



Land and Environment Court
New South Wales

Case Name: The Owners SP No 19443 v The Owners SP No 2554

Medium Neutral Citation: [2022] NSWLEC 1475

Hearing Date(s): 1 June 2022

Date of Orders: 1 June 2022

Decision Date: 1 June 2022

Jurisdiction: Class 2

Before: Douglas AC

Decision: The application is granted. Orders at [21].

Catchwords: TREES (DISPUTES BETWEEN NEIGHBOURS) –trees causing damage to wall and driveway - whether damage to infrastructure is caused by the trees – compensation for damage – consideration of privacy.

Legislation Cited: Trees (Disputes Between Neighbours) Act 2006, ss 7, 8, 9, 10, 12

Category: Principal judgment

Parties: The Owners SP No 19443 (Applicant)
The Owners SP No 2554 (Respondent)

Representation: Counsel:
C Koikas (Applicant)
R McCulloch (Respondent)

Solicitors:
Strata Specialist Lawyers (Applicant)
Pikes and Verekers Lawyers (Respondent)

File Number(s): 2021/346314

Publication Restriction: Nil

JUDGMENT

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

Background

- 1 **COMMISSIONER:** The applicant, The Owners SP No 19443, share a side boundary with the respondents, The Owners SP No 2554, in Mosman. The parties' dispute is based on alleged damage to a retaining wall and masonry edging, and possibly to adjacent driveway pavement, with maintenance of privacy between the various residences deemed an important consideration.
- 2 In 2017, the Owners SP No 2554 consulted Aura Tree Services in relation to trees on their land. Two large trees were identified as a *Celtis sinensis* (Chinese Celtis) near the centre of the block, and a *Harpephyllum caffrum* (African Plum) (the tree) growing close to the base of a retaining wall supporting the neighbouring property of Owners SP No 19443. The Celtis was removed prior to the onsite hearing.
- 3 Aura Tree Services identified that one fairly vertical large stem was "pushing against the adjoining common boundary masonry retaining wall" and recommended removal of this stem. No damage was identified at this inspection. Correspondence passed between owners and property managers. Ms Dawn Bell, on behalf of the Owners SP No 19443, sought removal of the tree based on concerns over the impact of its root system as well as the trunks. The Owners SP No 2554 preferred pruning of the identified major stem at their expense, and for any required wall repairs to be at the expense of Owners SP No 19443.
- 4 In 2018, Mosman Council (Council) granted permission for pruning of the tree but the maximum branch size specified was insufficient to provide for the required pruning of the rubbing stem. A subsequent 2021 application to Council, supported by reports, saw permission granted for pruning of the relevant stem. Regrettably, Aura Tree Services removed the wrong stem, such that the stem exerting pressure on the wall remained in place, with wall damage likely increasing as the stem progressively grew in girth.

- 5 Both parties procured engineering reports to clarify the situation, and in an attempt to remedy damage that the trees have caused, are causing, and are likely to cause in the near future, The Owners SP No 19443 submitted an application, pursuant to s 7 of Part 2 of the *Trees (Disputes between Neighbours) Act 2006* (the Trees Act).

The parties evidence

- 6 The Owners SP No 19443 seek orders that the respondent pays compensation to the applicant for the costs of remedying damage to the applicant's property.
- 7 The applicants procured the following documents and reports to clarify the damage and quantify the cost of repair:
- (1) Survey Report of Greg Firth, Rygate Surveyors, dated 28 January 2021.
 - (2) Arborist Report of Jack Williams, Urban Arbor, dated 8 February 2021.
 - (3) "Building Defects Report" and Damage Diagram of Marek Blaszczakiewicz, Demiakian Consulting Engineers, dated 13 May 2021.
 - (4) Quotation Q1034 of Rite Constructions Pty Limited dated 24 August 2021.
- 8 The respondents provided the following reports:
- (1) Brief Arborist Report of Kyle Hill, Aura Tree Services, dated 11 August 2017.
 - (2) Engineering Report – "Cracking Rear Retaining wall" of Garth Hodgson, Jack Hodgson Consultants Pty Limited, dated 14 November 2018.
 - (3) Preliminary Arborist Report of Alex Austin, Arborsaw, dated 29 October 2019.
 - (4) Engineering Report – "Inspection report for damaged retaining wall" of Daniel Banales, Southcross Structural Engineering, dated 16 December 2019.
 - (5) Final Arborist Report of Alex Austin, Arborsaw, dated May 2022.
 - (6) Engineering Report – Response to "Building Defects Report" of Marek Blaszczakiewicz by Neil Walsh, Northwood Pty Limited Consulting Engineers, dated 19 May 2022.
 - (7) Quotation of Castle Construction dated 21 May 2022 for "Retaining Wall Rectification Works".

The on-site hearing

- 9 The hearing commenced on-site with Mr Koikas, Mr Cunio, Mr Williams, Mr Blaszczakiewicz, and Strata representative, Ms Bell appearing on behalf of the

applicant. The respondent was represented by Ms McCulloch, Mr Austin, Mr Walsh and Strata representative Mr Lamy.

- 10 The parties inspected the tree on the respondent's property and the arborists concurred that the tree was more likely two trees rather than one tree with multiple stems. Thus, they were subsequently designated the eastern tree and the western tree. The wall and surrounds were closely inspected from both properties, and the engineers worked towards a repair solution. The arborists were largely in agreement, and Mr Austin outlined a plan to remove the residual eastern tree and implement a phased reduction pruning programme with the western tree to establish a sound lower canopy to maximise privacy between the properties, while simultaneously undertaking replanting of appropriate trees on the respondent's land.
- 11 There was a clear and obvious nexus between the eastern tree and the damage to the retaining wall. The hearing was adjourned and recommenced in Court at midday on MS teams.

Jurisdictional requirements

- 12 With respect to s 7 of the Trees Act, an owner of land may apply to the Court for an order to remedy, restrain or prevent damage to property on the land, or to prevent injury to any person, as a consequence of a tree to which this Act applies that is situated on adjoining land.
- 13 The applicant has satisfied the requirement under s 8(1)(a) of the Trees Act: to serve notice to the respondent more than 21 days prior to the proceedings.
- 14 They have also satisfied s 10(1)(a) of the Trees Act: to make a reasonable effort to reach agreement with the owner of the land on which the tree is situated. As noted in the application, there has been extensive correspondence between the respective strata committee members and their property managers for about four years.
- 15 The next major test that is posed, by s 10(2) of the Trees Act, which 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.

- 16 The various expert engineers and arborists agreed that the eastern tree was the primary cause of damage to the retaining wall, and I am similarly satisfied that the eastern tree was the primary cause of damage to the retaining wall. As a consequence, s 10(2) of the Trees Act is engaged.
- 17 When the Court resumed on MS teams, the parties advised that a negotiated settlement was near complete. Further short adjournments allowed an agreement to be finalised, and an 'Agreed Proposed Order' (Form 43) was submitted to the Court by the respondents. This included an arrangement for appropriate wall repair and final inspection, tree pruning and inspection, and a replanting program.
- 18 With s 10(2)(a) of the Trees Act satisfied, I have jurisdiction under s 9 of the Trees Act to make a wide range of orders with respect to the tree. In order to determine, what, if any, orders should be made, and that the Agreed Proposed Order satisfies the jurisdiction, the Court must consider the matters in s 12 of the Trees Act.

Discretionary matters – s 12

- 19 In making an order, the Court considers relevant matters in s 12 of the Trees Act.
- The trees are located in the respondent's property (s 12(a)).
 - The removal of the trees would create a major impact on the site, and particularly on the privacy of residents who face the common boundary. Though the reduction pruning recommended by the arborists is quite severe, and is likely to cause tree stress, I endorse this plan as this species is sufficiently hardy, and the residual tree is sufficiently healthy and vigorous to tolerate the heavy pruning. As recommended by Mr Austin at 5.4.2 of his report, "This canopy and expected regrowth will require additional pruning within 3 years where restorative pruning principles will be applied" (s 12(b2)).
 - The trees contribute to privacy for many residents, to the natural landscape and amenity of the respondent's property, and they provide some protection from the sun and wind. The recommended pruning is the least worst option and is likely to enhance residents' privacy in the medium term (s 12(b3)).

Conclusion

- 20 I have inspected the trees and the site and reached the following conclusions.

- (1) The applicant has satisfied the preliminary judicial requirements in s 8(1)(a) and s 10(1)(a) of the Trees Act.
- (2) As s 10(2)(a) of the Trees Act is satisfied, the Court will make orders under s 9(1) of Pt 2 of the Trees Act to remedy this damage, caused as a consequence of the tree/s subject of the application.
- (3) The extent and nature of the damage caused by the trees is such that extensive tree pruning works are necessary and appropriate to rectify the situation, even though privacy provided by the tree will be reduced in the short-term.
- (4) In this context, the orders provided by consent of the parties have met all judicial requirements of the Trees Act and appropriately resolve the dispute.

Orders

21 The Orders of the Court are:

- (1) The Respondent is to engage a suitably qualified building contractor to repair the retaining wall damage straddling the boundary between the parties' properties in accordance with the sketch plan and recommendations in the expert report of Neil Walsh filed on 27 May 2022.
- (2) The work in order 1 is to be carried out within 60 days or such later time as may be agreed between the parties.
- (3) Within 7 days of completion of the work in order 1, the respondent shall notify the applicant of the completion of the work and shall give access to its land to the applicant's engineer for the purpose of inspecting the work.
- (4) The following work shall be carried out by a suitably qualified tree contractor in relation to the Kaffir Plum trees growing on the respondent's land:
 - (a) Within 60 days the 4m stump remaining from the eastern tree shall be cut to ground level.
 - (b) Within 60 days the canopy of the western tree shall be reduced by 30% targeting exposed branches on the northern and western sides. The reduction pruning should include lopping back to 2m from the trunk of the tall, exposed stem with epicormic growth. Minor maintenance pruning to lift the canopy clear from parked vehicles and parking structures on adjoining properties shall occur at the same time.
 - (c) Within 3 years the western tree shall be inspected by a minimum AQF level 5 Arborist and pruned in accordance with restorative pruning principles.

- (d) Within 60 days two trees shall be planted centrally within the rear yard of the respondent's property, selected from the following species:
 - (e) *Glochidion ferdinandi* – Cheese tree
 - (f) *Eleocarpus reticulatus* – Blueberry Ash
 - (g) *Banksia integrifolia* – Coast Banksia
 - (h) *Banksia serrata* – Old Man Banksia
 - (i) If severe weather alters the condition of the western tree, it shall be inspected by a minimum AQF Level 5 Arborist within 14 days, and the recommendations of that arborist shall be implemented within 30 days.
- (5) The applicant shall, upon receipt of 2 days' notice, provide access to its land to the respondent's contractors at reasonable daylight hours to enable the work required by these orders to be carried out.

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J Douglas

Acting Commissioner of the Court

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