

AUSTRALIA / JUDGMENT

Schiff v Shnier

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Land and Environment Court New South Wales Medium Neutral Citation: Schiff v Shnier [2019] NSWLEC 1535 Hearing dates: 31 October 2019 Date of orders: 31 October 2019 Decision date: 31 October 2019 Jurisdiction: Class 2 Before: Galwey AC Decision: The application is refused. Catchwords: TREES (DISPUTES BETWEEN NEIGHBOURS) – hedges – bamboo – obstruction of views – the trees are not on land adjoining the applicant’s land Legislation Cited: Trees (Disputes Between Neighbours Act) 2006 (NSW) Cases Cited: Dive v Lin [2017] NSWLEC 1348 Dive v Lin and Liu [2017] NSWLEC 153 Texts Cited: Department of Justice and Attorney General, Review of the Trees (Disputes Between Neighbours Act) 2006 (NSW) (November 2009) Category: Principal judgment Parties: Barbara Schiff (Applicant) Michael Shnier (First Respondent) Mandy Shnier (Second Respondent) Representation: Counsel: B Schiff (Litigant in person) (Applicant) S Nash (Respondents) Solicitors: Boskovitz Lawyers (Respondents) File Number(s): 2019/259244 Publication restriction: No

Judgment

This decision was given as an extemporaneous decision. It has been revised and edited prior to publication. The application Barbara Schiff (‘the applicant’) has applied to the Court pursuant to s 14B of the Trees (Disputes Between Neighbours) Act 2006 (NSW) (‘the Trees Act’) seeking orders for bamboo and other vegetation to be pruned on a nearby property in Dover Heights. The bamboo grows on land owned by Michael and Mandy Shnier (‘the respondents’). Dr Schiff’s property is at number 6 in the street, the respondents’ at number 10. The properties are all rectangular, in series along the street. The Schiff property and the Shnier property are therefore separated by the property at number 8. Tenants at number 8, between the two properties, have written a letter supporting Dr Schiff’s application. Trees must be on land adjoining the applicant’s land At the outset of today’s hearing, I raised the issue of the spatial relationship between the applicant’s and respondents’ properties. The Trees Act provides a limited jurisdiction for affected neighbours to resolve tree disputes. At s 14B, the Trees Act limits the jurisdiction to trees on land adjoining an applicant’s land (with my emphasis): 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. In *Dive v Lin* [2017] NSWLEC 1348 (*Dive v Lin*), I found I could not make orders for a Part 2 application concerning damage because the tree was not principally on land adjoining the applicant's. The wording requiring trees to be on land adjoining the applicant's land is similar in both Parts 2 and 2A. In Part 2, s 7 similarly restricts the jurisdiction (again, with my emphasis): 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. The applicant in *Dive v Lin* appealed the decision, his grounds for appeal being my finding requiring the meaning of 'adjoining land'. In *Dive v Lin and Liu* [2017] NSWLEC 153, Preston CJ discussed the meaning of 'adjoining land' at [15]-[51] and dismissed the appeal, finding no error of law had been made. Dr Schiff wondered if the Court could take a flexible approach to the term 'adjoining land'. She pointed out that the tenant at number 8 had approached the Shniers with a request to prune the trees. Legislation should speak for itself, but where it might be of assistance, the Court can refer to relevant background material. The 2009 "Review of the Trees (Disputes Between Neighbours) Act 2006 (NSW)", preceding the 2010 addition of Part 2A of the Trees Act, considered the many submissions received. When discussing the scope to extend the jurisdiction to include trees obstructing sunlight or views, under the heading 'Strictly limited scope' the authors wrote on page 35: "The Court would only have the power to hear matters regarding: ...hedges which are directly next door (not one or two properties over)." Those drafting the new legislation carried this recommendation over by restricting the jurisdiction to trees 'on adjoining land'. It follows that the Court can only make orders for trees in a hedge where the affected person owns a property adjoining the tree owner's land. Other people may be affected by the trees, but they cannot gain orders from the Court to interfere with those trees. Dr Schiff explained that she was only acting on advice she received from the Community Justice Centre (CJC). The CJC deals with many disputes of various causes that may ultimately go to a court or tribunal under one or more of numerous pieces of legislation. It cannot be expected to provide expert legal advice. Its role is to provide free mediation to help people solve disagreements or resolve disputes without going to court. Mr Nash, counsel for the respondents, suggested the Court should use the onsite hearing to assess and make a finding on the severity of the view obstruction. I find it unlikely that the matter will return to Court via another application from Dr Schiff. Should an immediate neighbour of the Shniers apply to the Court, the view obstruction would need to be assessed from their property. I therefore saw no reason to assess view loss from Dr Schiff's property and there was no suggestion that I should, or could, assess view loss from other properties today.

Orders

As a result of the foregoing, the Court orders: The application is refused. D
Galwey Acting Commissioner of the Court

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