

AUSTRALIA / JUDGMENT

Smith v Gregory [2022] NSWLEC 1449

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Land and Environment Court New South Wales

Medium Neutral Citation: Smith v Gregory [2022] NSWLEC 1449 Hearing dates: 23 August 2022

Date of orders: 26 August 2022 Decision date: 26 August 2022 Jurisdiction: Class 1 Before: Galwey

AC Decision: The Court orders that:

- (1) The application is refused. Catchwords: TREES (DISPUTES BETWEEN NEIGHBOURS) – Pt 2A application – neighbouring trees – adjoining land – whether the trees are planted to form a hedge – obstruction of views – application refused Legislation Cited: Trees (Disputes Between Neighbours) Act 2006, Pt 2A, ss 14A, 14B, 14E Cases Cited: Johnson v Angus (2012) 190 LGERA 334; [2012] NSWLEC 192 P. Baer Investments Pty Limited v University of New South Wales [2007] NSWLEC 128 Wisdom v Payn [2011] NSWLEC 1012 Category: Principal judgment Parties: Robert Smith (First Applicant) Julia Smith (Second Applicant) Richard Gregory (First Respondent) Mary Gregory (Second Respondent) Representation: Counsel: R Smith (Self-represented) (First Applicant) J Smith (Self-represented) (Second Applicant) R Gregory (Self-represented) (Both Respondents) File Number(s): 2022/141005 Publication restriction: No

Judgment

Background to the application

1. COMMISSIONER: On a steep north-facing slope in Avalon Beach, Richard and Mary Gregory (the Respondents) have a garden with palms, tree ferns and other plants. Upslope to their south, the property belonging to Julia and Robert Smith (the Applicants) is close to the top of a natural ridge. From their dwelling, the Smiths have views to the north and northeast, over the Gregorys' property, to Careel Bay, the Palm Beach Peninsular and beyond.
2. The Smiths have 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 Gregorys to maintain trees in their front garden to a height no greater than 2.5 metres.

The hearing

1. The final hearing in these proceedings took place onsite, with parties self-represented. No expert reports were in evidence.

Framework for this decision

1. At s 14A, Pt 2A of the Trees Act only applies to certain trees. 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) Despite section 4, this Part does not apply to trees situated on Crown land.
1. At s 14B of the Trees Act, those trees must be on adjoining land. 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.
1. Before the Court can make any orders, the jurisdictional tests at s 14E of the Trees Act must be satisfied. 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.

The Applicants' position

1. The Smiths' application shows 12 trees (6 Bangalow or Golden Cane Palms, a dracaena, a tree fern, two date palms and two fan palms) that are 5–10 metres tall, planted throughout the Gregorys' front garden in a non-linear arrangement at irregular spacings. The Smiths submitted that the trees form a hedge, fulfilling the requirement at s 14A(1) of the Trees Act, as they are more than 2.5 metres tall and their foliage overlaps to form a continuous canopy.
2. The Smiths have lived at their property since 1988. They submitted that most of the trees were probably planted by the previous owner of the Gregorys' property in or around 1997.

3. The Smiths submitted that the trees severely obstruct views from several areas of their dwelling. The views include the broad landscape, water and the land-water interface, taking in Careel Bay, Whale Beach, the Palm Beach Peninsular, and beyond to Kilcare Heights and Maitland Bay. Filtered views were available through the more-distant native eucalypts. The impact of other trees on their views has decreased as those trees have grown, but the Gregorys' trees that are the subject of the application are growing up into the views, significantly or completely obstructing parts of the view. The Smiths submitted that this affects their enjoyment of their property and diminishes their property's value.
4. The Smiths have spoken with the Gregorys several times over several years, seeking to retain their views. They submitted that Mr Gregory made it clear that he would not be paying for any trees to be removed. While Mr Gregory might have offered to allow the Smiths to remove, or pay for removing, some trees or some foliage, the Smiths submitted that they should not be responsible for maintaining the Gregorys' garden.
5. The Smiths submitted that the trees are shallow-rooted and do not contribute to the prevention of landslip.

The Respondents' position

1. The Gregorys filed with the Court a response to the application that includes a rough plan of the vegetation in their front garden, with approximately 18 trees or overstorey plants between their driveway and their southern boundary, including various palms, tree ferns, dracaena, and frangipani. Again, the planting is shown to be non-linear, with plants scattered at irregular intervals throughout the garden. The Gregorys submitted that the trees were not planted to form a hedge, nor do they now form or appear as a hedge. The Gregorys value the trees for their amenity, shade and privacy. The Gregorys submitted that the trees preserve the stability of their sloping land in this landslip area.
2. The Gregorys submitted that they do not share a boundary with the Smiths – a driveway to another property in this subdivision separates their respective boundaries. Therefore the trees do not grow against the Smiths' boundary.
3. The Gregorys submitted that they sympathise with the Smiths, regarding the impact to their views, although they feel the Smiths' description of the severity of the view obstruction is exaggerated. When he last discussed the issue with the Smiths, Mr Gregory told them he could not afford the financial cost of any tree removal, but told the Smiths they could thin out the golden palms and the dracaena at their own expense if they wished.
4. The Gregorys submitted that cutting all plants down to 2.5 metres is not only unnecessary but would destroy most of the vegetation.

Findings

1. I find that the trees are not planted so as to form a hedge and therefore Pt 2A of the Trees Act does not apply to these trees (s 14A(1)(a)). The trees are planted in an apparently random manner throughout the garden. There is no linear or other form to their layout. While the foliage of adjacent trees might overlap, they do not appear as a hedge. Overlapping foliage is a feature of many tree plantings that are not hedges. In *Wisdom v Payn* [2011] NSWLEC 1012, Moore SC (as his Honour then was) and Hewett AC found at [45]: "... We are satisfied that the words forming a hedge mean that there must be a degree of regularity and arrangement, in a linear fashion, of the trees being considered. Whilst such an arrangement may be more than one tree deep and does not need to be in a perfectly straight line, the impression that is given by the planted arrangement of the trees must be one that, in an ordinary English language understanding of the word, would be perceived to be a hedge."
1. Nor does the planting layout suggest that the person who planted the trees intended to form a hedge, such an intention being required by the wording of s 14A(1)(a): see *Johnson v Angus* (2012) 190 LGERA 334; [2012] NSWLEC 192 at [28].
2. The separation of the two properties by a driveway would not have prevented me making orders, had I found that the trees were planted to form a hedge: *P. Baer Investments Pty Limited v University of New South Wales* [2007] NSWLEC 128.
3. Because Pt 2A of the Trees Act does not apply to these trees, there is no need for the Court to assess the severity of any view obstruction they might cause. I note that Mr Gregory offered to allow the Smiths to carry out some thinning of palms and pruning of other plants, an offer he repeated during the hearing.

Orders

1. As a result of the foregoing, the Court orders that:
1. The application is refused.

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D Galwey

Acting Commissioner of the Court

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Prepared on 26 October 2026 · Esheria