Pearson v The Owners – Strata Plan No 12969 - [2017] NSWLEC 1110

Land and Environment Court

New South Wales

Medium Neutral Citation:	**Pearson v The Owners – Strata Plan No 12969 [2017] NSWLEC 1110**
Hearing dates:	13-14 February 2017
Date of orders:	06 March 2017
Decision date:	06 March 2017
Jurisdiction:	Class 2
Before:	Fakes AC
Decision:	See [109]
Catchwords:	TREES [NEIGHBOURS] Damage to property; potential injury; causation; reactive clay soils; pre-existing condition; damage within the period of the applicant's ownership; apportionment of costs
Legislation Cited:	Trees (Disputes Between Neighbours) Act 2006 Land and Environment Court Act 1979
Cases Cited:	Liang & anor v Marsh & anor [2011] NSWLEC 1026 Robson v Leischke [2008] NSWLEC 152 Smith & Hannaford v Zhang & Zhou [2011] NSWLEC 29
Category:	Principal judgment
Parties:	Anne Pearson (Applicant) The Owners – Strata Plan No 12969 (Respondent)
Representation:	Counsel: Applicant: Ms J McKelvey Respondent: Mr M Seymour Solicitors: Applicant: Cordato Partners Lawyers Respondent: JS Mueller & Co Lawyers
File Number(s):	165826 of 2016

1. COMMISSIONER: The applicant, Ms Pearson, owns a property in Enmore. She contends that trees growing on the respondent's property, along the common boundary, have caused damage to her property and could cause injury to anyone on her property.

2. Ms Pearson has applied under s 7 Part 2 of the *Trees (Disputes Between Neighbours) Act 2006* (Trees Act) for the following orders to be made (as summarised from the Application):

    - Removal of trees 1 and 2;
    - Payment of $9,185 for replacement of the sewer, said to have been damaged by T1 and T2;
    - Payment of $2,189 for removal and replacement of a stormwater pipe plus the costs of reinstating pavement and landscaping;
    - Compensation of $2,364 for damage to property not covered by insurance;
    - Removal and replacement of the boundary fence;
    - Installation of a root barrier to protect her dwelling from the roots of Trees 3, 4, 5 and 6;
    - Restoration of her property to a maximum sum of $150,000; and
    - The respondent to pay for all of the above.

3. The proposed orders include a timeline for the undertaking of the proposed works.

4. Following further discussions and a conciliation under s 34 of the *Land and Environment Court Act 1979* , the order with respect to the root barrier is not pressed and the amount of compensation sought has been revised.

5. The orders now sought are (as summarised):

    - Removal of trees 1 and 2;
    - Payment of $3,061.66 for the replacement of the sewer due to damage from roots of T1 and T2;
    - Payment of $2,189 for removal and replacement of a stormwater pipe plus the costs of reinstating pavement and landscaping of $1,745;
    - Reimbursement of the insurance excess of $250.00 for damage to property;

- Rectification of the boundary fence;
- Restoration of the applicant's property to a maximum amount of $99,457.34 [as per the Schedules in Exhibit C].
- All costs to be borne by the respondent.

6. The respondent disputes the factual basis of the claim and opposes these orders. The respondent values the trees for the amenity they provide to the owners and occupiers of the premises and to the streetscape.

Jurisdiction

7. Section 7 of the Trees Act enables an owner (or occupier) of land to apply to the Court for an order to remedy, restrain or prevent damage to property on the applicant's land, or to prevent injury to any person, as a consequence of a tree to which the Act applies that is situated on adjoining land.

8. Section 10(1)(a) requires the Court to be satisfied that the applicant has made a reasonable effort to reach agreement with the owner of the land on which the tree is located.

9. 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.

10. These tests must be applied to all trees the subject of an application.

11. As the applicant is concerned about future damage as well as past and current 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/s, the history of any failures, any other relevant evidence, and the circumstances of the site apparent at the time of the hearing.

12. 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...". In *Robson v Leischke* [2008] NSWLEC 152 at [179] , Preston CJ notes that the tree the subject of an application need not be the sole cause of the damage in order to engage the Court's jurisdiction.

13. If the jurisdictional tests are met, the Court's powers to make orders under s 9 are engaged. Section 9(1) enables the Court to make any orders it thinks fit in the circumstances, to remedy, restrain or prevent damage to the applicant's property or to prevent injury to any person. This in turn requires consideration of relevant discretionary matters in s 12 of the Trees Act. The Court is not obliged to make the Orders either party seeks.

The trees

14. The trees are identified in the applicant's latest arboricultural report as:

    - T1 Tallowwood (*Eucalyptus microcorys*)
    - T2 Sydney Blue Gum (*E. saligna*)
    - T3 Bangalay (*E. botryoides*)
    - T4 Grey Gum (*E. punctata*)
    - T5 Silky Oak (*Grevillea robusta*)
    - T6 Bangalay (*E. botryoides*)
    - T7 Jacaranda (*Jacaranda mimosifolia*)

15. Trees 1 and 2 are thought to have been planted in the early 1980s although there is no documentation to prove this [Ireland review of Marrickville Council records included in Exhibit A]. I note that the parties' experts (see [A1]) in their Joint Report (Exhibit B) consider the trees to date from between 1972-1974. The experts also agree that the trees are past their stage of rapid growth but will continue to increase in height and girth.

16. The experts agree that trees 3-6 have not directly contributed to the damage to the applicant's dwelling and are unlikely to do so in the next 12 months.

17. Tree 7 is growing on the applicant's land and therefore the Court has no jurisdiction to consider this tree. The other trees are wholly on the respondent's property and are trees to which the Act applies. The trees of greatest concern are trees 1 and 2 and the expert evidence primarily deals with these trees and their impact on the dwelling rather than the other elements of the claim.

Relevant background and preliminary reports

18. A significant amount of material has been tendered in evidence. The following section outlines the sequence of alleged events, the engagement of experts by both parties prior to the filing of the Class 2 application, and summarises the findings of the various experts.

19. Ms Pearson's dwelling is thought to have been constructed in about 1910. The uncontested statement of a former owner of the applicant's property, Ms Kathy Green, is that major renovations were carried out in 1997. These included strengthening of the roof beams, some work under the house, and a new rear extension to replace a badly cracked old kitchen and laundry. Ms Green states that there was major cracking in the plasterwork of ceilings and walls and that the walls were relined with gyprock rather than having them re-plastered. In 2011, the property was advertised and sold as being in "pristine condition". Mr Charles Rickard, Consulting Engineer, RH Consulting Engineers, opines in his report of November 2015 that the property was probably painted and repaired prior to its sale.

20. According to material included in the application claim form and supporting documents as well as in evidence given orally, Ms Pearson purchased her Enmore property in late June 2011 and moved into it on or about 1 August 2011. On 29 June 2011, just prior to purchasing the property, Ms Pearson received a 'Pre-purchase Property and Timber Pest Report' (PPR) from Mr John Maglis of Tyrrells Property Inspections. Relevant to this matter are the following extracts [the report does not include any photographs demonstrating the condition of the dwelling at the time of purchase]:

> Structure *Will it fall down?*
>
> 1. Structure is subject to moderate levels of movement and settlement cracking which is common in buildings of this age and type. The movement observed in the structure is not considered serious and may be repaired during planned redecoration and maintenance of the building. Further movement may occur and periodic repairs may be required. NB: Plasterboard linings have been placed over the majority of internal masonry walls likely due to cyclic and/or persistent cracking in walls. Cracks may occur on external walls that may not be evident on internal walls due to the plasterboard linings concealing the masonry walls.
>
> 2. Monitor cracking and displacement in external south elevation wall and foundation walls at east end of entrance hall as the dwelling is affected by roots from large trees present on the south property. Seek further advice from your Consultant if movement worsens. Anticipate the need for structural repairs to this dwelling in future.

21. The report notes other defects/ necessary actions including:

    - floors out of level due to settlement - advises possible re-supporting in future;
    - door frames require additional support;
    - corroded steel lintels over front door and windows should be replaced within 12-24 months;
    - ceiling frame and beams undersized and sagging – monitor for persistent cracking or sagging and strengthen if necessary;
    - mortar requires re-pointing;
    - engage a roofing contractor to seal gap between roof flashing/covering/capping at north-eastern side of pitched metal roof to avoid further roof leaks

- regularly clean gutters and valleys;
- regrade perimeter guttering to ensure roof water drains readily to downpipes.
- evidence of rising damp – monitor and remediate if necessary;
- showers have not been used for a while – monitor for leaks;
- remove and relay uneven/displaced pavements;
- monitor saturated soil in rear yard;
- provide adequate cross-flow ventilation under the floors.

22. On 4 May 2012, Ms Pearson wrote to the respondent asking the Owners' Corporation to remove two large trees growing close to the boundary fence. The applicant states that in a period of heavy rain [April 2012], a large branch from one of the trees fell onto her roof and three tiles were broken. This led to water damage to internal furnishings and ceilings. Ms Pearson states that she was advised that this may happen again and that pruning overhanging branches would be detrimental to the trees and so removal was the best option. Ms Pearson also states:

> In addition to the likelihood of further damage to my roof from falling branches, the roots of both trees are also damaging the foundations of my house. I have been advised by an engineer that the roots are causing my foundations to crack and if this is not addressed in the next 12 months there will be significant damage to my house. It is quite easy to see that this is happening as the brick paving on my pathway next to both large trees has risen over the roots (there is a big bump) and there are obvious cracks in the house walls next to this.

23. The damage was covered by insurance; Ms Pearson paid $250.00 excess.

24. In October 2012 Ms Pearson engaged Mr John Maglis, of Tyrrells to reinspect the property and assess the impact of T1 and T2 on the cracking of the dwelling. The two page report is dated November 2012. Mr Maglis states in part:

> Shallow roots from large *Eucalyptus sp*. trees on adjacent south neighbouring property have caused displacement in pavers to south side path and south boundary fencing.
>
> Notable movement cracking and displacement in the structure has primarily occurred due to the action of the roots of two large *Eucalyptus sp*. trees located within 1m of the subject dwelling and situated on the adjacent south neighbouring property.
>
> Movement cracking in the original section of the dwelling has been exacerbated by the action of the large tree roots due to:
>
> Shallow brick footings in the original section of the dwelling which are prone to displacement from action of tree roots including uplift and changes to soil moisture content levels; and
>
> The dwelling is built on moderately reactive clay foundation soils which are prone to shrinkage and heave with changes in soil moisture content levels.

25. Mr Maglis recommends engaging an arborist to assess the trees and notes that the dwelling may experience further movement and damage necessitating costly remedial structural work. He suggests obtaining legal advice to determine the potential for recovering the costs of the repairs from the neighbouring property. In oral evidence, Ms Pearson confirmed that Mr Maglis did not carry out any excavation of the site. Some 126 photographs taken at the time of the inspection were later supplied. Amongst other things, the photographs show internal cracking above door frames, in and around cornices, cracks in the brickwork in the south-western corner, the condition of paving and parts of the fence as well as the proximity of the respondent's trees.

26. In December 2012 Ms Pearson states that a section of cornice fell, narrowly missing her small child.

27. In February 2013, in response to Ms Pearson's request for an arborist report, the respondent engaged Mr Hugh Taylor of Australian Tree Consultants to inspect the trees. Mr Taylor was provided with a copy of Mr Maglis' November 2012 report and photographs of the interior of Ms Pearson's dwelling. Mr Taylor found the trees to be in good condition – both in health and structure. He concludes that while the trees may have contributed to some of the damage, in his opinion, the age of the shallow footings and the action of reactive clay soils is likely to be the primary cause of cracking if the applicant's dwelling.

28. In August 2013 the respondent, albeit reluctantly, lodged an application with Marrickville Council under their tree management controls to remove T1 and T2. This was refused on 17 September 2013. The notice of determination details the reasons for refusal; in essence, there was insufficient technical or scientific evidence to justify the removal of the trees.

29. In August 2013, the applicant engaged an arborist, Mr Steve McLaughlin of Treehaven Enviroscapes to prepare a tree inspection report. Amongst other things, Mr McLaughlin removed two sections of paving along the southern side of Ms Pearson's dwelling, and excavated the soil beneath. The locations were selected on the basis of obvious uplift of pavers. In the vicinity of the south-western corner, Mr McLoughlin uncovered a woody root, believed to be from T1, approximately 250mm in diameter at a depth of 300mm. He observed this root to be in contact with the brick footings. In the second hole, in the vicinity of an access door to the sub-floor area of the dwelling, Mr McLoughlin found a woody root about 220mm in diameter at a depth of 500mm. This root is consistent with being from T2. Photographs of the roots are included in Mr McLoughlin's report in Exhibit A. Tree 1 is 2.6m from the applicant's dwelling; T2 is 1.9m away; the dwelling is within the calculated structural root zone of each tree. Mr McLoughlin also observed what he describes as a 'root matrix' around the stormwater pipe in the south-western corner of the dwelling, which he assumes to be from T1 and T2.

30. Mr McLoughlin opines that the major structural root from T1 is directly impacting on the dwelling, paving, fence and retaining wall causing cracking and uplift. He considers that the structural root from T2 is uplifting the paving, fence and retaining wall on which it sits and the root is growing under the dwelling directly below cracks in the external wall. Mr McLoughlin

anticipates that these impacts will increase over time as the trees grow. He also assumes that the dwelling is indirectly affected by the extraction of soil water by roots causing shrinkage of the reactive clay soils. Mr McLoughlin states that regrettably, while the trees are healthy specimens, the only way to limit structural damage to Ms Pearson's dwelling is to remove them.

31. In September 2013 the parties attended mediation. It appears that the respondent subsequently agreed to the regular removal of dead wood from the trees.

32. In April 2014, a green branch from T2 fell into the side passage between the applicant's dwelling and fence; Ms Pearson contends it narrowly missed her child.

33. In June 2014, the applicant engaged Mr Bede Ireland, a consulting and structural engineer, to inspect her property in the company of herself and Mr McLaughlin. Mr Ireland reviewed reports to date as well as council documents relating to the respondent's property. In his opinion, the damage to Ms Pearson's dwelling is primarily caused by T1 and T2 which are not shown on any council-stamped and approved landscape plans for the respondent's property. Mr Ireland considers that the respondent should remove the trees and repair the damage caused by them to Ms Pearson's dwelling. He opines that other minor damage to the applicant's dwellings is due to the reactive clay soils.

34. On 28 November 2014, the respondent engaged Mr Wayne Costin of Strata Engineering Solutions to investigate and report on whether the damage claimed to be affecting Ms Pearson's property could or could not be mitigated or prevented by any reasonable or practical means other than removing the trees. He visited the site with Mr Taylor, the respondent's arborist. Mr Costin examined all reports to date; he photographed various elements of the elements property including external, internal and under-floor. In Mr Costin's opinion the cracking of the walls and ceilings is associated with foundation movement due to a number of factors. He opines that the primary factor is the shrinkage and swelling of reactive clay soils. Mr Costin states that other potential causes include water ingress from broken water/ sewer pipes, and the effect of removing wide sections of the foundation walls to provide access for new pipes. Mr Costin also acknowledges that tree root suction is also a possible contributing factor, however, before considering any tree removal, there should be sampling to determine a soil suction gradient and other measurements made. He concludes that unless the root suction claim is substantiated, he is of the opinion that the damage caused by T1 and T2 is limited to the potential damage caused by tree root uplift as suggested by Mr McLoughlin.

35. In early July 2015, Mr Taylor, the respondent's arborist, returned to Ms Pearson's property and supervised the excavation of two holes – one at the south-western corner of the dwelling and the second at the trap door to under the house on the southern façade. In the first pit he observed: hard and compacted clay at 450mm; a 230mm diameter root from T1 at 300mm depth – the top of the root is flat and in contact with subsurface bricks; the brick footing is about 350mm deep; the root is flat and appears to be heading in a north-east direction under the house. In the second pit, Mr Taylor observed: a 210mm diameter root, round in shape [presumed to be from T2]; the top of the root is 270mm below the brick footing and the bottom of the root is 480mm below; no direct contact between the root and any fixed structure of the house; the bricks in the area were

dropping and had not been lifted by roots. Apart from excavating, Mr Taylor used a soil moisture meter to measure the percentage of volume of water in the soil. The testing was done at two depths – 7.6cm and 18.8 cm in a range of locations including the street verge and around and under the dwelling. The measurements are recorded in a table and visually represented in Figure 2 of Mr Taylor's 16 July 2015 report. In regards to the root from T1, Mr Taylor concludes that the available water in the vicinity of this root is favourable for root growth and action needs to be taken to stop further growth into the sub-surface bricks [presumably the footing]. In his view, it is not feasible to cut the roots along the side of the house. Mr Taylor suggests somehow stabilizing the moisture content under the dwelling and investigating whether there may be an engineering solution which provides space around the root to enable it to grow away from the house. If an engineering solution cannot be found he states the tree should be removed. He also considers that the soil moisture testing which showed higher moisture levels along the front of the house may also be affecting the footings. Mr Taylor also notes that removing the tree may not reduce future cracking. Based on his observations of the root from T2 and its surroundings, in particular the absence of any direct contact, Mr Taylor considers that the influence of the trees is only secondary with the principal cause of cracking being the water movement within the clay soils under the house.

36. In July 2015 Mr Pickering of Strata Engineering Solutions, the respondent's engineering consultants, made further inspections on 3 July, 17 July and 31 July. He was provided with Mr Taylor's 16 July report. In his report dated 5 August 2015 Mr Pickering states that eight trial pits were excavated adjacent to the footings of cracked walls as well as near soil tension cracks; all were excavated at least to the bottom of the footing. The report includes a number of photographs throughout and under the dwelling. Mr Pickering states that four tree roots were found: two within the footprint of the dwelling and two on the south-western footpath adjacent to the trees. Of the four, only one was in contact with the dwelling [presumed to be the root from T1]. In other pits excavated below cracks, no roots were found. Apart from the roots, Mr Pickering observed other things beneath the house including: cracked and undulating topsoil, which he considers indicative of swelling and shrinking of the clay soil; evidence of attempted repairs and alterations including a new stabilizing pier under the bathroom, ad-hoc addition of packing under many floor bearers, filling of previously cracked brickwork; and inadequate or absent support of brickwork over penetrations through foundation walls. He observed what he describes as the 'sinking' of walls and piers away from the floor beams and 'loosening' of bricks in the subfloor walls. As a consequence of his investigation, Mr Pickering concludes that only one root is contributing to the damage of the south-western corner of the dwelling and that there is no conclusive proof that any other roots from trees on the adjacent property – either by direct contact and subsequent upward pressure or by root suction affecting soil moisture – are the cause of damage to the walls of the dwelling. In his opinion, the primary cause is the impact of moisture on the reactive clay soils. Mr Pickering suggests the corner be rebuilt with the construction of two concrete piers either side of the root from T1 with a galvanised steel lintel above. A 100mm gap around the root will enable root expansion.

37. On 31 July 2015, Mr Malcolm Rolls, an engineer from RH Consulting Engineers, visited Ms Pearson's property to assess the damage. In his opinion the large trees on the respondent's property, in particular the Sydney Blue Gum, have, over time, dried the clay soil leading to shrinkage with subsequent deleterious effects on the dwelling. Mr Rolls estimates remedial work on the dwelling to be in the vicinity of $100,000-$150,000. He recommends removing the trees.

38. In August 2015 RH Consulting Engineers requested Douglas Partners undertake a site investigation of subsurface conditions in order to test and classify the soil in terms of shrink-swell and plasticity. The Douglas Partners report states that under Australian Standard AS2870 – *Residential Slabs and Footings 2011*, the site would be classified as 'M' for the purposes of designing footings. However, due to the presence of mature trees close to the building, in accordance with Clause 1.3.3 of the standard, the site is considered to be affected by 'abnormal moisture conditions' and the site would then be classified as 'P'. The author of the report makes assumptions on the basis of four trees one metre from the building to estimate a surface movement of about 45mm. [It is noted that the trees in question are more than 1m from the building.]

39. In September 2015 Ms Pearson re-engaged Mr Maglis from Tyrrells Property Inspections to re-inspect the house and record any changes in its condition since the previous inspection in 2012. Mr Maglis states that there appears to be move severe and widespread movement cracking to the dwelling which, in his opinion, is localised to the southern half of the dwelling adjacent to the trees. His report dated 8 September 2015 includes some 474 photographs of the applicant's property/ neighbouring trees; accompanying notes describe the photographs. No recommendations are made.

40. In or about October 2015, Ms Pearson engaged Mr Charles Rickard of RH Consulting Engineers, to inspect the property, review other expert reports to date and prepare a report. The report dated November 2015 is in three volumes. Volume 1 constitutes the report; Volume 2 comprises Appendix 1 which in turn includes reports from other consultants [described in preceding paragraphs] and well as technical and other reference material. Volume 3: Appendix 2 includes the three reports prepared by Mr Maglis from Tyrrells. In essence, Mr Rickard concludes that the trees are the principal cause of the damage to Ms Pearson's dwelling. He suggests two options to eliminate the damage: Option 1 is the removal of T1 and T2, installation of a root barrier to protect the dwelling from Trees 3-6; after six months, during which the moisture levels should stabilise, repair the dwelling (including removal of gyprock which he opines should not have been necessary if the trees hadn't been planted); Option 2: installation of a root barrier and 25% reduction in height and spread of T1 and T2; after 6 months – repair the dwelling as in option 1.

41. In October 2015 Mr McLoughlin, in the company of Mr Charles Rickard and Mr Matthew Nicholson, a carpenter, carried out a survey of cracking and displacement of the brickwork around and under Ms Pearson's dwelling. A plan was produced indicating approximate locations of exposed tree roots. The report 'Addendum 2 to Tree Inspection Report' included in Volume 1 of Mr Rickard's report as pages 7- 45 of 64 includes photographs of sections of the external brickwork and areas beneath the floor and indicates areas where roots were found near a number of cracks. In Mr McLoughlin's opinion, the photographs suggest that the closer to the trees, the greater the damage.

42. On 6 November 2015, another larger section of cornice fell in the lounge room and damaged furnishings and the floor. This occurred during a heavy rainstorm when water leaked through the roof near the chimney. Ms Pearson alleges the flashing around the chimney had been damaged by debris and that the gutter had moved from the wall and there was a crack in the wall through which the water had entered.

43. On 11 March 2016, a plumber was called to investigate a stormwater pipe blockage at the front of the dwelling near the south-western corner. Photographs taken in June 2016 show tree roots blocking the storm water pipe. There is no accompanying report identifying the source of the roots.

The Class 2 application, subsequent reports and final hearing

44. The applicant filed the Class 2 application on 3 May 2016. Following a Directions Hearing on 21 June 2016 the matter was listed for an on-site hearing on 8 September 2016. Other directions were made for the preparation and filing of expert reports.

45. In accordance with the Court's directions, Ms Pearson sought further expert reports from Mr Anthony Capaldi, a Building Consultant from Tyrrells Property Inspections (Exhibit F), P/L Mr Tadd Walford, Senior Structural Engineer from Partridge Structural P/L (Exhibit E), and Mr Simon Leake, Principal Soil Scientist, SESL Australia P/L (Exhibit D). The experts were provided with all previous reports.

46. Mr Leake augered two soil profiles and took samples soil from under the footing near T2. He notes that the brick footings are not founded on the subsoil or B horizon but are resting on the A2 horizon [lower layer of the 'topsoil'] and the major exposed roots are above the subsoil and within the A2 horizon. Based on the site characteristics, Mr Leake opines that T2 has an asymmetrical root system with important structural/tension roots likely to be beneath the footings of Ms Pearson's dwelling and which will continue to expand. In his opinion both trees are causing two types of damage: damage caused by the imposition of differential moisture suctions across the house and particularly on the inner and south facing walls with subsequent rising and falling of footings and piers; and point-source damage – in particular at the south-western corner and near the access hatch on the southern façade – both sites of large roots. In Mr Leake's view, the trees are solely responsible for the large cracks and heaving of bricks in the vicinity of the two large roots and the only solution which would be cost-effective and avoid destabilizing the trees is to remove them and install a watering system to bring the soil moisture levels back to normal.

47. Mr Capaldi inspected the property in July 2016. His report includes photographs of internal and external cracks in the applicant's dwelling. In his opinion the cracking and movement of the building is not consistent with the age and type of the dwelling but is more consistent with being caused by T1 and T2 which in his view have caused uplift and drying of the foundation material resulting in extensive settlement and structural cracking. Mr Capaldi recommends removing the trees, and where possible any roots adjoining or below the dwelling. Rectification should not occur until the moisture content has reached an acceptable level [level not stated]. His report includes a schedule of costs of various elements of the rectification works, which amount to a figure of $148,176.78.

48. Mr Walford inspected the applicant's property on 11 July 2016 and took a number of photographs. He also inspected the southern façade of the dwelling on the adjoining property to the north, which appears to be of the same style and contemporaneous with Ms Pearson's dwelling. Mr

Walford's report includes a relatively detailed discussion, with appended calculations, of footing design, soils, and expected movements and cracking in the light of the observations he made on site including the type and location of settlement, heaving and cracking. While he accepts that the footings would not meet current standards, he is of the opinion that trees 1-6, but particularly T1 and T2, have caused damage to the applicant's dwelling. In Mr Walford's view this is reinforced when the limited cracking of the southern façade of the adjoining dwelling is compared to the cracking of the southern façade of Ms Pearson's property. At [10.4.1] of his report he states (references excluded):

> In my opinion there is no way to unequivocally assign the total extent of damage, or degree of damage for that matter, caused by the presence of trees T1-T6, however it is clear that the cracking located in both the foundations and the walls directly over the exposed roots are a direct result of root growth.

49. Mr Walford considers that the majority of shrinkage would have occurred and stabilised prior to the construction of the respondent's property and thus the notable damage after this time could be attributed to surface movements associated with the trees. He opines that absent the trees, there would be cracking but of a different nature and smaller in width. Mr Walford discusses various options for rectification; in essence he finds that the most cost-effective and least risky approach would be to remove T1 and T2 and stabilise the soil moisture levels beneath the dwelling.

50. On the scheduled day of the hearing, at the request of the parties, the Registrar re-listed the matter for conciliation under s 34 of the *Land and Environment Court Act 1979* (Court Act). Prior to the conciliation, the parties' experts prepared a joint expert report [Exhibit B]. The experts participated in the conciliation and later gave oral evidence during the subsequent hearing. During the conciliation, the site was inspected – both internally and externally. Two pits were excavated and inspected – one near the south-western corner and the other near the door to the subfloor area on the southern façade.

51. Despite some progress, the conciliation was terminated on 2 November 2016 and the matter was listed for a hearing on 13-14 February 2017. The hearing recommenced on site. The two pits were re-opened and inspected; the interior and exterior of Ms Pearson's dwelling were inspected. The trees were viewed from a top floor unit in the respondent's property. The hearing resumed in Court.

52. Expert evidence was provided by:

Expert	Field of expertise	Party
Mr S McLoughlin	Arboriculture	Applicant
Mr H Taylor	Arboriculture	Respondent

Mr T Walford	Structural Engineering	Applicant
Mr W Costin	Structural Engineering	Respondent
Mr S Leake	Soil Science	Applicant
Mr A Capaldi	Builder	Applicant

53. Prior to the hearing the experts prepared a Supplementary Joint Report (Exhibit C) as well as individual reports. The Supplementary Joint Report includes an amended version of Mr Capaldi's estimates for rectification works. All six experts participated in concurrent oral evidence. Their involvement with the matter is limited to the past two years. Notably, Mr Maglis and Mr Rickard, who prepared the earlier reports, were not engaged for the hearing.

54. The outline of the expert evidence to follow is taken from joint reports, recent individual expert reports and oral evidence.

Have the trees caused damage to the applicant's dwelling?

55. The experts agree that the large woody root directly below and in contact with the masonry footings at the south-western corner of the dwelling is from T1 and has contributed to the cracking of the building, in Mr Leake's view from radial expansion of the root. Several experts noted the flattening of the root, indicative of being contained. The damage is the cracking damage to several bricks and mortar joints in the southwest corner of the dwelling including some rotation of the southwest masonry. There has been a 20mm settlement of this corner when compared to the northwest corner [exhibit J also shows a 20-25mm settlement of the south-eastern corner of the original section of the dwelling]. The engineers agree that the exact cause cannot be determined but they agree that the T1 root has either arrested further settlement or that the southwest corner has undergone settlement and then was lifted by the root. Mr McLoughlin is also of the view that because he observed a concentration of fibrous roots around the southwest corner, roots from T1 have damaged the downpipe in that vicinity. The experts also agree that the roots from T1 have more than likely altered the soil moisture content around and below the property but the degree to which this has happened in unknown.

56. In their joint reports, while they disagree as to whether T2 has caused damage to the dwelling, the experts agree that the root exposed near the mid section of the southern wall is from T2. They all agree that there is a 52mm vertical/upwards deflection or 'hogging' of the brickwork above the exposed root from T2 [about 30mm above the southwest and southeast corners]. The applicant's

experts consider that it has contributed to the cracking and hogging of the brickwork in the central portion of the southern facade brickwork. The respondent's experts remain of the opinion that the root from T2 is too deep to exert pressure on the brick footings.

57. In the Supplementary Joint report, the structural engineers agree that the profile of the hogging, as illustrated in Exhibit J, does not appear to be consistent with a single structural root but may be consistent with multiple structural roots or due to differential settlement along the lengths of the wall associated with localised water ingress. Mr Leake is firmly of the opinion that the hogging has been caused by the radial expansion of roots from T2 within the zone of rapid taper. Mr Walford and Mr Capaldi consider that the relative displacement is inconsistent with localised shrink /swell movements and more likely to be associated with the proximity of T2.

58. In oral evidence, the experts generally agreed that the exposed root from T2 may have caused damage to the applicant's dwelling. Mr Costin opined that the damage is minor and localised to fine cracks. Mr Costin stated that there was no flattening of the root and that the 'hogging' or upwards deflection of the dwelling in the vicinity of the root was coincidental. Mr Walford did not think the 'hogging' above this root to be coincidental but rather as a consequence of displacement by the root.

59. It is agreed that the soil is moderately reactive, i.e. swelling and shrinking, clay, classified as Class M modified by the presence of trees to Class P for the purpose of designing residential slabs and footings. It is agreed that moderately reactive clay soils can cause foundation movement and subsequent cracking of building constructed on brick footings. It is also agreed that T1 and T2 have more than likely affected the soil moisture content around and beneath the dwelling however no soil testing has been undertaken to determine the extent or degree of alteration and the extent to which the trees have contributed.

60. The arborists dispute the number and location of fibrous roots found under the house and the extent to which they may have contributed to the drying of the soil and subsequent cracking. Mr Taylor and Mr Costin state only woody roots were found beneath the house. The applicant's experts opine that the presence of fibrous roots will exaggerate the shrinking and swelling of reactive clays and this is occurring beneath the house. Mr Costin considers that soil moisture testing by Mr Taylor has demonstrated there is a presence of water under the house thus negating the effect of any fibrous roots. In his view there is an abnormal amount of water under the house that may come from runoff and or damaged pipes (of which he states there has been some history). Mr Taylor concurs and is of the opinion that the fibrous roots are of limited consequence.

Are other factors contributing to the damage?

61. Apart from the reactive clay soils, the experts also agree that the absence of a lintel over the sub-floor opening hatch may have contributed to some of the cracking. They observed localised settlement in the section of wall directly over the hatch. The experts agree that previous works undertaken to the sub-floor of the building, including the removal of masonry walls have contributed to the cracking of the building.

62. In oral evidence, Mr Walford considered that the type of deflection observed in the southern façade is generally in the range of class M soils (20-40mm) if taken locally but not globally. He remains of the opinion that the movement is beyond what he would normally expect on these soils.

What damage is likely to have occurred in the period the applicant has owned the property?

63. Ms Pearson prepared a detailed affidavit and gave evidence in court. In oral evidence she stated that while she had obtained the Pre-purchase Inspection Report the day before she exchanged contracts on the house, she didn't read it until afterwards. She had read it by the time of settlement four weeks later. Ms Pearson said that she saw the trees on the adjoining property and thought they were beautiful.

64. In regards to the condition of the dwelling at the time of purchase, Ms Pearson concurs with the statement on the real estate brochure which notes the condition as "Pristine condition throughout, nothing to spend". Ms Pearson also relies on comparative photographs in Exhibit K, which show various internal and external parts of the dwelling taken between 2011 and 2016. She states that cracking, both internally and externally has worsened since she purchased the property.

65. In their joint report, the experts agree that if it is found that the trees have caused or have contributed to the damage, the cracking would have been visible between the 1980s and 2000, with the root flares being visible from about 1995. The experts agree that, based on visual assessment, there has been no discernable change in the extent of cracking in the southern wall of the dwelling over the past two years.

66. In oral evidence, Mr McLoughlan stated that since 2013 the cracking in the vicinity of the root from T1 has worsened and there has been some further deterioration of mortar between the bricks. Mr Taylor thought there may have been minor changes. Mr Costin is of the view that little has changed in the condition of the south-western corner but notes that the area has been disturbed by the replacement of the stormwater pipes. He also considers that the fine cracks in the mortar in the bricks above the root from T2 are only fine and probably a consequence of the reactive clay. Mr Walford has only been involved since July 2016 but considers there are some subtle changes.

What rectification steps should be taken?

67. In the Supplementary Joint Report, Mr Leake opines that [given the normal expected increase in root growth and] the subsequent increase in root pressure and exponential increase in damage, the two trees must be removed before any work commences.

68. The arborists agree that the exposed roots cannot simply be cut. Should root removal be required, the trees should be removed. All experts agree that if T1 and T2 are removed, further cracking and

settlement of the building are likely as any roots beneath the house begin to decay. They also agree that the removal of the trees will more than likely result in stabilisation of the soil moisture.

69. In regards to the damage caused to the southwest corner by T1, the structural engineers agree that localised repairs and bridging of the footings, as suggested in the Strata Engineering Report August 2015, is appropriate. They are of the view that mass concrete piers are to be founded on clay and articulation joints will be required. They refer to Appendix C which is a costing prepared by Mr Capaldi based on Mr Costin's suggested rectification of damage caused by T1. The total for all associated works is $10,952.76 with perhaps another $310 for articulation joints.

70. While there is no consensus as to the impact of T2 on the damage to the building, Mr Capaldi costed two options for the rectification of the damage allegedly attributable to T2; these are found in Appendix D and Appendix E to the Supplementary Joint Report. Appendix D covers the costs to underpin the south wall and walls connected to the south wall and rectifying internal and external cracking in those walls including all incidental costs. The cost of this option is $88,504.58. Appendix E covers rectification of consequential damage from T2 to the south wall and walls connected to the south wall without any underpinning. This amounts to a sum of $70,418.33; factoring in a CPI of 3% p.a., the total at 5 years later would be $81,634.14.

Risk of injury

71. Ms Pearson contends that a green branch fell from one of the respondent's trees onto her property. Photographs in evidence show green branches on the pathway on the southern side of the house. The ends of the branches show signs of having snapped. There is no mention of the weather conditions but the pattern of failure and the amount of debris on the ground indicates the branches snapped in a storm. The branches appear to be from T2.

Submissions

72. Ms McKelvey for the applicant contends that the evidence of the experts is that the root from T1, which is in direct contact with the footings on the south-western corner of Ms Pearson's dwelling, and which may be affecting the moisture content of the soil with the consequential impact on soil and building movement, is a cause of damage to Ms Pearson's property. As such, I should be satisfied that the Court's jurisdiction is engaged.

73. In regards to T2, Ms McKelvey presses the evidence of Mr Walford who, while accepting that the footings are old and shallow, considers the extent of the damage to be in excess of that ordinarily expected from a building on moderately reactive clay soils, especially as the peak displacement is over the root from T2. She submits that the localised damage on the southern wall is not a mere coincidence, as opined by Mr Costin.

74. Ms McKelvey maintains that the evidence is such that both trees are at least a cause of the damage to the applicant's property. As the threshold considered in *Smith & Hannaford* is achieved, the Court's jurisdiction is engaged.

75. As the Court is required to consider relevant discretionary matters in s 12, Ms McKelvey makes the following submissions:

    - The trees are in close proximity to the common boundary and the dwelling is only about 1.2m from the boundary; given the proximity, root pruning is not recommended by either arborist;

    - All trees provide amenity and make a general contribution to the ecosystem. While the canopy provides some shading of the respondent's property, the canopy is too high to afford much privacy to units in the respondent's building. The trees are part of the streetscape but there are a number of other trees on the respondent's property and within the street that will continue to provide amenity.

    - It is acknowledged that there are a number of factors, apart from the trees, that have contributed to the damage.

    - In regards to the actions taken by each party, while the respondent did apply to council to remove the trees it was reluctantly done and not surprising that, on the evidence before the council, that the application to remove would be refused. Ms Pearson has taken advice from experts in good faith and has attempted to resolve the matter with the respondent. The respondent should have known of the potential for damage when the trees were planted that planting them so close to a dwelling that was approximately 60 years old at the time, and since 2012 has been on notice that the tree are causing damage.

76. Ms McKelvey maintains that I should prefer the evidence of the applicant's experts and order the removal of the two trees, which they agree is the most efficient way of avoiding future damage. This would also enable rectification work to proceed in a cost-effective manner. The removal of the trees would also remove the risk of injury from falling braches.

77. Having regard to the issue discussed in *Liang & anor v Marsh & anor* [2011] NSWLEC 1026 at [33]-[35], Ms McKelvey acknowledges that the compensation claim is limited to damage that has occurred in the period Ms Pearson has owned her property. Ms Pearson's evidence is that the house appeared 'pristine' when she purchased it; the applicant relies on the photographs in Exhibit K, which illustrate the extent of deterioration.

78. Ms McKelvey submits she is instructed to press all of the amended orders (see [5] of this judgment) and seek full compensation. However, if the Court considers apportionment is appropriate, the applicant would reluctantly accept a contribution of 25% of the cost estimate prepared by Mr Capaldi. Ms McKelvey contends that there is nothing that would warrant the Court ordering her client to contribute to the costs of removing the trees.

79. Mr Seymour for the respondent argues that while there is a root from T1 at the footing, for it to be causing damage, the tree must be actively doing something. He contends that at best, on the engineering evidence, the tree root is arresting the tilting of the dwelling, and thus in in this case, the active element is the not the tree.

80. Mr Seymour asserts that the house was not 'pristine' in 2011 as there were cracks. He maintains that primarily, the damage stems from its construction on reactive clay soils and a consequential overall tilt in the building; any damage as a consequence of T2 is negligible. Mr Seymour presses the evidence of the engineers who agree the cracks are generally within the range expected on those soils. However, to the extent that the engineers differ in their opinions, he maintains that Mr Costin's evidence should be preferred over Mr Walford's as Mr Costin has taken a much more comprehensive investigation compared to what he argues, is Mr Walford's more narrow focus.

81. In regards to what should be done, Mr Seymour contends that the responsibility rests with the applicant. He submits that Ms Pearson purchased the property with knowledge of existing structural damage, pre-existing repairs, and the potential for further damage. Further, within months Ms Pearson was engaging experts but then took no action to rectify the damage on the belief that the trees had to be removed and ignoring other factors. Mr Seymour presses the actions of his client in that since 2012 the Owners' Corporation has responded to Ms Pearson's claims but its experts found T1 to have had a minor impact and no evidence that T2 had caused any damage. Nevertheless, at the applicant's request, the respondent applied to council.

82. Mr Seymour submits that it would be open for me to make no orders but if I were to require some contribution for any rectification works from the respondent it should be no more than 10% of the cost of items in Mr Capaldi's schedule in Appendix C, Exhibit C that relate specifically to restoration of the damaged south-western corner of the dwelling; any costs for site inspections and certification should be deleted. In regards to Appendix E, Mr Capaldi's costs to rectify the south wall without underpinning, Mr Seymour rejects any contribution towards installation of a root barrier (item 1), sub-floor works (item 2), internal areas to southern wall and wall adjoining southern wall (item 5) and reconstruction of the bathroom (item 6). Of the remaining items, Mr Seymour suggests 10% of the cost of remaining relevant items such as external paving and repair of the external wall.

83. Regarding the claims for the other items, Mr Seymour maintains there is no evidence to support these claims so no orders should be made for any reimbursement of them.

Findings

84. The substantive issue in this case is the extent to which T1 and T2 have contributed to the damage to the applicant's property over the period she has owned it. Before dealing with this major element of the matter, I will address the other issues raised by the applicant.

The sewer

85. Page 35 of the applicant's bundle of evidence (Exhibit A) is a quote dated 4 August 2013 from Maintenance King Plumbing for $9,185.00 for the installation of a new PVC sewer pipe following the common sewer to a shaft at the rear of the applicant's property. The claim for the sewer has been reduced to a sum of $3061.66 being the applicant's one-third share of the cost of replacing the sewer.

86. There is no evidence to prove, to anywhere near the level of satisfaction required by s 10(2), that the damage was caused by any of the respondent's trees. This element of the claim is dismissed.

The stormwater pipe

87. Photographs in the evidence attached to Ms Pearson's affidavit show fine roots blocking a section of stormwater pipe removed from the southwest corner of the dwelling. The tax invoice for the investigation has a note 'Could be due to the age and neighbouring trees'. While Mr McLoughlin states that he saw a 'root matrix' in the vicinity of that pipe, there is no evidence to prove that the pipe was blocked by the roots from T1 or any other tree growing on the respondent's property. It is not clear from the photographs just how or where the roots have entered the pipe; they may be from the street-side of the property. As the pipe is PVC it is highly probable that it has been replaced at some earlier stage and prior to the applicant's purchase. There is no evidence as to the quality of earlier workmanship. The photographs indicate that the pipe was close to the surface.

88. As with the claim for the reimbursement of the costs of replacing the sewer, there is insufficient evidence to prove the nexus between any of the respondent's trees and the stormwater pipe and thus none of the tests in s 10(2)(a) are met. This element of the claim is also dismissed.

The insurance excess

89. While it is possible that a branch fell from one of the respondent's trees and broke the roof tiles, which subsequently resulted in damage to internal fittings and fixtures, there is no evidence, such as an insurance assessor's report or even a notation on the tax invoice [p5 Exhibit AP-1 attached to Exhibit G], to prove this was the case.

90. I am not satisfied that there is probative evidence to make orders for the reimbursement of the insurance excess paid by the applicant. This part of the claim is dismissed.

Paving and fence

91. It would appear from Ms Pearson's May 2012 letter to the respondent (the first letter) that she was aware of the 'big bump' in the brick paving along the southern side of her dwelling. The

pre-purchase inspection report notes uneven/displaced pavement. It would be highly improbable that this 'big bump' developed in the relatively short time that she had owned her property. Mr Maglis' brief October 2012 report also notes the displacement of the pavers and some displacement of the boundary fencing. Mr McLoughlan's initial August 2013 excavation of the areas of greatest uplift would seem to confirm the observations that roots from the trees have caused the uplift.

92. Therefore I am satisfied to the extent required by s 10(2)(a) that the Court's jurisdiction is engaged. As to what orders should be made, the primary consideration is what damage has occurred in the period the applicant has owned her property. I have included the fence and paving in the discussion in the following paragraphs.

The dwelling

93. While Mr Maglis based his assumption that roots from the adjoining trees were causing damage to Ms Pearson's dwelling on visual clues rather than any excavation, his assumptions were subsequently confirmed when the two sites of greatest deflection in pavement were excavated, albeit that the roots were not shallow as he suggests in his 2012 report (see extract in [24]). The shallow brick footings and reactive soils were also later verified by other experts.

94. Having considered the abundant and detailed evidence in this matter, I am satisfied to the extent required by s 10(2)(a) that T1 has caused damage to the applicant's dwelling and will continue to do so. It is common ground that the large woody root at the southwest corner is pressing against the footing and that it will continue to exert more pressure as it ages and expands. I am also satisfied that the tree will have contributed to removal of moisture from the reactive clay soils but note the agreement of the experts that the extent to which this has occurred is unknown.

95. In regards to T2, while the evidence is more conflicted in regards to the degree of impact, I am satisfied that T2 is **a** cause of the damage to the applicant's dwelling and to the uplifted paving, and having made that finding s 10(2)(a) is also met for this tree. I agree with Mr Walford and Mr Leake that the additional uplift/ hogging above the root is more than coincidental. I also accept the agreed expert evidence that T2 is also likely to contribute to the reactivity of the clay soils and exacerbate shrinkage.

96. I agree with Mr Leake and the arborists that the large woody roots will continue to radially expand and any contribution the roots are making to the damage to the applicant's dwelling will continue.

97. As the Court's jurisdiction is engaged, the relevant discretionary matters in s 12 must be considered.

98. The trees are close to the applicant's dwelling but were planted some 40 years ago, quite possibly as a condition of development consent, albeit maybe not the species indicated on the plans identified by Mr Ireland (s 12(a)). The trees do provide considerable amenity to both the

respondent's building and to the streetscape; however, I accept Ms Mckelvey's submission that there are other trees in the immediate vicinity (s 12(b3)(e)(f)).

99. In regards to the impact of pruning (s 12(b2)), the arborists agree that if the major structural roots need to be severed in order to rectify or prevent damage to the dwelling, the trees should be removed.

100. The key subclause in this matter is s 12(h)(i) and (ii) – anything other than the tree that has contributed, or is contributing, to any damage or likelihood of damage, including any act or omission by the applicant; and, any steps taken by the applicant or respondent to prevent or rectify the damage.

101. As the preceding analysis of the many expert reports shows, there are many other factors contributing to the damage to Ms Pearson's property. The most significant of these is the reactive clay soil on which the dwelling was built over 100 years ago. Mr Walford notes that the shallow brick footings would not comply with today's standards. It is hard to ignore the many photographs and comments in many of the expert reports, but particularly those prepared by Strata Engineering Solutions (Mr Costin and Mr Pickering) that clearly show the modifications, repairs and alterations to the subfloor area over the life of the building. Sections of walls have been removed, new pipes installed, piers have partially collapsed and others built, and floor joists and bearers packed. Apart from the modifications to the underfloor area, there have been repairs carried out to external brickwork, and internal renovations (such as the bathroom), the quality of which has not been assessed. It is also reasonable to assume that changes in soil moisture content, other than caused by the trees, are likely to have occurred over time since the dwelling was constructed and then the trees planted. The pre-inspection building report implies problems with roof drainage. Mr Taylor's investigation of soil moisture, while a one-off assessment indicates uneven soil moisture levels around and under the dwelling. The experts agree that the extent to which the trees have contributed cannot be determined on the available information and that to do this would require lengthy [and therefore probably expensive] further testing.

102. Despite these other factors, I accept that trees have contributed to the damage and, should they remain, will continue to contribute to ongoing damage. While it would be preferable to simply remove the large woody roots identified in the excavations, the arborists specifically advise against this, presumably because of the potential risk of destabilising the trees. Therefore, reluctantly, I am ordering the removal of the two trees at the respondent's expense.

103. In regards to what if any contribution the respondent should make towards rectification of the applicant's dwelling, I agree with Mr Seymour's submission that the dwelling was not 'pristine' when Ms Pearson purchased it. It is reasonable to assume, as did Mr Rickard, that the dwelling was repaired and painted prior to its sale. Therefore, it is not surprising that Mr Maglis' Pre-purchase Inspection Report did not identify any serious internal cracking but implies that some movement in the structure "may be repaired during planned redecoration and maintenance of the building". However, as recorded in paragraphs [20] of this judgment, Mr Maglis did note the previous placement of plasterboard over internal masonry walls; supported by the uncontested evidence of the previous owner. Mr Maglis anticipates that further movement may occur and the

need for future structural repairs. He specifically notes that cracking and displacement of specified parts of the dwelling are affected by roots of trees on the adjoining property. Paragraph [21] included a number of internal and external defects that required attention. Apart from the replacement of flashing around the chimney, none of the specified actions have been undertaken by Ms Pearson at any stage. Ms Pearson was thus made aware of the issues regarding the nearby trees. I also note that less than 12 months after she purchased the property, when she first wrote to the respondent, Ms Pearson identified what can only have been pre-existing damage to the pathway and the cracks in the external walls near T2 (see [22]).

104. Therefore, while I accept that internal and some external cracking has worsened over the period that Ms Pearson has owner her property, there is no compelling evidence as to what proportion of this, and indeed which elements of it, are directly attributable to the respondent's trees, in particular T1 and T2.

105. Having regard to the cost schedules prepared by Mr Capaldi – appended to Exhibit C, I agree with Mr Seymour that many items are incidental to, or go beyond, the areas most likely damaged by the roots from T1 and T2. Many other items, particularly those dealing with internal areas appear to include rectification of defective elements identified in the Pre-purchase Inspection report such as removal of plasterboard and re-levelling of the floor. The areas likely to be directly impacted by T1 and T2 are the south-western corner and in the vicinity of the access door to the sub-floor area midway along the southern façade, and the adjoining paving. The relevant rectification works are indented in Exhibit C as Appendix C Item 3 - South-western wall $2,359.00; Appendix E, Item 3 – External pavers $1,745.00, Item 4 – External walls [southern wall] $4, 678.00.

106. These items total $8,782.00. As the rectification work will occur some time after the trees have been removed, allowing for CPI increases, contingencies, localised removal of sections of roots, and rectification of the areas of uplifted wall beneath the dividing fence, I have rounded this figure up to $12,000. Given the other factors that have contributed to the damage, such as the shallow footings and the corroded lintel over the access door, and the limited time the applicant has owned her property, and its pre-existing condition, I consider the maximum contribution the respondent should be required to make is 20%. That is $2400.00 to be payable only after receipt of a tax invoice for the completed work.

Potential injury

107. Ms Pearson claims that she was struck by a branch; there is no evidence of this. However, having ordered the removal of T1 and T2 the risk of injury from falling branches from these trees has been eliminated.

Other

108. Nothing in these orders prevents the respondent from replanting other trees. However, it would be prudent to obtain advice on species, location, and if necessary, measures to limit encroachment of woody roots onto the applicant's property.

Orders

109. As a consequence of the foregoing, the Orders of the Court are:

1. Within 60 days of the date of these orders, the respondent or their agent is to engage and pay for an arborist with a minimum AQF level 3 qualification in Arboriculture, and with appropriate insurance cover, to remove T1 (Tallowwood) and T2 (Sydney Blue Gum) to ground level. The stumps are to be ground to a depth of at least 500mm. All large woody roots between the trunk and the boundary fence are to ground to the same depth.

2. The work in (1) is to be carried out in accordance with the WorkCover NSW *Code of Practice for the Amenity Tree Industry* or its equivalent.

3. The applicant is to provide all reasonable access on reasonable notice for the purpose of quoting and for the safe and efficient carrying out of the works in (1).

4. Within 2 years of the date of these orders, the applicant is to undertake all necessary rectification of the damage to the south-western corner of the dwelling, the external brick wall of the southern façade, the affected sections of pavement on the southern side of the property, and rectification of the supporting wall below the dividing fence, otherwise order (6) lapses.

5. Should it be required, the respondent is to provide all reasonable access on reasonable notice for the purpose of the rectification of the supporting wall beneath the dividing fence.

6. Within 21 days of the receipt of a tax invoice for the completed works in (4), the respondent is to reimburse the applicant the sum of $2,400.00.

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Judy Fakes

Acting Commissioner of the Court

Decision last updated: 06 March 2017