

AUSTRALIA / JUDGMENT

Zarate v Horton

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Land and Environment Court

New South Wales

Medium Neutral Citation:

Zarate v Horton [2023] NSWLEC 1375

Hearing dates:

20 June 2023

Date of orders:

19 July 2023

Decision date:

19 July 2023

Jurisdiction:

Class 2

Before:

Galwey AC

Decision:

The Court orders:

- (1) The Pt 2 application is granted.
- (2) The Pt 2A application is granted.
- (3) The respondents are to engage and pay for a suitably experienced and insured contractor to remove all bamboo from their property and the applicant's property within 2 metres of any common boundary shared with the applicant. These works are to be completed within 30 days of the date of these orders; and are to be done in accordance with the Safe Work Australia (2016) 'Guide to managing risks of tree trimming and removal work'.

- (4) The applicant is to provide any access required to complete the works in order (3) during reasonable hours, on 48 hours' notice from the respondents.
- (5) The respondents are to take any steps necessary to prevent bamboo regrowing on their property within 2 metres of any common boundary shared with the applicant.
- (6) Any further hedge plantings on the respondents' property within 2 metres of any common boundary shared with the applicant are to be limited to plant species that grow no taller than 3 metres.

Catchwords:

TREES (DISPUTES BETWEEN NEIGHBOURS) – Pt 2 application – damage caused by neighbouring trees – damage is likely in the near future – orders for tree removal – Pt 2A application – bamboo – obstruction of sunlight and views – whether the obstruction is severe – benefits of the bamboo – whether the bamboo should be maintained or removed

Legislation Cited:

Trees (Disputes Between Neighbours) Act 2006, Pt 2 ss 7, 10, 12, Pt 2A ss 14B, 14E, 14F

Cases Cited:

Barker v Kyriakides [2007] NSWLEC 292

Robson v Leischke (2008) 72 NSWLR 98; [2008] NSWLEC 152

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

Yang v Scerri [2007] NSWLEC 592

Texts Cited:

Safe Work Australia, 'Guide to managing risks of tree trimming and removal work' (July 2016)

Category:

Principal judgment

Parties:

Anibal Zarate (Applicant)

Anthea Horton (First Respondent)

Gary Horton (Second Respondent)

Representation:

Counsel:

A Zarate (Self-represented) (Applicant)

J Burrell (Solicitor) (Respondents)

Solicitors

Burrell Solicitors (Respondents)

File Number(s):

2023/95290

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Judgment

Background

COMMISSIONER: Anibal Zarate (the applicant), of Bangalow in northern New South Wales, has applied to the Court seeking orders for the removal of bamboo (the trees) growing on the neighbouring property of Anthea and Gary Horton (the respondents). Pursuant to s 7 (Pt 2) of the Trees (Disputes Between Neighbours) Act 2006 (the Trees Act), Mr Zarate seeks orders for tree removal due to damage the bamboo has caused, or is likely to cause, to his property. Pursuant to s 14B (Pt 2A) of the Trees Act, he seeks orders for the bamboo's removal on the grounds that it obstructs his access to sunlight and views.

The respondents' alternative orders are for the bamboo hedge to be pruned and maintained.

The hearing took place onsite, allowing the Court to inspect the bamboo and both properties. The Court went to Mr Zarate's dwelling to inspect the trees' impacts on his views and sunlight. Privacy and overlooking issues were observed at both properties. Marco Veronesi, architectural draftsman, prepared a report for the respondents and gave evidence at the hearing.

The trees

The respondents have several hedges of Slender Weavers Bamboo (*Bambusa textilis* var. *gracilis*) growing on their property, along boundaries and elsewhere. The hedges in Mr Zarate's application are those on the Hortons' property along Mr Zarate's eastern side boundary and rear (southern) boundary. The side boundary hedge continues along the Hortons' front boundary for a short distance. I estimated the bulk of these hedges to be approximately 8 metres tall, with slender new growth of some culms extending up to 10 metres tall.

Reasonable effort

Under both Pt 2 (at s 10(1)) and Pt 2A (at s 14E(1)) of the Trees Act, the Court must be satisfied, before making any orders, that the applicant has made a reasonable effort to reach agreement with the trees' owners. The applicant filed records of text messages (Exhibit E) between himself and the first respondent during the period of May–November 2022, showing that he initiated and

repeated his request for resolving issues around the bamboo, without reaching a satisfactory outcome. I am satisfied that he made a reasonable effort to reach agreement with the respondents.

Part 2 application – damage

Before orders can be made under Pt 2 of the Trees Act, the Court must be satisfied that the trees have caused, are causing, or are likely in the near future to cause, damage to the applicant's property, or are likely to injure any person (s 10(2) of the Trees Act).

Bamboo has been planted close to the common boundary fences, so that the culms closest to the fences push against them. Mr Zarate pointed out that the top of the fence is now 20–30 millimetres closer to his dwelling than it was a year ago, due to, he submitted, lateral pressure from the bamboo. He submitted that this problem will only get worse with time. Bamboo culms have emerged and are growing on his side of the fence – Mr Zarate submitted that this is damaging his land. Mr Zarate provided photographs (in Exhibit D) showing tall parts of the bamboo bending over his property and touching his roof guttering and solar panels. He submitted that the bamboo is likely to damage these elements of his property when it moves in strong winds. Mr Zarate submitted that debris from the bamboo is excessive and blocks his gutters and pool filters.

Mr Burrell, solicitor for the respondents, submitted that the respondents are willing to remove bamboo nearest the fence to prevent it damaging the fence, and to reduce the bamboo's height to prevent it hitting solar panels or guttering. He suggested that the respondents are willing to take action to address all of the applicant's concerns.

I observed no damage to the applicant's solar panels or roof guttering, but I accept that damage is likely in the near future as the bamboo moves in strong winds. As is usual in tree dispute proceedings under Pt 2 of the Trees Act, I consider a period of 12 months reasonably represents 'the near future': see *Yang v Scerri* [2007] NSWLEC 592 at [12]–[14].

Bamboo culms growing on the applicant's side of the fence might affect the land, but this is not considered 'damage' within its meaning in the Trees Act: see *Robson v Leischke* (2008) 72 NSWLR 98; [2008] NSWLEC 152 at [166]. However, these culms are closest to the applicant's dwelling, and are therefore those that are most likely to damage his guttering or solar panels in the near future.

I consider the misalignment of the fence to be relatively minor at present, but I accept that the bamboo is growing quickly and will push the top of the fence further toward the applicant's dwelling within 12 months. That is, the bamboo is likely to damage the fence in the near future.

I observed debris from the bamboo on top of the applicant's water tank and covering the narrow strip of ground, approximately one metre wide, between the side boundary fence and his dwelling. The applicant's statements regarding the required frequency of clearing debris from gutters and pool filters are believable. However, there is no evidence that debris has caused damage. Even if it had, as per the long-standing principle set down in *Barker v Kyriakides* [2007] NSWLEC 292 at [20], I would not make orders to interfere with the bamboo on this basis.

In summary, I find the respondents' bamboo hedges along the common boundaries shared with the applicant are likely in the near future to damage the applicant's property, being his solar panels and roof guttering and the common boundary fences. Before determining if orders should be made, and the nature of any such orders, the Court is required to consider the matters at s 12 of the Trees Act. For efficiency, I will do this further below along with consideration of matters at s 14F.

Part 2A application

Before making orders under Pt 2A of the Trees Act, the Court must be satisfied at s 14E(2) 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.

Obstruction of sunlight

The respondents engaged Marco Veronesi to prepare shadow diagrams based on the current height of the hedge along the applicant's side boundary, and on the respondents' proposed hedge height of 3.5 metres (Exhibit 1). Those drawings are accompanied by a brief analysis of the findings. He also prepared diagrams showing the effect of reducing the side boundary hedge to a height of 2.5 metres, and of removing part of the hedge where it continues along the respondents' front boundary (Exhibit 2).

Windows along the eastern side of Mr Zarate's dwelling are the only windows in his application and the only ones affected by the Hortons' hedges. The windows face slightly south of east, and therefore only receive morning sunlight. Mr Veronesi's diagrams show that the hedge along Mr Zarate's side boundary currently obstructs all direct sunlight that would be available to these windows. Mr Veronesi stated in his analysis in Exhibit 1 that the bamboo causes shadowing of the windows up until 10:15 am on the winter solstice, after which sunlight would be unavailable to the windows regardless of the hedge. Questioned by Mr Zarate, Mr Veronesi confirmed that the bamboo prevents all sunlight that would otherwise be available from reaching these windows.

The windows are, from the front of Mr Zarate's dwelling: a bedroom window, a frosted window in a bathroom, a window to the second bedroom, another frosted bathroom window, a window to the lounge room and another to the dining area at the rear of the dwelling. While the Court inspected these rooms, Mr Zarate pointed out how dark they were compared with rooms on the western side of his dwelling, even though it was approximately 10:00 am and the sun was still east of north.

Mr Zarate submitted that the sunlight obstruction is severe, as all available sunlight is obstructed. The bamboo has the effect of an 8-metre wall standing 1 metre from his dwelling. Mr Burrell argued that the side boundary hedge obstructs sunlight for only a limited time during the morning. He insisted that the respondents are agreeable to reducing the hedge height to 3.5 metres, being the height shown by Mr Veronesi to cause minimal shading to the windows, and at which height the obstruction could not be considered to be severe.

I find that the side hedge severely obstructs sunlight to the applicant's windows. The loss of all direct morning sunlight up to 10:15 am at the winter solstice has, to my mind, an impact that would be more than mildly irritating to the occupants of the applicant's dwelling. In *Tenacity Consulting v Waringah* (2004) 134 LGERA 23; [2004] NSWLEC 140 at [28], Roseth SC used the following qualitative terms to describe the impact of view loss: negligible, minor, moderate, severe or devastating. These qualitative terms are also useful for assessing the loss of sunlight, especially here where the test at s 14E(2)(a)(i) uses the word 'severe'. No shadow diagrams were provided for summer, but it follows that the bamboo at its current height would obstruct all morning sunlight to the applicant's windows throughout the entire year. Morning sunlight would otherwise be available to these windows for more hours in summer than in winter. I find that the loss of all available sunlight to the applicant's eastern windows is severe. The Court must weigh up the reasons for and against interfering with the hedge, at s 14E(2)(b) of the Trees Act. For efficiency, I will consider the relevant matters at s 14F after turning to the view obstruction.

Obstruction of views

The applicant claims that the respondents' hedge along his rear boundary obstructs views from the back of his dwelling. The Court was shown the outlook from the applicant's rear deck and living area. The bamboo, approximately 8 metres tall, grows along the length of the boundary, closer than 10 metres from the applicant's deck. For the most part, the bamboo obstructs any land view that might be available and the lower part of the sky. Only from the deck's southwestern corner is the landscape beyond the hedge partially visible. The nature and extent of the unobstructed view, as seen in a photo taken in November 2021 (in Exhibit D), includes a hill to the south with trees and a dwelling, and the sky above. It is a pleasant outlook. That view is now entirely obstructed from more than 90% of the deck and from all of the living areas at the back of the dwelling. The view might not be iconic, but this southern outlook is the principal view from the dwelling, with large windows across the main living areas where people are most likely to spend time. Windows along the sides of the dwelling provide more limited view opportunities. Even the sky view from the back of the dwelling would be valued.

The bamboo hedge to the applicant's south obstructs the landscape and lower sky view from almost all of the applicant's living areas and deck, being the foremost view available from the dwelling. I find the bamboo's obstruction of the applicant's view is severe.

Consideration of relevant matters

The respondents' hedge is likely in the near future to damage the applicant's property. It severely obstructs sunlight to the applicant's windows and the view from his dwelling. Before making any orders, the Court is required to consider the matters at ss 12 and 14F of the Trees Act. Having done so, I discuss below those that are relevant in these proceedings.

Bamboo hedges that impact the applicant grow on the respondents' property along the common boundaries. Bamboo grows against the fence, close to the applicant's dwelling; it overhangs the applicant's property and dwelling.

The parties provided no evidence regarding the requirement for any consent to interfere with the bamboo. It seems unlikely that any consent would be required, or that such consent, if it were required, would be refused.

The bamboo provides some shade and possibly limited habitat value. Its main contribution is towards the respondents' landscape value and their privacy. The respondents submitted that the bamboo was a major attraction of the property for them. Bamboo hedges around the boundaries and in the front garden create garden rooms, provide symmetry, and screen their dwelling from neighbours and the street.

The applicant articulated his understanding of the bamboo's value to the respondents, but argued that their enjoyment of their property should not require such a devastating impact on his own enjoyment of his property.

At ss 12(h) and 14F(n), the Court is required to consider any actions or omissions of the applicant and respondents that may have contributed to the situation. The applicant purchased his property in 2019, before the bamboo was planted by earlier owners of the respondents' property in 2020. He had an agreement with the previous owners of the respondents' property that they would prune the hedge at the height of his eaves. They sold to the respondents in 2022, before the bamboo grew to that height. Mr Zarate has tried to resolve the issues around the bamboo with the respondents since they came here.

The respondents have not pruned the hedges along the applicant's boundary since they bought their property. They have allowed the bamboo to grow to a significant height and to overhang the applicant's property. On 25 October 2022, Mrs Horton's texted reply to Mr Zarate included the statement: "As mentioned, we are happy to discuss a maintenance programme of sorts and again [although this had apparently not been done before] have a professional come and thin out areas on your side but the height of the bamboo isn't something I'm willing to interfere with." She texted that they would be willing to maintain the bamboo, preventing it growing over his property, but took no such action. It seems that it is only now, with the matter before the Court

and with the possibility of Court orders being made, that the respondents are committed to compromise. Mr Burrell declared at the opening of the respondents' submissions that: "We are here today offering to cut back the side hedge to 3.5 metres." Had they offered earlier, the Court's involvement may have been unnecessary. The respondents have shown little regard for the applicant's concerns; it seems unlikely that this would change without the weight of Court orders.

The bamboo benefits the respondents through its contribution to their landscape value and privacy, but contributes little to public amenity and the natural environment. Its negative impacts to the applicant seem greater than its advantages to the respondents.

The respondents submitted that they are willing to remove all bamboo growing on the applicant's side of the boundary, as well as all bamboo on their property within 30 centimetres of the boundary. They submitted that they had received professional advice that cutting the roots would prevent the bamboo from regrowing and again spreading to, and across, the boundary. There was no reliable evidence presented to support this submission. Relying on my own expertise, I don't accept the respondents' submission: the nature of bamboo is to continue spreading laterally after roots have been cut. The likelihood of the respondents successfully preventing the bamboo from growing against the fence and spreading to the applicant's property is low.

During the hearing, the respondents offered to maintain the hedge at 3.5 metres, at which height Mr Veronesi's diagrams show it would have little impact to the applicant's windows. Mr Veronesi confirmed that this would be around the height of the applicant's eaves, or a little lower. For two reasons, I find this proposal is unlikely to lead to a successful outcome into the future. Firstly, the respondents have shown no inclination to resolve the issues prior to the applicant commencing these proceedings. The respondents' limited offers made via text did not lead to any greater effort on their part to resolve the issues. Their reluctance to change the situation may continue. Secondly, the task of maintaining this fast-growing bamboo at a height of 3.5 metres would be onerous. Even if it were retained at that height, the bamboo is likely to spread to and across the boundary again, increasing its obstruction of sunlight beyond that shown in Mr Veronesi's drawings, which depict the bamboo growing vertically to the boundary, with no parts of the hedge overhanging the boundary. Such a situation is unlikely to be achieved.

Mr Zarate submitted that overlooking could be prevented using other means, such as installing blinds or awnings. Other plantings up to 3 metres tall would not impact sunlight or views, but should create privacy. A height of 3 metres should prevent overlooking between the raised decks of each property, the standard boundary fence being too short to achieve this.

Following the reasoning set out above, I find it appropriate to order removal of the offending bamboo, rather than its ongoing maintenance. If the respondents plant any further hedges along the applicant's eastern or southern boundaries, plant selection must be limited to species that will grow no taller than 3 metres.

Summary

The respondents' bamboo is likely to damage the applicant's property in the near future. Their bamboo hedges severely obstruct both: sunlight to the applicant's windows; and views from his dwelling. Benefits to be gained by making orders outweigh any reasons to avoid interfering with the bamboo. The applicant's proposed orders for removing bamboo would resolve the issues. The respondents' belated offer to maintain their hedges is unlikely to prevent the future recurrence of view and sunlight obstruction. Orders will be made for the respondents to remove bamboo from their property and the applicant's property, within 2 metres of common boundaries shared with the applicant. The respondents will be responsible for preventing the bamboo's regrowth on their property within 2 metres of the boundary; the applicant will be responsible for preventing bamboo regrowth on his property. A further order will limit the height of any new hedges to be planted by the respondents along these boundaries.

Orders

The Court orders:

The Pt 2 application is granted.

The Pt 2A application is granted.

The respondents are to engage and pay for a suitably experienced and insured contractor to remove all bamboo from their property and the applicant's property within 2 metres of any common boundary shared with the applicant. These works are to be completed within 30 days of the date of these orders; and are to be done in accordance with the Safe Work Australia (2016) 'Guide to managing risks of tree trimming and removal work'.

The applicant is to provide any access required to complete the works in order (3) during reasonable hours, on 48 hours' notice from the respondents.

The respondents are to take any steps necessary to prevent bamboo regrowing on their property within 2 metres of any common boundary shared with the applicant.

Any further hedge plantings on the respondents' property within 2 metres of any common boundary shared with the applicant are to be limited to plant species that grow no taller than 3 metres.

D Galwey

Acting Commissioner of the Court

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Decision last updated:

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