



Land and Environment Court
New South Wales

Case Name: The Owners – Strata Plan No. 11351 v Burton

Medium Neutral Citation: [2018] NSWLEC 1617

Hearing Date(s): 22 October 2018; 19 November 2018

Date of Orders: 19 November 2018

Decision Date: 19 November 2018

Jurisdiction: Class 2

Before: Galwey AC

Decision: (1) Within 30 days of the date of these orders, the respondent is to remove all live parts of the tree from the wall.

Catchwords: TREES (DISPUTES BETWEEN NEIGHBOURS) – damage to wall – removal of tree

Legislation Cited: Dividing Fences Act 1991 (NSW)
Trees (Disputes Between Neighbours) Act 2006 (NSW)

Category: Principal judgment

Parties: The Owners – Strata Plan No. 11351 (Applicants)
Colin Craig Burton (Respondent)

Representation: A Bugeja, agent (Applicants)
C Burton, litigant in person (Respondent)

File Number(s): 2018/155565

Publication Restriction: No

JUDGMENT

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

Background

- 1 A small fig tree ('the tree') grows on the wall along the common boundary that separates two Paddington properties, one belonging to the Owners of Strata Plan No. 11351 ('the applicants'), the other to Colin Burton ('the respondent'). The stone boundary wall is cracking along mortar between its blocks. The applicants asked Mr Burton to remove the tree, which grows on his side of the wall. Mr Burton has not removed the tree, so the applicants applied to the Court pursuant to s 7 of the *Trees (Disputes Between Neighbours) Act 2006* (NSW) ('the Trees Act') seeking orders for the tree to be removed.
- 2 Due to an error in communications, only the applicants were present when I attended the property in October. I observed the situation and subsequently heard submissions in Court today (19 November).
- 3 The fig tree is attached to the boundary wall on Mr Burton's side, with its crown extending above the top of the wall. Its roots extended down into the ground on Mr Burton's side. The crown has been pruned and roots severed approximately one metre above ground level. According to the applicants, this pruning took place approximately two months earlier, one day before the directions hearing.
- 4 According to the Trees Act, the matters I must first determine are:
 - Does the tree grow on land adjoining the applicants'?
 - Has the tree caused damage, or is it likely to cause damage, to their property?
- 5 If both these questions are answered affirmatively, I must consider a range of matters set out at s 12 of the Trees Act before making any orders to appropriately remedy or prevent the damage.

Findings

- 6 The tree is attached to the boundary wall, below the top of the wall, on Mr Burton's side. The area on the applicants' side of the boundary near the tree is common property belonging to the applicants. I am satisfied that, for the purposes of the Trees Act, the tree is situated principally on Mr Burton's land, which adjoins the applicants' land.

- 7 Cracks in the wall, up to 10 mm wide, run along mortar joints in areas where the tree's roots grow into the wall. The pattern is consistent with damage caused by roots. In the absence of any other explanation, and noting that other sections of the wall are not cracked in the same way, I accept on the balance of probabilities that roots from the tree have damaged the wall. If the tree continues to grow, damage will become more severe, eventually making parts of the wall unstable.
- 8 The tree is small, providing little amenity to either site. There is no reason to find alternative solutions that might allow its retention. Although its roots were cut, the top of the tree remains alive and will continue to grow. The tree should be removed.
- 9 The applicants say the tree began as a pot plant. Mr Burton claims the tree grew due to an 'act of god', as a bird deposited the seed which grew into the tree. He argues that this means he is not responsible for any damage it might cause.
- 10 Under Part 2 of the Trees Act, whether the tree is planted or self-sown may be considered, but here it does not remove any onus on the respondent to take action to prevent further damage. The issue has been brought to his attention and he has not yet adequately resolved it.
- 11 Mr Burton says the tree was removed. However my observations and his photos show the tree to be alive and growing, despite its roots being cut above ground.
- 12 The applicants have provided no evidence of damage beyond what can be seen, but want Mr Burton to repair any damage they find during future investigations. They had the opportunity to undertake such investigations but did not. Without any such evidence the Court cannot make orders for repairs or compensation. The damage I could see in October was not significant enough to warrant orders from the Court. If in future the parties determine that repairs are required, it is a matter that can be dealt with between themselves and under the *Dividing Fences Act 1991* (NSW).

Orders

13 As a result of the foregoing, the orders of the Court are:

- (1) Within 30 days of the date of these orders, the respondent is to remove all live parts of the tree from the wall.

D Galwey

Acting Commissioner of the Court

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