the applicant's land (subs (2)(a)(i)), or secondly, are severely obstructing a view from a dwelling on the applicant's land (subs (2)(a)(ii)). Next, subs (2)(b) requires the Court to be satisfied that the severity and nature of the obstruction overrides or outweighs the undesirability of disturbing or interfering with the trees the subject of the application.
 3. Finally, before determining an application brought under Part 2A, the Court must consider those matters for consideration at s 14F, that are as follows:

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.

Whether reasonable efforts to reach agreement have been made

1. The Applicant states that numerous attempts have been made to negotiate an agreement with the owners of No 8 Peru Place, without success and so solicitors were engaged to prepare and serve a Notice. (Exhibit A, Form G, p 6).
2. While not initially in evidence, parties agreed that four text messages represent exchanges between the parties in 2018, 2019 and 2022. I directed that those text messages, if agreed, be provided to the Court.
3. The text messages exchanged between Mr Hunt and Ms Sader, provided to the Court following the hearing at 2.49PM, are as follows:

Mr Hunt, 23 December 2018, 4.13PM: "I can cut branches soon if you unlock gate. Nathan"

Mr Hunt, 13 April 2019, 2.07PM: "If you unlock the gate I'll trim overhanging branches", to which Mr Sader appears to reply: "OK I'll do it now"

Mr Sader, 5 March 2022 at 6.16PM: "Nathan, what are you planning to do with the trees?", in which Mr Hunt appears to reply: "It's been wet, I'll do some tomorrow, I'll text you to unlock gate"

Mr Sadler replies: "So we're on the same page, I expect my view to unobstructed [sic] from any trees. In your land [sic]."

Mr Hunt replies: "No, we'll see what your [sic] talking about tomorrow."

1. The parties also agree that no contact occurred between the parties for a period between 5 March 2022 and 4 June 2024 when the Notice was issued.
2. The parties agree that there were certain circumstances at play during the period between March 2022 and June 2024 that may, to some extent, explain the lack of communication between the parties over that period. It is not necessary to explain those circumstances here for 2 reasons:
 1. Firstly, because the Applicant believes those circumstances are irrelevant to the matter in dispute, and
 2. Secondly because the Respondents submit that notwithstanding those circumstances, however distressing, Ms Sader was in no way constrained from making a reasonable effort to reach agreement with the Respondents at any stage during that period.
1. The Applicant submits that the requirement at s 14E(1)(a) of the Trees Act is less demanding than the language used in provisions of other statutory enactments that require parties to make 'reasonable attempts', and does not specify any particular time at which those efforts must be made: *Robson v Leischke* (2008) 72 NSWLR 98; [2008] NSWLEC 152, at [194].
2. In addition to those exchanges evident in text messages, the Applicant cites the text of the Notice to the effect that the Applicant seeks a solution that is achieved out of court.
3. Ms Sader's oral evidence is that she understood her husband to be taking the lead in efforts to resolve the matter with the Respondents, and was aware of the text messages. It is also her evidence that she was initially uncertain as to whether she was permitted to approach the Respondents until legal advice confirmed she was permitted to do so. Still, Ms Sader did not approach the Respondents or correspond with them as she considered it best to rely on professionals, which I understand to refer to legal representatives.
4. The Respondents submit that Ms Sader's evidence demonstrates that despite receiving legal advice confirming otherwise, Ms Sader opted not to make reasonable efforts for a period of two years, but to rely on the Notice as the only path to resolve the dispute.

5. A careful read of the text messages suggests that nowhere is an effort made by Mr Sader, in my view, to do more than request Mr Hunt trim trees forming part of Group 2, because Group 2 is located behind a side gate that provides access to the side passage of No 7 Peru Place. The text messages do not reveal any broad or ongoing concern as to the group or groups of trees that are the subject of the Application. There is clearly no explicit reference to the trees forming Group 3. While not fatal in itself, I do not consider the text messages indicative of efforts to reach agreement on the trimming of the trees that are now the subject of proposed orders.
6. I also note that the text messages are said to be authored by Mr Sader, and not the Applicant, Ms Sader. While I accept that these things can be a matter of shared responsibility, I consider it relevant to the formation of an opinion of satisfaction as to efforts made by the Applicant that the Applicant's evidence is that she, Ms Sadler, made no effort to reach agreement prior to the issue of the Notice.
7. Neither do I understand the text message attributed to Mr Sader on 5 March 2022 that he expected views to be unobstructed from any trees on the Hunt's land to be anything more than a one-sided statement of expectation, and not an effort to reach agreement.
8. However, as shown in Robson, a reasonable effort to reach agreement can be made at any point prior to the Court making orders.
9. The Notice is in the following relevant terms:

"The Owner gives the Adjoining Owners twenty-one (21) days' notice pursuant to Section 14C of the Trees Act that the Owner will, if, by making a reasonable effort through negotiation with the Adjoining Owners, cannot reach an agreement in relation to the Bamboo Trees, make an application to the Land and Environment Court to seek any one or more or all of the following orders:

..." (Exhibit A, Tab 2, folio 7)

1. Paragraph A.5 of the Notice states that the Owner and Mr Sader support the proposed solutions included in the Expert Arborist Report set out in paragraph B.2 of the Notice.
2. The proposed solutions set out at paragraph B.2 of the Notice are as follows:

"(a) The pruning of Group 1, Group 2 and Group 3 to maintain a certain height, width and shape with no detriment to the vegetation itself. The reduction of height and reduction of canopy encroachment of Group 1. Our client will do pruning of Group 1 (murraya) that overhangs to our Client's property;

- (b) The weeding of the palms in Group 2, noting that the Palms in Group 2 cannot be pruned to a nominated height [sic]. Some of the Palms in Group 2 could be removed or the fronds removed. The health of the remaining Palms being maintained by the reduction in the overall number of Palms in Group 2;

- (c) removing of the overcrowding of palms and bamboo in Group 2 to reduce the conflicting growth of the plants in Group 2 along with removing the dead fronds; and
- (d) determining what solutions are required for Group 3 upon inspection after site access has been granted."

1. On 14 June 2024, Mr Hunt replied to the issue of the Notice by email to Mr Sader that relevantly stated:

"...

We are, however, prepared to trim the relevant trees to our satisfaction by no later than Monday, 5 August 2024. This is a period of approximately two months from the receipt of the Notice. We consider this to be an appropriate period of time to undertake such a task around our other responsibilities, including running a business, employment and our family obligations...

We have no objection to your clients trimming the relevant trees on their side of the boundary in Group 1.

We will give permission to the Arborist to access our property to investigate the Group 3 plants to correctly identify the plants and to examine the health of these plants. Such permission will only be granted from 5 August 2024 and in the presence of both of us...

...

If, by 5 August 2024, your clients have any ongoing concerns with respect to the trees in question, we request you correspond with us and provide a further 21 days for us to consider your clients' requires before commencing any proceedings." (Exhibit A, Attachment 1)

1. On 24 June 2024, the Applicant, replied, stating relevantly:

"...

It is not clear from your email why a delay of 5 August 2024 is required for you to complete the works set out in the Notice. Have you approached contractors to undertake the work? If so, please provide us with a copy of the scope of works they have quoted to undertake the works and when they expect to be able to commence the works. If:

The scope of works accords with the works required under the Notice;

The contractor is unable [sic] to complete the works prior to 5 August 2024; and

The contractor confirms that he has been engaged by you to undertake the works;

then we expect that our client will agree to wait until 5 August 2024 for you to have the work completed.

..."

1. On 25 June 2024, the Respondents replied to state relevantly:

"...

We are not in a position to have met your arbitrary 21 day time frame. We have explained to you that we have other responsibilities, including running a business, employment and our family obligations. We will attend to the appropriate trimming as per our family's commitments and by no later than 5 August 2024. Further, you may not be aware, but the Sutherland Shire has experienced significant rainfall these past two weeks.

..."

1. It is commonly held that the last communication between the parties was on 25 June 2024.
2. I consider the Notice, and the correspondence prompted by it at [30]-[35] to represent an effort by the Respondent to address the concerns of the Applicant as set out in the Notice, but for in respect of the timeframe, and for which a reasonable alternative appears to have been offered. This accords with exchanges found in text messages at [19] which suggests Mr Hunt has responded to requests to trim Group 2 promptly, and without rancour or resentment.
3. Given Ms Sader's evidence that she made no effort to reach agreement, even after receiving legal advice that she was free to do so, text messages that imply no effort to reach agreement, and the apparent effort made by the Respondents that was effectively rebuffed by the Applicant, I am not satisfied that the Applicant has not made a reasonable effort to reach agreement of a kind at s 14E(1)(a) of the Trees Act. Rather, it would appear the reasonable effort has been exercised by the Respondents, in my view.
4. However, in the event there is a flaw in my formation of this finding, I will now turn my attention to the obstruction asserted by the Applicant. For reasons that I will now set out, I am of the view that the obstruction caused by Group 1, Group 2 or Group 3 trees does not reach the threshold of severity required to enliven the Courts power make the orders sought by the Applicant.

Whether trees severely obstruct sunlight to a window

1. The Applicant relies upon an Arborists Report prepared by NSW Trees Arboricultural consultants dated 16 May 2024, appended to the Notice.
2. The Arborists Report identifies 25 viewpoints located on the ground floor and first floor of the Applicant's dwelling, and from which the obstruction to sunlight and views is assessed. The diagram identifying the viewpoints is re-produced below:
 1. Obstruction of sunlight is identified at the following viewpoints:
 1. Viewpoint 7: minor obstruction to ground floor bathroom window
 2. Viewpoint 12: minor obstruction to ground floor balcony
 3. Viewpoint 13: moderate obstruction to ground floor bathroom window

4. Viewpoint 21: obstruction of sunlight is likely due to the density of Group 2 trees.
1. The Arborists Report concludes there is minor obstruction of sunlight (p 41). I agree.
2. As the Court's jurisdiction to make orders at s 14D(1)(a)(i) is contingent upon the obstruction of sunlight being found, firstly, to be severe, and secondly to a window, I find there is no basis for the Court to make orders in respect of the obstruction of sunlight.
3. The jurisdiction of the Court is directed, at s 14E(2)(a)(i), to those trees that are severely obstructing sunlight to a window (my emphasis), and not to trees that have a potential or a likelihood to obstruct to some unspecified degree in the future, as the assessment at Viewpoint 21 would appear to suggest.
4. On the basis of the Arborist Report, and my own assessment at the onsite view, I am not satisfied that the obstruction to any window is severe. In both Viewpoint 7 and 13, the window was receiving direct sunlight when viewed at around 10.30AM, and the room was illuminated by the sunlight. As the windows face north east, I consider this an appropriate time for such an assessment to be made.

Whether trees severely obstruct views from the dwelling

1. The Arborists Report qualifies the expertise of the author in respect of views at in the following terms:

The arborist is not a Views expert, cannot make commentary on the nature of the loss of obstruction of views, but can only discuss the management of the vegetation to possibly increase/enhance the views.(p 8)

1. That said, the author also states that the assessment of the view obstruction undertaken by the author adopts the scale of assessment found in the Court's planning principle *Tenacity Consulting v Warringah Shire Council* (2004) 134 LEGRA 23; [2004] NSWLEC 140.
2. The Viewpoints identified on the plan at [41] where obstruction is noted are assessed in the following manner in the Arborists Report:
 1. Viewpoint 1: view obstruction minor, causing severe obstruction if Group 3 trees not maintained to a reasonable height.
 2. Viewpoint 2: view obstruction severe, caused by Group 2 trees.
 3. Viewpoint 3: view obstruction severe, caused by Group 2 trees.
 4. Viewpoint 4: view obstruction severe, caused by Group 2 trees.
 5. Viewpoint 5: view obstruction moderate to severe, caused by Group 2 trees.
 6. Viewpoint 6: view obstruction moderate to severe, caused by Group 2 trees.
 7. Viewpoint 13: moderate obstruction to ground floor ensuite bathroom window.

8. Viewpoint 14: view obstruction moderate – severe, to both current and potential views caused by both Group 2 and 3 trees.
9. Viewpoint 15: view obstruction moderate – severe, to both current and potential views caused by both Group 2 and 3 trees.
10. Viewpoint 16: view obstruction moderate – severe, to both current and potential views caused by both Group 2 and 3 trees.
11. Viewpoint 17: view obstruction moderate – severe, to both current and potential views caused by Group 3 trees.
12. Viewpoint 18: view obstruction currently minor, but likely to be moderate – severe, to both current and potential views caused by Group 3 trees.
13. Viewpoint 19: view obstruction currently minor, but likely to be moderate – severe, to both current and potential views caused by Group 3 trees.
14. Viewpoint 20: view obstruction currently minor, but has the potential to be moderate caused by Group 3 trees.
15. Viewpoint 22: view obstruction currently minor, but has the potential to be moderate caused by Group 3 trees.
1. The Arborists Report concludes there is only minor obstruction of sunlight, and minor to potentially severe obstruction of views (p 41). The author also concludes vegetation on the site at No 8 Peru Place can be "managed to a more tolerable height" and that the Group 2 trees "seem to be planted ad hoc", with no real thought given to the overcrowding nature of this garden patch. The potential loss of some of these specimens not only allows the client to obtain better views, it will also be better for the trees themselves..."
2. Whether or not it is evident from the images at Viewpoints 2-6, I did not conclude the view to the Georges River was severely obstructed by Group 2 trees at those viewpoints. At worst, the effect could be described as light filtering of views to the water, from a ground floor location. In fact, the view to the Georges River from Viewpoint 2 was a notable aspect of the location, and was clearly visible.
3. For reasons similar to those at [45], the jurisdiction of the Court is directed, at s 14E(2)(a)(ii), to those trees that are severely obstructing a view from a dwelling (my emphasis), and not to trees that have a potential or some likelihood of obstructing to some unspecified degree in the future, as the assessment by the Arborist would suggest in the majority of instances.
4. The Arborist Report considers only Viewpoints 2-6 to be severe obstructed. As stated above, having had the benefit of an onsite view, I cannot conclude the same.

Conclusion

1. For reasons I have set out, I am not satisfied that the Applicant has made a reasonable effort to reach agreement with the Respondents as to terms that might resolve this dispute. Rather, in my mind, it would appear those efforts to achieve the outcome sought by the Applicants, as proposed by the Respondents within a reasonable time frame, have been frustrated.
2. On the basis of the Arborist Report, and my own observations from the Applicant's property, I am also unable to be satisfied that the obstructions claimed are severe.
3. As such, the Court's power to make orders is not enlivened and the Application must be dismissed.

Orders

1. The Court orders that:
1. The application is dismissed.

T Horton

Commissioner of the Court

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Decision last updated: 22 January 2025

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