



Land and Environment Court
New South Wales

Case Name: The Owners – Strata Scheme 51500 v The Owners – Strata Scheme 4234

Medium Neutral Citation: [2017] NSWLEC 1576

Hearing Date(s): 9 October 2017

Date of Orders: 12 October 2017

Decision Date: 12 October 2017

Jurisdiction: Class 2

Before: Fakes AC

Decision: Application dismissed

Catchwords: TREES [NEIGHBOURS] : Damage to property, potential injury; compensation; sufficiency of evidence of causation and notification

Legislation Cited: Trees (Disputes Between Neighbours) Act 2006
Limitation Act 1969

Cases Cited: Barker v Kryiakides [2007] NSWLEC 292
Hinde v Anderson & anor [2009] NSWLEC 1148
Maroney v John [2008] NSWLEC 32
McCallum v Riodan & anor [2011] NSWLEC 1009
Osborne v Hook [2008] NSWLEC 1231
Robson v Leischke [2008] NSWLEC 152; (2008) LGERA 280
Smith & Hannaford v Zhang & Zhou [2011] NSWLEC 29
Yang v Scerri [2007] NSWLEC 592
Zangari v Miller (No 2) [2010] NSWLEC 1093

Category: Principal judgment

Parties: The Owners – Strata Scheme 51500 (Applicant)

The Owners – Strata Scheme 4234 (Respondent)

Representation:

Applicant: Mr Appleby (Agent)

Respondent: Ms Mozjeko (Solicitor)

Solicitors: McCabes

File Number(s):

195613 of 2017

JUDGMENT

- 1 COMMISSIONER: The parties in these proceedings are the owners of two strata schemes. The applicant has applied under s 7 Part 2 of the *Trees (Disputes Between Neighbours) Act 2006* (Trees Act) for orders concerning a large *Ficus macrophylla* (Moreton Bay Fig) growing at the rear of the respondents' property and extending over the common boundary.
- 2 The applicant is seeking the following orders (summarised from the Class 2 Application):
 - Yearly ongoing maintenance/pruning of the Fig away from the applicant's property at the respondent's expense;
 - The respondent to be liable for all future damage to the applicant's property or injuries caused by the tree and for all associated payments and compensation; and
 - Payment of compensation for damage to the applicant's property – including the dividing fence, paving, and damage to a sewer pipe [by way of reimbursement of \$11,052 for money spent by the applicant].
- 3 The orders are sought on the basis of the applicant's contention that the tree has caused damage to various elements of common property and could continue to do so. The applicant submits that branches falling from the tree could cause injury to anyone on their property.
- 4 The respondent contends that the tree has been, and will continue to be, maintained. The respondent disputes the evidentiary basis of the claim.
- 5 In applications under Part 2, the key jurisdictional test is found in s 10(2). This states:
 - (2) The Court must not make an order under this Part unless it is 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.

- 6 The level of satisfaction required by s 10(2) is discussed in *Smith & Hannaford v Zhang & Zhou* [2011] NSWLEC 29. At [62] Craig J states in part “something more than a theoretical possibility is required in order to engage the power under [the Trees] Act...”.
- 7 As the applicant is concerned about future damage, the guidance decision in *Yang v Scerri* [2007] NSWLEC 592 has determined that the 'near future' is a period of 12 months from the date of the hearing. In regards to injury, the Court considers the risk posed by a tree in the foreseeable future based on the characteristics of the tree, the history of any failures, any other relevant evidence, and the circumstances of the site apparent at the time of the hearing.
- 8 If any of the tests in s 10(2) are satisfied, the Court's powers to make orders under s 9 of the Trees Act are engaged. This in turn requires consideration of relevant matters under s 12.

The damage and compensation claim

- 9 In the application claim form, the applicant contends that the tree has caused the following damage to property on its land. I was told during the hearing that the alleged damage to elements of the townhouse on Lot 29 was damage to common property and not the individual property of Lot 29. Any orders sought under the Trees Act for damage to individual property would require a separate Tree Dispute Application to be made by the owner or occupier of that property.
- roots from the tree damaged the toilet/sewer pipe of Lot 29;
 - roots damaged paving between the dividing fence and the rear of Lot 29;
 - a branch fell and damaged a light and post; and
 - roots damaged the dividing fence.
- 10 During the on-site hearing, the applicant also alleged that leaves from the tree blocked the guttering and downpipe of Lot 29 and that a branch or branches damaged the aerial of that Lot.
- 11 The applicant is also concerned that branches may cause damage to the roof of Lot 29.

12 Attachment B in the application claim form includes a chronological summary of the items/tax invoices that comprise the compensation claim. This list was used as the basis for determining both the jurisdictional tests and relevant discretionary matters. The eleven items are considered in the table below. The date refers to the tax invoice/ month work completed; the item is the work undertaken on behalf of and paid for by the applicant; the amount is the sum claimed for the work; respondent notified indicates whether there is any evidence provided by the applicant that the respondent was formally notified of the damage at the time it occurred; and the last column notes whether the applicant has provided any probative evidence of the nexus between the tree and the alleged damage.

13 Table of dates, repairs/actions/ claim/notification/ evidence

Date	Item	Amount \$	Respondent notified?	Evidence of damage provided on file
04/2005	1. Pruning over dwelling	1,100	No	No
10/2006	2. Installation of a root barrier	1,391	No	No
06/2009	3. Removal of pavers from area between dividing fence and rear fence	1,100	No	Very unclear black and white photocopy of alleged paving; no

	of Lot 29			detail discernible
06/2011	4. Cleaning and clearing of leaves/ debris from gutters, valleys, downpipes and roofs nearby carports and dwelling	330	No*	Statement by contractor that "roof and gutters at this address appear to be in good condition
07/2011	5. Pruning of branches over roof	1,100	No	No
07/2011	6. Repair of TV antenna said to be damaged by tree	187*	No	No – invoice included other items unrelated to the antenna
10/2012	7. Pruning away from antenna	750	No	No (invoice also

				included other works)
07/2013	8. Repair of dividing fence	750	No	No
07/2013 10/2013	9. Toilet replacement/ inspection and unblocking of sewer in dwelling on Lot 29 (Aqua Flush Plumbing)	1353 368.50	No**	Plumber's invoices note presence of 'large tree roots' found to be entering through cracked dislodged joint
07/2013 11/2013	10. Effectively same as above by Boyd Parsons Plumbing	638 1,628	No**	Plumber's invoice states - appears tree roots have entered through joint where toilet pan connects to sewer

				pipe.
02/2014	11. Cleaning of pathway, clearing of debris from access pathway between rear of Lot 29 and dividing fence	357	No	There are several photographs of dead branches, leaf litter and weeds in this area

* On 19 June 2009 the applicant wrote to the Secretary of the respondent's Strata Scheme advising that the tree had encroached onto the roof of townhouse 29 and that leaves were filling the gutters. Of greater concern was the potential for damage in periods of heavy rain and strong winds. The applicant requests that the tree be pruned to a manageable height. There is no evidence from either party as to what if any action was taken. During the hearing I was informed that the respondent has regularly engaged the services of an arborist to undertake pruning in accordance with consent obtained from Ashfield (now Inner West) Council.

** The application claim form includes a letter from the Applicant's Strata Manager to Ashfield Council dated 16 October 2013 informing the council that the Fig tree has encroached over the roof of townhouse 29 resulting in the filling up of gutters with leaves. The council's attention is also drawn to tree roots getting into the plumbing system of townhouse 29 and concerns about the possible compromising of the structural integrity of the building. The applicant requests that council inspect the tree and suggest ways of best managing the situation in order to avoid further damage to common property. There is no evidence that a copy of the letter was sent to the respondent.

- 14 All except one of the letters from the applicant to the respondent included in the evidence post-date the claims. A similar letter to that sent to Ashfield Council, dated 24 November 2014 was sent to the Secretary of the respondent's Strata Scheme. The letter requests that the respondent engage an arborist to inspect and report on the issues (roots in the plumbing system of Lot 29 and damage to the common property pathway) and then take appropriate action. A letter dated 24 July 2015 mentions previous correspondence sent in May 2015 to

which there has been no reply. The only relevant sentence is non-specific: “The tree continues to cause damage and continues to present a significant safety hazard”. An urgent response is requested. There is no claim for reimbursement of any costs.

- 15 In May 2016, Mr Martin Peacock, Consulting Arborist, prepared a ‘Tree Pruning Specification’ at the request of the applicant’s Strata Manager [who also manages the respondent’s property]. The specification details the branches to be removed from parts of the Fig’s canopy overhanging the roof and garden area of Lot 29. Photographs in the specification and in the claim form show the proximity of the branches to the roof although there is no evidence that any of the branches had caused/ or were causing, any damage to that property. It appears that the respondent contributed 50% of the cost of the subsequent pruning but did not contribute to Mr Peacock’s fee [although there is no claim for this].
- 16 The application claim form also includes an invoice for the supply and installation of an outdoor light, which was damaged by green branch that fell from the Fig in January 2017. The evidence also includes a letter dated 2 February 2017 from the applicant to the respondent advising them of the problems caused by the tree and advising the respondent of the fallen branch that damaged the light (and allegedly damaged a fence post). Amongst other things, the letter requests compensation for the damaged light and fence post, the joint engagement of an arborist to provide a pruning schedule for annual pruning, and that the respondent be responsible for that annual pruning. The respondents paid for the rectification; photographs in the application claim form show the branch and the damaged light.
- 17 During the on-site hearing, I was shown a number of smallish dead branches in the backyard of Lot 29.

Findings – damage

- 18 On the evidence before me, I am satisfied that a branch from the Fig damaged the outdoor light at the rear of the applicant’s property. As such, s 10(2)(a) is satisfied and the Court’s jurisdiction to make orders is engaged.

- 19 While it is hypothetically possible that a root from the Fig contributed to the blockage of the toilet within the dwelling on Lot 29 and a branch may have dislodged the television aerial, there is no probative evidence to substantiate these claims. I note that the aerial has been relocated to the other side of the roof of Lot 29.
- 20 In regards to the sewer, I note that in 2006 the applicant installed a 1.2m deep root barrier between the tree and Lot 29 and the plumbing problems arose in 2013. Either the root barrier has been ineffective or the root may be from another tree. The plumbers reported the problem to be at the junction between the toilet pan and the pipe; it is unclear whether this is the common property of the strata plan or the property of Lot 29. If the latter, then it may have been subject to a separate application under the Trees Act. I was informed that there have been no problems with the plumbing since those repairs. Similarly, it is unclear from the invoices as to whether the junction was faulty which then allowed access to the root, or that the root had caused the problem with the junction.
- 21 Similarly, while I am not satisfied on the evidence that any damage has occurred to the guttering [item 4] or to the pathway [item 11] as a consequence of the leaves, or is likely in the near future to occur, as a matter of discretion I would not make any order for any intervention with the Fig tree on the basis of leaf litter.
- 22 In *Robson v Leischke* [2008] NSWLEC 152; (2008) LGERA 280 Preston CJ at paragraphs [168] to [173] discusses 'damage' in general. In this discussion, his Honour specifically noted (at [171]) that:
- 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" within s 7 of the *Trees (Disputes Between Neighbours) Act 2006*. Hence, leaves, fruits, seeds, twigs, bark or flowers of trees blown onto a neighbour's land might cause annoyance or discomfort to a neighbour, but unless they also cause damage to property on the neighbour's land they will not be actionable under s 7.
- 23 Many applications are made on the basis of annoyance or discomfort associated with the dropping of leaves, fruit, twigs and other material naturally

shed from trees. The Court has published a Tree Dispute Principle in *Barker v Kryiakides* [2007] NSWLEC 292 which states that:

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

- 24 There are many examples of the application of this Principle. To date it has been adopted consistently and there have been no examples where the Court has been satisfied to the extent required by s 10(2) that any orders should be made for any intervention with a tree on this basis; and so it is with this matter.
- 25 Similarly, it is possible that the surface roots of the Fig had caused some displacement of both the dividing fence and pavers installed along a pathway between the fence at the rear of Lot 29 and the dividing fence between the parties' properties. However, there is insufficient evidence of the damage to satisfy s 10(2)(a). The fence has been relocated to accommodate the tree; this encroaches onto the applicant's land but does not appear to be an impediment to anyone using the pathway and, absent the actions of the applicant in relocating the fence, such relocation would have been something the Court could have ordered if an order was warranted. The fence appeared to be in good order and fully functional.
- 26 In regards to the compensation claims, apart from the absence of evidence to support the claims, as a matter of discretion it is unlikely that orders for reimbursement for any of the claims would have been made. The Court has held that s 14(1)(d) of the *Limitation Act 1969* applies to compensation claims under the Trees Act. The consequence is that there is a general six-year time limit as from the date of the filing an application under the Trees Act for compensation claims for past damage to an applicant's property (see *Maroney v John* [2008] NSWLEC 32 at [32] – [33]).
- 27 In addition, while I was (repeatedly) informed during the hearing that many letters had been sent to the respondent, the applicant has not provided any

evidence of any correspondence that demonstrates that the applicant advised the respondent of the alleged damage when it happened. The Court has held that this does not provide a tree owner with an opportunity to assess the damage or be consulted about the method and cost of repairs (see *Osborne v Hook* [2008] NSWLEC 1231), although it is recognised that sewer blockages need urgent action but the respondent should be notified of the problem as soon as possible.

- 28 The only damage for which there is clear evidence is the damage to the outdoor light. The respondent paid for the repair of this damage.
- 29 Apart from past damage, the applicant is concerned that despite the recent pruning, the canopy of the tree will continue to grow over and potentially damage the roof of the nearby townhouse on Lot 29. Photographs included in the application claim form show that prior to the pruning carried out in late 2016, there were a number of branches very close to the roof with some foliage in contact with the tiles.
- 30 The respondent engaged Ms Melanie Howden, a Consulting Arborist, to inspect and report on the condition of the tree and comment on the issues raised in the application claim form. She inspected the tree from the respondent's property on 28 September 2017. Amongst other things, Ms Howden notes that the tree is a mature, healthy, vigorous, stable specimen with apparently sound branch attachments. There are two dead branches over the respondent's property but otherwise the foliage is in very good condition. Ms Howden identifies some cracking and dieback in some of the buttress roots on the southern side of the tree where root severance has occurred on the applicant's property. She also notes evidence of pruning throughout the tree. Ms Howden states that she was informed that the branch failure in January 2017 occurred during strong winds and that branch was the only reported failure in the past 12 years. In Ms Howden's opinion, the likelihood of future branch failure is low.
- 31 With the arboricultural expertise I bring to the Court, and based on the observations made during the on-site hearing, I concur with Ms Howden's observations. While there is some deterioration of some of the buttresses

towards the applicant's property, the remaining buttresses appear healthy and sound and the respondent's property provides the tree with a reasonable and apparently undisturbed rooting area.

- 32 Given the recent pruning, there appears to be at least a 3m clearance between the overhanging canopy and the roof of townhouse 29. There is no evidence that the tree is likely, in the near future, to cause damage to the applicant's property and therefore there is no basis for making any orders for the annual pruning of the tree.

Injury

- 33 The applicant is concerned that branches similar to the one that caused the damage to the light may fall from the tree and injure anyone who may be under the branch at the time. It would appear from the discussion on site that residents are also concerned about dead wood falling from the tree.
- 34 Given the expert evidence provided by Ms Howden and the observations I made on site, I am not satisfied that the jurisdictional test in s 10(2)(b) is met. While the failure of dead wood is predictable and there is a small amount of dead wood over the respondent's property, it would appear to be over a portion of the property unlikely to be frequently used and the respondent has raised no issue with it. I saw no dead wood of any size likely to cause injury to anyone that is overhanging the applicant's property. The single reported branch failure appears to have been an unpredictable event in windy conditions and not related to any apparent structural defect in the branch or its union which could be used to identify other branches at greater risk of failure.

Conclusions and orders

- 35 On the evidence before me I am not satisfied that any orders for future maintenance or reimbursement of costs are warranted.
- 36 As discussed in *Hinde v Anderson & anor* [2009] NSWLEC 1148, a fresh application can only be made if the circumstances have changed since the Court determined the earlier application and there is fresh evidence that could not have been adduced at the earlier hearing. The judgments in *McCallum v Riordan & anor* [2011] NSWLEC 1009 and *Zangari v Miller (No 2)* [2010]

NSWLEC 1093 give some indication as to what the Court considers to be 'changed circumstances' and fresh evidence.

37 Therefore, the Orders of the Court are:

(1) The application is dismissed.

Judy Fakes

Acting Commissioner of the Court

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