

Land and Environment Court

New South Wales

Case Name: Owners of Strata Plan 4334 v Linkara Pty Ltd

Medium Neutral Citation: [2018] NSWLEC 1197

Hearing Date(s): 18 April 2018

Date of Orders: 18 April 2018

Decision Date: 18 April 2018

Jurisdiction: Class 2

Before: Galwey AC

Decision: 1) The application is dismissed.

Catchwords: TREES (DISPUTES BETWEEN NEIGHBOURS); retaining wall; age and deterioration of the wall; roots not shown to be the cause of damage; dividing fence; damage to fence is minor and does not justify orders.

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

Category: Principal judgment

Parties: Owners of Strata Plan 4334 (Applicant)
Linkara Pty Ltd (Respondent)

Representation: M Russell, agent (Applicant)
L Karathanassis, agent (Respondent)

File Number(s): 17/366419

Publication Restriction: Nil

JUDGMENT

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

Background

- 1 The land on which the building of Strata Plan 4334 (the applicant) sits is slightly lower than the property to their southwest, owned by Linkara Pty Ltd (the respondent), a company owned by Mr Karathanassis and Ms Lintott. A retaining wall up to a metre tall on the applicant's land supports the soil. Above this a steel panel dividing fence that runs along the boundary.
- 2 In 2013 owners of the Strata Plan units noticed that the retaining wall was cracking and being displaced. An engineer, Lewis Martin, advised that this was due to roots from neighbouring trees and recommended the wall's replacement with a new block wall. Unit owners discussed the issue with Mr Karathanassis but were unable to come to any agreement. When part of the top of the wall collapsed in 2015, the applicant had the wall demolished and replaced with a new block wall as recommended.
- 3 The applicant now seeks orders pursuant to s 7 of the *Trees (Disputes Between Neighbours) Act 2006* (NSW) ('the Trees Act') for the respondent to:
 - remove two philodendron plants, one alive and the stump of another that was recently cut back;
 - repair the dividing fence; and
 - pay compensation of 50% of the cost of replacing the wall, equivalent to \$8,756.
- 4 Apart from the philodendron plants, the application also claimed an umbrella tree on the respondent's land caused damage to the wall, however there is no umbrella tree to be seen near the common boundary.

Framework of the Trees Act

- 5 If I am 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 anyone (s 10(2) of the Trees Act), I have the jurisdiction to make appropriate orders (s 9) after considering a range of matters set out at s 12.

The retaining wall

6 Photographs from 2015, when the top of the wall had collapsed but before it was replaced, show some roots behind and through the wall. There are no plants on the applicant's land, so any roots must be from the respondent's plants. Mr Forder, an engineer engaged by the respondents, says the wall was inadequate for its purpose, and its deterioration was due to its age. He says many retaining walls fail like this even without any presence of tree roots. He suggests cracks that opened in the wall, due to its deterioration, might have allowed roots to grow between bricks. The report of Lewis Martin, an engineer engaged by the applicant, states that the wall is approximately 40 years old and that it would not meet current standards, but he was of the opinion that roots had triggered the damage. Mr Brian Russell, who built the new retaining wall, also acknowledged during the applicant's submissions that the wall's age contributed to its condition, but holds the opinion that the roots caused the damage.

7 While I accept that roots were *present* when the wall was damaged, I cannot be satisfied on the evidence before me that they *caused* the damage. Soil pressure alone may have been sufficient to cause much of the damage. Certainly the age of the wall and its thickness, being inadequate for its purpose, are likely to have resulted in its deterioration.

8 I appreciate that the applicant had tried to reach agreement with the respondent prior to replacing the wall. Then, when the wall began to collapse it needed to be repaired, despite the lack of any agreement with the respondent. However the wall is on the applicant's property and belongs to the applicant. I am not satisfied that respondent's plants caused the damage; therefore I cannot make orders for compensation.

The dividing fence

9 Regarding the fence, I noticed another section of the fence closer to the street was displaced also, away from any trees. The fence has been here for many years. Photos show the philodendron plants growing onto and over the fence where it is displaced above the retaining wall. The applicant has gained quotes for repairing this section, where apparently only two posts need replacing.

Were I minded to make orders I might get the respondent to contribute a greater amount to the costs of that, perhaps 60%. However, in my view the displacement is minor, there is no risk of the fence falling, and it does not warrant orders from the Court.

Preventing future damage

10 While roots from the two philodendrons grow in the soil along the boundary, and may grow near or against the retaining wall, there is nothing to satisfy me that they are likely to damage the applicant's property in the near future, being the test required before I can make any orders for this element of the application. Therefore, I will not order removal of any vegetation.

Orders

11 As a result of the foregoing, the Court orders that:

(1) The application is dismissed.

D Galwey

Acting Commissioner of the Court
