

AUSTRALIA / JUDGMENT

Stubbs v Lipar [2024] NSWLEC 1780

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Land and Environment Court

New South Wales

Medium Neutral Citation: Stubbs v Lipar [2024] NSWLEC 1780

Hearing dates: 17 June 2024

Date of orders: 17 June 2024

Decision date: 17 June 2024

Jurisdiction: Class 2

Before: Douglas AC

Decision: The Court orders that:

(1) The application is refused.

Catchwords: TREES (DISPUTES BETWEEN NEIGHBOURS) – Pt 2 – is alleged future damage likely in the near future? Pt 2A – high hedges – future severe obstruction of views and sunlight claimed – do trees form a hedge for the purpose of the Act – s 14F considerations – oversight from applicant's dwelling – privacy important

Legislation Cited: Trees (Disputes Between Neighbours) Act 2006,

Pt 2, ss 7, 8, 9, 10, 12

Pt 2A, ss 14A, 14B, 14C, 14E

Trees (Disputes Between Neighbours) Regulation 2019 s 4

Cases Cited: Barker v Kryiakides [2007] NSWLEC 292

Grantham Holdings Pty Ltd v Miller [2011] NSWLEC 1122

Hendry & anor v Olsson & anor [2010] NSWLEC 1302

Johnson v Angus [2012] NSWLEC 192

Robson v Leischke (2008) 72 NSWLR 98; (2008) 159 LGERA 280

Tenacity Consulting v Warringah (2004) 134 LGERA 23; [2004] NSWLEC 140

Wisdom v Payn [2011] NSWLEC 1012

Yang v Scerri [2007] NSWLEC 592

Category: Principal judgment

Parties: Matthew John Stubbs (Applicant)

Sarah Lipar (First Respondent)

Steven Lipar (Second Respondent)

Representation: M Stubbs (Self-represented) (Applicant)

S Lipar (Self-represented) (First Respondent)

S Lipar (Self-represented) (Second Respondent)

File Number(s): 2024/154660

Publication restriction: Nil

Judgment

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

Background

1. COMMISSIONER: Matthew John Stubbs, (the applicant), and Sarah and Steven Lipar, (the respondents), share a side boundary between their properties in Catherine Hill.
2. The parties' land parcels were around 750 square metres (m) and roughly rectangular. Both dwellings were two-storey and recently constructed and ran parallel with the common boundary. They faced northeast. Mr Stubbs dwelling was setback 1.3 m from the common boundary, while the common boundary setback of the respondents' dwelling was about 2 m.
3. The dwellings were located near the front of the blocks, though the front Mr Stubb's dwelling was setback a few metres further than the Lipar's. Similarly at the rear, Mr Stubb's dwelling extended beyond the respondents' dwelling. Both blocks had a moderate downward slope from about north to south, which resulted in a high vantage point at the rear of the dwellings for views of their large back yards and bushland beyond.
4. Mr and Ms Lipar occupied their property in 2017. The respondents established a garden in their front yard soon after occupation and planted trees and shrubs along the northwestern side of their dwelling and bamboo in planter boxes along the northwestern boundary of their back yard. Mr Stubbs purchased his land in mid-2019 and occupied in mid-2021, after his dwelling was constructed.

5. Mr Stubbs contended that the Lipar's tree and shrub plantings were going to cause damage to his property and block views from two balconies of his dwelling. Mr Stubbs sent messages and visited the respondents and requested the removal of a tree or trees from the respondents' gardens. Mr and Ms Lipar rejected Mr Stubbs proposal, as they valued the trees, refuted that the trees were likely to cause damage, and were growing hedges for future privacy. The parties were polarised.
6. Consequently, Mr Stubbs made an application under s 7 of Pt 2 of the Trees (Disputes between Neighbours) Act 2006 (the Trees Act), and under s 14B of Pt 2A of the Trees Act, proposing the Court make orders for removal of 7 trees and 22 bamboo plants to prevent future damage, and to prevent view and sunlight obstruction by the respondents' trees.

The on-site hearing

1. Both parties were self-represented at the hearing, which commenced with an inspection of the respondents' trees and shrubs. The Court moved to the applicant's property and considered view obstruction as a consequence of the respondents' trees from the applicant's first-floor balconies, then proceeded with oral submissions.
2. The common boundary extended from northeast at the street to southwest at the rear. In the front yard, trees and shrubs were planted in garden beds surrounding a small lawn, while a Mango tree that concerned Mr Stubbs was contained in a masonry planter box built against the side of the respondents' dwelling. The bamboo along the common boundary in the back yard were contained in narrow planter boxes lined with heavy grade plastic.

Jurisdictional requirements – Part 2

1. With respect to s 7 of the Trees Act, 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. Mr Stubbs owns his property, and the trees are on adjoining land. Thus, the application meets the requirements of s 7 of the Trees Act.
2. Mr Stubbs provided evidence of satisfaction of s 8 of the Trees Act, requiring notice of the application for orders to be given to owners of affected land, and to Council. Both parties attended a preliminary hearing by telephone on 28 May 2024.
3. Section 9(1) of the Trees Act details the Court's broad jurisdiction to make orders "as it thinks fit to remedy, restrain or prevent damage to property, or to prevent injury to any person, as a consequence of the tree the subject of the application concerned."

4. Section 10(1)(a) of the Trees Act requires the applicant to make a reasonable effort to reach agreement with the owner of the land on which the tree is situated. Mr Stubbs claimed to have spoken with Ms Lipar several times with tree removal requests without likelihood of reaching an agreement. The respondents confirmed that Mr Stubbs had made approaches but said the content was restricted to messages requesting removal of one misidentified tree, and one visit.
5. In *Robson v Leischke* (2008) 72 NSWLR 98; (2008) 159 LGERA 280 (Robson), Preston CJ provides guidance about the 'reasonable effort' required to satisfy the Trees Act. At [191]-[194]; his Honour said:

"Reasonable effort to reach agreement

191 The requirement in s 10(1)(a) of the Trees (Disputes Between Neighbours) Act 2006 that the applicant make a reasonable effort to reach agreement with the tree landowner is consistent with the recommendations of the New South Wales Law Reform Commission that neighbours should endeavour to settle a dispute about trees between themselves before taking court action. The Law Reform Commission had noted in its Report 88, *Neighbour and Neighbour Relations* that: "[t]he remedies proposed in this Report should be regarded as remedies of last resort. Talking to the neighbouring landowner and trying to find a mutually acceptable solution should be the first step when a dispute arises.": para 1.13, p 7.

192 The Trees (Disputes Between Neighbours) Act 2006 does not prescribe any particular means by which an applicant must make a reasonable effort to reach agreement with the tree landowner. The New South Wales Law Reform Commission had recommended in its report a process whereby the affected landowner would write a letter before taking any court action to the tree landowner telling them what problems the tree is causing and asking them to abate the problem and, if the affected landowner has suffered damage, asking the tree landowner to pay the amount needed to compensate for the damage caused: see para 2.45, p 33. Through this mechanism, the affected landowner could negotiate. If the tree landowner did not respond to the notice within the specified time, the affected landowner could then apply to the Local Court for an order: para 2.46, p 33."

1. Therefore, the requirement at s 10(1)(a) to make "a reasonable effort to reach agreement" does not prescribe the conduct or means of negotiation of an applicant, nor does it require either party to compromise.
2. The reasonable effort to reach agreement may continue through the hearing until the judgment is determined, thus Mr Stubbs' initial inclusion of just one tree is not ideal but is still satisfactory. Consequently, Mr Stubbs' messages and lone personal approach were sufficient to engage s 10(1)(a) of the Trees Act.
3. Section 10(1)(b) is also engaged as Mr Stubbs has given notice in accordance with s 8 of the Trees Act.

- 4. The next major test, at s 10(2) of the Trees Act, is that the Court must be satisfied that the tree concerned:
 - (a) has caused, is causing or is likely, in the near future, to cause damage to the applicant's property, or
 - (b) is likely to cause injury to any person.

Property damage

- 1. In the Tree Dispute Claim Details (Damage to property or injury to a person) (Exhibit B), Mr Stubbs proposed the removal of seven trees (T1-T7) and about 22 bamboo plants (cumulatively T8), as described in the table below:

Tree No. Common name and species (Claimed) mature size – height x spread (m)

T1 Tuckeroo (Cupaniopsis anacardioides) 5 – 8 x 5 – 7

T2 Claimed by applicant to be Argyle Apple (Eucalyptus cinerea) but identified as Silver-leaved Mountain Gum (shrub form) (Eucalyptus pulverulenta 'Baby Blue') E.cinerea – 15 - 30 x 15 - 30

E. pulverulenta 'Baby Blue' – 6 x 3

T3 Pink Bottle Brush (Callistemon 'Pink Champagne') 2.5 x 2

T4 Coastal Banksia (Banksia integrifolia) 6 x 4

T5 Tuckeroo (Cupaniopsis anacardioides) 5 – 8 x 5 – 7

T6 Pink Laceflower (Archidendron grandiflorum) 15 x 10

T7 Mango (Mangifera indica) 10 x 8

T8 Slender weavers' bamboo (Bambusa textilis var. Gracilis) x 22 Over 30

- 1. T1 was located near the centre of a garden bed along the Lipar's front boundary, T2 – T6 were in a garden bed along the front of the common boundary, while T7 was contained in a large masonry planter box that appeared to be joined to the side of the respondents' dwelling.
- 2. Mr Stubbs wanted to prevent encroachment of the respondents' trees beyond the common boundary and contended T2 – T6 were planted too close together and too close to the boundary. The applicant claimed that all the trees (T1 – T7) were likely to scrape paint off dwelling walls and damage PVC pipes by branch contact, damage the common boundary fence, crack paths, and cause mould. Having seen footpaths damaged by trees, Mr Stubbs anticipated root damage to his house footings, and blocked pipes. Further, Mr Stubbs claimed the bamboo would rub against his house and damage roof gutters and balcony railings and was likely to obstruct solar panels.

3. Section 10(2)(a) of the Trees Act considers damage a tree has caused, damage a tree is causing, or damage a tree is likely to cause in the near future. In this regard, the respondents cited *Yang v Scerri* [2007] NSWLEC 592 (Yang); which, at [12]-[14], established a Tree Dispute Principle whereby near future damage, as a rule of thumb, is considered to be a period of about 12 months.
4. Mr and Mrs Lipar contended that Mr Stubbs had misidentified the *Eucalyptus pulverulenta* 'Baby Blue' as a much larger species, and that the 'Baby Blue' was unlikely to cause damage. The respondents said that no damage was likely over the next few years at the earliest and the Mango that concerned Mr Stubbs was confined in a planter box, about 2 m from the common boundary. The Lipar's stressed the ecosystem benefits the trees provide, the amenity they will increasingly receive from privacy the trees provide, and the trees' aesthetic contribution.
5. As submitted by the respondents, Mr Stubbs provided no evidence of any of the trees causing or having caused damage, nor evidence substantiating probable near future damage. The respondents' trees were relatively young, largely restricted to their garden beds, and were clear of the applicant's dwelling. Consequently, I am not satisfied any of the trees are likely to cause damage in the near future, so s 10(2)(a) is not engaged.
6. Mr Stubbs was particularly concerned about encroachment by T2, a small *Eucalyptus* tree that he had misidentified, but encroachment of branches over, or roots into, neighbouring land is common in urban areas and the jurisdiction of the Trees Act provides no remedy for encroachment unless the encroachment also causes damage. This is addressed in *Robson*, at [56], where his Honour states that "mere encroachment into the neighbour's land is insufficient to complete a cause of action" under the Trees Act.
7. The trees may have been planted close together or close to the boundary, but it is common for gardens to initially be overplanted, and to be planted near boundaries to provide privacy and ambience around a central space, such as a lawn. Mr Stubbs alleged there was a legally prescribed minimum exclusion distance for tree planting near boundaries, but this is not the case. Due to the deeper setback of Mr Stubbs' dwelling, most of the trees were not in close proximity.
8. Where trees and shrubs are overplanted, resources needed for growth are often thinly spread, and plants generally grow smaller than usual. While some trees may grow strongly, others will probably be less successful in competing for limited sunlight, nutrients, and water, and their growth is suppressed. Some trees may die from damage or disease. Given such competition and the relatively infertile sandy soils in the area, the trees are unlikely to reach the mature proportions Mr Stubbs claimed, as expected mature size of trees in references is generally based on ideal growing conditions.

9. In future, some of the trees may need removal due to competition and overcrowding. Some trees may grow beyond the boundary and need branches pruned, some may develop roots that become likely to cause near future damage and require root pruning. Particularly if the trees are monitored by the respondents, most are unlikely to cause future damage as potential damage can usually be prevented, but where root damage becomes likely and root pruning is deemed unsafe or not viable, tree removal may be required.
10. Nonetheless, options like pruning of branches or roots that mitigate damage while retaining the trees are preferred to removal as this maximises the benefits the trees provide the respondents, and to the environment.
11. Regarding Mr Stubbs' claim that the trees will cause mould as a result of future sunlight obstruction, many applications include claims of damage, annoyance, and excessive maintenance resulting from neighbours' tree debris. In *Barker v Kryiakides* [2007] NSWLEC 292 (*Barker*), a Tree Dispute Principle was established; at [20], which states:

"For people who live in urban environments, it is appropriate to expect that some degree of house exterior and grounds maintenance will be required in order to appreciate and retain the aesthetic and environmental benefits of having trees in such an urban environment. In particular, it is reasonable to expect people living in such an environment might need to clean the gutters and the surrounds of their houses on a regular basis."

"The dropping of leaves, fruit, seeds or small elements of deadwood by urban trees ordinarily will not provide the basis for ordering the removal of or intervention with an urban tree".

1. The maintenance expectation arising from *Barker* was extended in *Hendry & anor v Olsson & anor* [2010] NSWLEC 1302 (*Hendry*), at [11]-[14], to include the cleaning of mould and slime. Therefore, even if mould arose from sunlight obstruction by the trees, the Trees Act provides no remedy.

Risk of injury to a person

1. Mr Stubbs contended that the trees were likely to cause injury as they are located in a bushfire prone area and because strong easterly winds will "blow the trees over onto my home", onto the wall where bedrooms are located. The applicant re-iterated that the trees would block sunlight, create mould, constantly rub against my home, and block solar panels.
2. The applicant's final four claims relate to damage rather than injury. Regarding Mr Stubbs' initial claim of risk of fire and vulnerability of Eucalyptus trees due to their volatile oils, there is nothing about these trees that makes them a particular fire risk. The Court would not deem the respondents' trees a risk of injury due to bushfire potential unless such a determination had been made pursuant to an inspection by an appropriate fire authority.

3. For the injury claim based on the respondents' trees blowing over, firstly this is unlikely but even if a tree was blown onto Mr Stubbs' home, the home has solid masonry walls that would protect occupants from injury. The most likely outcome of a tree blowing onto the wall is scratched paint, thus minor damage only. Consequently, I was not satisfied the trees presented a genuine risk of injury to a person in the foreseeable future, so s 10(2)(b) is not engaged.
4. As the trees failed to engage the jurisdiction with respect to damage or injury, s 10(2) of the Trees Act is not satisfied. Consequently, the application is refused and discretionary elements in s 12 do not require consideration.

Jurisdictional requirements – Part 2A

1. Under Pt 2A of the Trees Act, the jurisdiction is limited to hedges causing a severe obstruction of sunlight to a window of an applicant's dwelling, or of views from an applicant's dwelling. The Court must consider a number of tests before any orders can be contemplated. If obstruction by a hedge is determined as severe, the Court must consider a range of matters such as privacy and environmental benefits the trees may provide. The process is set out in *Grantham Holdings Pty Ltd v Miller* [2011] NSWLEC 1122 at [17]-[22].
2. In the Tree Dispute Claim Details (High hedges) (Exhibit C), Mr Stubbs included the same seven trees and 22 bamboo clumps nominated in the Pt 2 application. Notwithstanding the applicant's contention that the Lipar's gardens were planted in September 2021 after his July 2021 occupation, in their Statement in Response of 12 June 2024 (Exhibit 1), Mr and Mrs Lipar noted the planting occurred prior to Mr Stubbs land purchase and submitted aerial photographs showing the plants throughout the gardens when the applicant's land was still a vacant block. The respondents noted the plants used were consistent with their Council approved landscape plan.
3. Mr Stubbs contended the trees in the respondents' front yard would grow to block his water views from an upstairs veranda and the row of bamboo along the respondents' side of the common back boundary would grow to obstruct views of bushland beyond Mr and Mrs Lipar's back yard. The applicant also claimed the trees will grow to severely obstruct sunlight from windows of his dwelling.

Do the trees form a hedge?

1. The first test is s 14A(1), that is, are the trees a hedge for the purpose of the Trees Act?
2. Section 14A(1) states:
 - (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. Pursuant to s 4 of the Trees (Disputes Between Neighbours) Regulation 2019, bamboo is a tree for the purposes of the Trees Act.
2. Due to their physical separation, the trees will be considered as two alleged hedges, with trees in the front yards in hedge 1 and the bamboo in hedge 2.

Hedge 1

1. In clarifying which trees hedge 1 comprised, Mr Stubbs nominated T1-T7, as he had in his application, even though T1 was located in the middle of the front garden bed, quite separate from T2 – T6, which were in the boundary garden bed. T7 was also alone in a planter box at the side of the respondents' dwelling, around 15 m from the other trees. Mr Stubbs was focused on preventing view obstruction by the trees, but did not consider the requirements the trees must satisfy to be deemed a hedge for the purpose of the Trees Act.
2. Section 14A(1) "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". This requires that the intention of the planting was to make a hedge. Upon inspecting the site, my first and lasting impression was of a small front garden planted with a range of shrubs, and small and medium sized trees that was atypical of a hedge. The respondents claimed they hadn't planted a hedge in the front yard.

3. In *Wisdom v Payn* [2011] NSWLEC 1012; at [46], the Commissioners state:

"Whilst it is clear that the legislation does not invest any maximum height of the trees that might comprise such an arrangement - so that a line of modestly old firs evenly spaced along a driveway that have reached considerable maturity and height might well be a hedge for the purposes of the Act, a purely random planting of trees cannot be so regarded. Certainly, a single tree that is obviously separate and distinctly so (as is the case here) cannot be so regarded.

1. On this basis, T1 and T7 are set aside as they were clearly individual trees which could not be hedge members. The remaining T2 – T6 were planted in a rough line but this appeared largely due to the side boundary bed being narrow and straight along the boundary. Even with this constraint, however, the trees displayed little sense of order or pattern to suggest they formed a hedge. To the contrary, T2 – T6 were all highly dissimilar. They were all different species, with a wide variety of size and form, and of texture, colour, and shape of foliage and flowers.
2. In *Johnson v Angus* [2012] NSWLEC 192 (Johnson), at [37]-[38], Preston CJ provides commentary on the requirement of s 14A(1)(a), that the trees are planted (whether in the ground or otherwise) so as to form a hedge:

"[37] I reject the Johnsons' submission as to the meaning of the adverb clause of purpose, 'so as to form a hedge', for three reasons. First, the Johnsons' submission fails to inquire as to the purpose of the planting of the trees at the time of planting. The earlier grammatical analysis (particularly [24] – [25]) establishes that s 14A(1)(a) requires that the trees that are the subject of the

application under s 14B of the Trees Act be 'trees that are planted ... so as to form a hedge'. As I have explained earlier, this requires that the trees, at the time of planting, be planted so as to form a hedge and, having been so planted, the trees continue that state of affairs of being planted so as form a hedge. The requirement of being planted so as to form a hedge is to be understood as requiring that the trees be planted in order to form, or with the result or purpose of forming, a hedge.

[38] If trees are not planted at all, but rather are self-sown, or are not planted for the purpose of forming a hedge, but rather for some other purpose, then Part 2A will not apply to the trees. In either of these circumstances, it will not matter whether the trees, as events have happened, have in fact grown so as to form a hedge. Part 2A will not apply to the trees.

1. His Honour expands on the requirements of a hedge, in Johnson; at [41]:

"But the criterion of sufficient proximity does not exhaust the relevant criteria to be considered in determining whether trees are planted so as to form a hedge. Section 14A(1)(a), construed in its own terms and in the context of Part 2A, does not so circumscribe the criteria that may be considered in determining whether the trees are planted so as to form a hedge. Other criteria are relevant, including the species of trees planted; whether the trees are all of one species or different species and, if different species, the similarity or dissimilarity and compatibility or incompatibility of the different species in terms of morphology (the form and structure of the trees), function and growth of the trees; the planting arrangement of the trees, such as whether the trees are planted in a linear, curvilinear, or another spatial relationship conducive to the trees forming a hedge."

1. Considering his Honour's comment in Johnson; at [38], "If trees are not planted at all, but rather are self-sown, or are not planted for the purpose of forming a hedge, but rather for some other purpose, then Part 2A will not apply to the trees", I am not satisfied that T1 – T7 were planted to form a hedge or currently have the appearance of a hedge. Therefore, they are not part of a hedge for the purpose of the Trees Act. Instead, they are a collection of individual amenity trees and shrubs to which Pt 2A does not apply, and thus they require no further assessment.
2. While orders may be made for severe obstruction of views as a consequence of a hedge under s 14A of the Trees Act, no such remedy is available for severe obstruction of views as a consequence of individual amenity trees.

Hedge 2

1. Unlike trees in the front yard, I was satisfied the bamboo formed a hedge. The bamboo clumps were closely and evenly distributed along the boundary planter boxes and the respondents acknowledged planting the bamboo to establish screening and privacy. Though some of the bamboo appeared to be less than 2.5 m tall, provided at least two of the trees exceed a height of 2.5 m, all of the trees may be considered part of a hedge (Wisdom; at [66]). Consequently, s 14A(1) of the Trees Act is engaged.
2. The requirements at s 14C and s 14E(1)(b) have already been met, respectively at s 8 and s 10(1)(b) of the Pt 2 application. The requirement for the applicant to "make a reasonable effort to reach agreement", at s 14E(1)(a), is also the same requirement already satisfied at s 10(1)(a) of Pt 2 of the Trees Act.

Assessment of obstruction severity

1. The next jurisdictional test is to assess the severity of the obstruction of sunlight to a window of the applicant's dwelling, or the obstruction of all or any of the views from the applicant's dwelling as a consequence of any or all of the trees in the hedges.
2. Section 14E(2)(a) states:
 - (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 from 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 ...

View obstruction

1. Mr Stubbs nominated both verandas on the first floor for assessment of obstruction of views. The view over the respondents' front yard was examined and assessed for obstruction but this view became irrelevant when the respondents' front yard was determined not to contain a hedge for the purpose of the Trees Act.
2. The rear first-floor veranda of the applicant's dwelling was upslope of the respondents' backyard, and the bushland view the applicant desired was over the respondents' side boundaries and back yard. Consequently, the relatively young bamboo was well below Mr Stubbs view line and caused no obstruction of the applicant's view. Section 14B states "that an owner of land may apply to the Court for an order to remedy, restrain or prevent a severe obstruction" ... of views. Where an applicant proposes orders to prevent a severe obstruction of sunlight or views, however, such future obstruction must be probable reasonably soon, which in this case it is not. Here, regardless that it is usually fast growing, the bamboo was currently more than 5 m lower than the veranda and would likely take some years before it

reached the applicant's veranda floor height.

3. Further, though Mr Stubbs claimed the bamboo would grow to a height of 30 m, this was incorrect. In fertile soils and ideal growing conditions on the NSW far north coast, Slender weavers' bamboo may reach a height around 10 m but the advertised mature height is 8 m, and the bamboo's growth potential here is likely to be restricted by limited growing medium in the narrow planter boxes. Therefore, even at its height at maturity, the bamboo may barely restrict the applicant's views. Consequently, obstruction of views by the bamboo is not severe, and there is no evidence even suggesting severe obstruction of views by the bamboo is imminent, or necessarily likely in the future. Therefore, s 14E(2)(a)(ii) is not engaged and this element of the application is refused.

Sunlight obstruction

1. Obstruction of sunlight to dwelling windows by the bamboo hedge requires only cursory assessment. The hedge is currently only a few metres tall and is downslope and south of the applicant's nominated dwelling windows. The applicant's nominated windows are located in a dwelling wall facing southeast, an aspect that allows direct sunlight to reach the wall only until around 11 am in summer and perhaps 9:30 am in winter before Mr Stubbs' own dwelling obstructs sunlight from the wall. The respondents' dwelling also obstructed direct sunlight from the applicant's wall and this impact was increased by the location of the respondents' dwelling forward of the applicant's dwelling.
2. Due to the bamboo's current small size and its location relative to the applicant's nominated windows, I am satisfied the bamboo is not obstructing any sunlight to the applicant's nominated windows, and nor is it likely to cause a severe obstruction in future. Therefore, s 14E(2)(a)(i) is not engaged and this element of the application is also refused.
3. As neither s 14E(2)(a)(i) nor s 14E(2)(a)(ii) were satisfied, s 14E(2)(a) of the Trees Act has not been met. Consequently, the application under Pt 2A of the Trees Act is refused.
4. Even if s 14E(2)(a) had been met for the hedge, it would next be necessary to consider the balancing of interests required by s 14E(2)(b). This states:
 - (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.
1. Ms Lipar argued that had the bamboo hedge engaged 14E(2)(a), any imperative to intervene with the bamboo is outweighed by the respondents' families' need for backyard privacy because the applicant's coveted view was gained across the respondents' back yard and side boundaries. Mrs Lipar cited *Tenacity Consulting v Warringah* (2004) 134 LGERA 23; [2004] NSWLEC 140 (Tenacity), to substantiate this submission and Tenacity is often referenced by the Court for guidance in applications under Pt 2A of the Trees Act. In Exhibit 1, Mr and Mrs Lipar provided extensive submissions as to environmental benefits of the trees and cited

numerous relevant contemporary cases under the Trees Act. Given the circumstances of the case, however, I was not required to consider all submitted cases in the judgment.

Conclusion

1. In balancing property owners' free will over use of their land with a reasonable remedy for damage or risk of personal injury caused by the property owners' trees to neighbours' property, the jurisdiction of Pt 2 of the Trees Act covers damage caused to date, and damage that is probable in the near future, which is considered as a period around 12 months.
2. Mr Stubbs provided no evidence of past or current damage, or risk of injury by the respondents' trees, nor substantiation of claims of future damage beyond mere speculation. While some damage may become likely in the long term, it would be an unreasonable and disproportionate response for the Court to make orders causing a sustained loss of the respondents' amenity to prevent possible damage that most likely will not eventuate.
3. Consequently, s 10(2) of the Trees Act is not engaged and the application under Pt 2A was refused.
4. The respondents' front yard trees nominated as a hedge by Mr Stubbs were determined not to have been planted to form a hedge for the purpose of the Trees Act. The bamboo in the back yard met the requirements of a hedge but it was not causing any view obstruction and was unlikely to cause a severe view obstruction for many years, if at all. Therefore, s 14(E)(2) (a) was not engaged. Consequently, the application under Part 2A of the Trees Act was refused along with the Pt 2 application.

Orders

1. As a consequence of the foregoing, the orders of the Court are:
1. The application is refused.

.....

J Douglas

Acting Commissioner of the Court

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Decision last updated: 02 December 2024

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