3 Tree-Lessons from the Land & Environment Court

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Trees can mean many things to many peoples, for the ancient Norse people Yggrasil “the giant tree of life” connected the heavens and the earth, for real estate agents in metropolitan Sydney it delivers a mystical extra $40K to the selling price, and for the ancient welsh druids – stationary lovers. This varied appreciation of trees also extends to the many and various Class 2 applications in the Land & Environment Court. One person’s tree delights, is another’s waking terror.

1. **Annoyance or Discomfort of the Third Kind**

If your neighbour’s trees or hedges continue to deposit leaves and other detritus all over your property, the best solution maybe to forgo the Class 2 Application and pick up a rake instead – as the Court has found that Gaia’s garbage will not be enough to engage an application by an affected land owner pursuant to section 7 *(Disputes Between Neighbours) Act 2006* (NSW) (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.”* (My emphasis added).

But, as Preston CJ explains in *Robson v Leischke* [2008] NSWLEC 152, at (171):

“However, annoyance or discomfort to the occupier of the adjoining land occasioned by nuisances of the third kind is not "damage to property on the land".”

Damage must be evident before the Court’s jurisdiction is enlivened. Being bothered by rotting frangipanis petals is not quite enough.

2. **A Good View**

In the recent case of *Jensen v Low & Davis-Low* [2018] NSELEC 1539, Mr Jensen purchased a house in 1999 high upon vertiginous hill, from there he had resplendent panoptic views. However several years later, neighbours moved-in across the road. They planted a wall of lush Leighton Green Cypress Trees. After a few years, Mr Jensen found his view wholly obscured by an opaque coniferous wall.

He made an application pursuant to s 14B of the Trees Act:

“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****."* (My emphasis added).

It is important to point out that houses which are situated across a public road have been held as "on adjoining land": *Baer Investments Pty Limited v University of New South Wales* [2007] NSWLEC 128 at [1-7].

In cases such as these, the Court will only have the power to interfere if the obstruction of the view is "similar to a wall in their visual effect" and as Galwey AC stated in *Ingham v Pettigrew* [2016] NSWLEC 1002 at [39] the Court will only make an order if it affects the "enjoyment of the property".

In Mr Jensen's case, orders were made in his favour, despite the considerable cost to the respondents.

So if you are seeking privacy from nosy neighbours, be sure you are not also blocking a good view.

3. **Damage and Chores – *Barker v Kyriakides Principle***

In *Ebsworth v Migachov* [2014] NSWLEC 1157 berry-nuts from the neighbouring palm trees were causing significant damage to Ms Ebsworth's pool pump filter. Unlike leaves or branches falling on the grass or begonias, this damage was enough to enliven the Court's jurisdiction under Part 2 of the Trees Act.

However, the Court also took the *Barker v Kyriakides Principle* into consideration, which states that people living in urban environments with trees are expected to maintain their own properties and that such maintenance includes the cleaning up of debris from trees in the broader environment.

In a palm nut-shell. If by consistently cleaning your own property to a reasonable standard would prevent damage to your property, then the Court will be disinclined to support your application.