

Land and Environment Court
New South Wales

Case Name: Owners Strata Plan 31839 v Alafaci & anor
Medium Neutral Citation: [2016] NSWLEC 1083
Hearing Date(s): 9 March 2016
Date of Orders: 9 March 2016
Decision Date: 9 March 2016
Jurisdiction: Class 2
Before: Fakes C
Decision: Application granted; tree removal ordered
Catchwords: TREES [NEIGHBOURS] Damage to property, risk of injury; consent orders
Legislation Cited: Trees (Disputes Between Neighbours) Act 2006
Cases Cited: Ghazal v Vella (No. 2) [2011] NSWLEC 1340
Hinde v Anderson & anor [2009] NSWLEC 1148
McCallum v Riodan & anor [2011] NSWLEC 1009
Robson v Leischke [2008] NSW 152; (2008) LGERA 280
Zangari v Miller (No 2) [2010] NSWLEC 1093
Category: Principal judgment
Parties: Owners Strata Plan 31839 (Applicant)
Mr L Alafaci and Ms S Lee-Smith (Respondents)
Representation: Applicant: Mr B Gibson (Agent)
Respondents: Mr T Orlizki (Solicitor)

Solicitors:
Respondents: Kent Attorneys
File Number(s): 21143 of 2015

JUDGMENT

- 1 COMMISSIONER: The applicants have applied under s 7 Part 2 of the *Trees (Disputes Between Neighbours) Act 2006* (the Act) for orders seeking the removal

of one tree and the pruning of other trees growing on the adjoining property in Belmore.

2 The parties have proposed consent orders to allow for the removal of one tree. Before the Court can agree to the orders proposed by the parties, the Court's jurisdiction to do so must be engaged.

3 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.

4 The application concerns seven trees growing in a garden bed at the rear of the respondents' property. Some of these trees overhang the parking area at the rear of the applicant's unit block. The main element of the claim is that the roots of one of the trees, identified in an arborist's report as T3 – a *Eucalyptus robusta* (Swamp Mahogany) have caused damage to the concrete parking area. Orders are sought for its removal to enable the applicant to remove and replace the car park. Orders were originally sought for the pruning of overhanging branches of other trees so as to avoid damage to parked cars. Whilst not formally listed in the proposed orders, the applicants were also claiming rectification of the concrete car park with a quoted cost of \$38,880.

5 The hearing commenced on site with an inspection of the trees from the respondents' property. I am satisfied that the trees in question are wholly located on that land and are trees to which the Act applies.

6 The alleged damage is the extensive lifting and cracking of the concreted rear of the applicant's property. The concrete extends to the boundaries with all three adjoining properties. Apart from damage, the applicant is also concerned about the trip hazards created by the lifted slabs.

7 I am satisfied on the evidence seen on site that T3 is at least a cause of the damage to the concrete car park. *Robson v Leischke* [2008] NSW 152; (2008) LGERA 280 Preston CJ at paragraph [179] states that it will be sufficient if the tree is "a" cause of damage to property on an applicant's land in order to engage the Court's jurisdiction. It is clear from the type and extent of the damage across the entire car park that there are likely to be other causes including normal wear and tear of an old slab and perhaps failure of the sub-grade for some reason.

8 As the tree is very close to the dividing fence, the removal of the concrete and its relaying will involve some excavation and inevitable damage to supporting roots of

the tree. With the arboricultural expertise I bring to the Court, apart from causing a detrimental impact on the health of the tree, I consider that the extent of root pruning required is likely to destabilise the tree. Therefore the only feasible option in this case is to order the removal of the tree before the car park is replaced.

- 9 While the Swamp Mahogany provides some amenity to the parties' properties, there is a large Jacaranda growing at the rear of the respondents' property which will provide compensatory benefits as it grows.
- 10 The other trees are T1 – Privet, T2 – Pittosporum, T4 – Umbrella tree, T5 – Paperbark, T6 – Bhutan Cypress and T7 – Queensland Silver Wattle.
- 11 In regards to the pruning of overhanging branches, I observed nothing that would lead me to conclude that any of those branches is likely, in the near future, to cause any damage to any property on the applicant's land or to cause injury to any person that would be sufficient to engage the Court's jurisdiction. However, that is not to say that circumstances may change or that permission could not be obtained from Canterbury City Council under its Tree Preservation Order for minor pruning [see *Ghazal v Vella (No. 2)* [2011] NSWLEC 1340 for a discussion of the respective roles of local councils and the Court in regards to tree disputes]. To that end I note the following agreement between the parties proposed in Short Minutes of Order handed to the Court at the hearing:
 - (1) The Applicant is authorised to prune the trees the subject of the application to the extent the branches encroach over the boundary between the properties of the Applicant and the Respondent on terms that:
 - (a) The pruning is to be undertaken no more than once every 12 months;
 - (b) The pruning is to be undertaken by an appropriately qualified and insured contractor engaged and paid for by the Applicant;
 - (c) The pruning is to be limited to that necessary to protect from damage the property of the Applicant's owners and their tenant or occupiers, including their vehicles;
 - (d) The pruning be carried out in such manner as to preserve the shade and privacy afforded by the relevant trees [the Court drew the parties attention to the usual requirement for all pruning work to be carried out in accordance with AS4373: 2007 *Pruning of Amenity Trees*];
 - (e) To the extent that the consent of Canterbury City Council is required to undertake the pruning:
 - (i) The Applicant is responsible for obtaining the relevant consent at its cost; and
 - (ii) The Respondents shall provide consent or other assistance reasonably required by the Applicant to obtain the consent of Canterbury City Council.

- 12 The Court also notes the agreement between the parties that each party pay its own costs in these proceedings.
- 13 It was expressly drawn to the parties' attention that whilst the Court has agreed to note the agreement, they are not orders of the Court. However, I am satisfied that the agreement recognises the need for consent from the relevant authority.
- 14 During the hearing there was some discussion about the claim for compensation and what might be discovered once the concrete is removed. 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. 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.
- 15 In conclusion, I am satisfied on the evidence that the following agreed orders can be made. By consent, the Court orders:
- (1) Within 45 days of the date of this order, the Respondents are to engage and pay for an arborist with a minimum AQF level 3 qualification in Arboriculture and appropriate insurance cover to remove the *Eucalyptus robusta* identified as T3 in the Tree Dispute Claim Details filed by the Applicant ("the Subject Tree") to ground level and poison the stump ("the Works"). The Works must be completed within a further 28 days.
 - (2) The Applicant is to provide all reasonable access to the Applicant's property during normal business hours for the purpose of quoting and the safe and efficient carrying out of the Works.
 - (3) The Respondents are to give the Applicant at least 7 days' written notice of their intention to commence the Works, such notice to be given to the Applicant's Strata Manager – Strata Owners Services.
 - (4) The Works are to be carried out in accordance with the NSW WorkCover *Code of Practice for the Amenity Tree Industry* or its equivalent.
 - (5) All other claims for relief in these proceedings are dismissed.

Judy Fakes

Commissioner of the Court
