

AUSTRALIA / JUDGMENT

Franco v Mazzetti [2022] NSWLEC 1090

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Land and Environment Court

New South Wales

Medium Neutral Citation: Franco v Mazzetti [2022] NSWLEC 1090

Hearing dates: 11 November 2021

Date of orders: 24 February 2022

Decision date: 24 February 2022

Jurisdiction: Class 2

Before: Douglas AC

Decision: The Court Orders that:

- 1) The application is granted.
- 2) Within 45 days, and at her expense, the Respondent shall remove the tree to at least 300mm below existing ground level, ensuring that all roots emerging from the stump of the tree, to this depth, are separated from the stump.
- 3) The structural root growing towards and under the common boundary wall, identified in the Laws' report as being about 130mm diameter where it emerges into the Applicant's property, shall be removed to a point as close to the base of the wall as is practical, on the Respondent's side of the wall.
- 4) All works shall be completed by an AQF level 3 arborist, with all appropriate insurances.
- 5) All works shall comply with the Safe Work Australia Guide to Managing Risks of Tree Trimming and Removal Work 2016.
- 6) All works are to be completed during normal work hours. Should access be required into the Applicant's property to undertake these works, or for removal of refuse, such right to access shall be granted, subject to 48 hours written notice.

Catchwords: TREES (DISPUTES BETWEEN NEIGHBOURS) – Is the tree causing damage to retaining wall; excavation undertaken to expose roots; are there viable alternatives to tree removal; do benefits from tree exceed the imperative to remove it

Legislation Cited: Environmental Planning and Assessment Act 1979

Trees (Disputes Between Neighbours) Act 2006

ss 7, 9, 10, 12, Pt 2

Uniform Civil Procedure Rules 2005, Sch 7

Cases Cited: Robson v Leischke (2008) 72 NSWLR 98; [2008] NSWLEC 152

Stevens v Russell [2016] NSWLEC 1233

Texts Cited: Land and Environment Court of NSW, COVID-19 Pandemic Arrangements Policy, April 2021

Safe Work Australia, Guide to Managing Risks of Tree Trimming and Removal Work, 2016.

Standards Australia, Protection of trees on development sites, 2009

Category: Principal judgment

Parties: Joe Franco (Applicant)

Ozlem Mazzetti (Respondent)

Representation: J Franco (Litigant in person) (Applicant)

O Mazzetti (Litigant in person) (Respondent)

File Number(s): 2021/236725

Publication restriction: No

Judgment

Background

1. COMMISSIONER: Mr Franco (the Applicant) and Ms Mazzetti (the Respondent) share a side boundary between their properties in Leichhardt, in Sydney's inner west. The Respondent's property is one of four under a Strata title, and a 2.3m tall reinforced block wall separates her property from the Applicant's.
2. Four Gleditsia triacanthos (Honey Locust trees) were planted at various distances from the common boundary in the Strata property in 1992. In August 2019, Mr Franco received a report from Glenyss Laws, an arborist with extensive qualifications and experience, which displayed photographs of tree roots penetrating under or through gaps in the wall's foundations into the Applicant's property. This report was included in Mr Franco's Tree Dispute and Claim details (Form H) as part of his application to the Court, and Ms Laws acknowledged having read the Expert Witness Code of Conduct contained in Sch 7 of the Uniform Civil Procedure Rules 2005.

3. The site inspection which informed this report was undertaken on 20 July 2019. As at this date, the four trees were in situ and Ms Laws' report provided information about three of the trees. Since that time, three Honey Locust trees have been removed by the Body Corporate, as a result of damage caused to surface drains and paving, associated trip hazards, and aesthetic considerations.
4. The remaining tree was classified by Ms Laws as Tree 1 (the tree), and is the subject of this application. Mr Franco seeks orders for the removal of this tree, pursuant to s 7 of Pt 2 of the Trees (Disputes Between Neighbours) Act 2006

('the Trees Act'), as a consequence of the damage he claims it is causing to the common wall and his paved surfaces, and because of his concerns that its roots will cause further damage to both these structures, and also to his dwelling.

5. Ms Mazzetti prefers that the tree be retained for up to at least 3 years, subject to regular monitoring of the wall for damage. She claims that her position is endorsed by recommendations from engineering reports. Ms Mazzetti occupied her property in 2003 but has lived in Melbourne since about 2014. Though the property has been leased to tenants since then, she appreciates the aesthetic and environmental services which the tree provides.

The onsite hearing

1. The hearing was conducted on 11 November 2021, via audio-visual means according to the Court's COVID-19 Pandemic Arrangements Policy. Both parties attended the hearing and were self-represented.
2. Ms Laws had assessed the tree from within the Applicant's land as mature, and noted that it was 9 metres tall, with a canopy spread of 7 metres and diameter at breast height (DBH) averaging 350mm.

Jurisdictional requirements

1. 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.
2. The Court is obliged to consider a number of matters pursuant to s 10 of the Trees Act which states:
 - (1) The Court must not make an order under this Part unless it is satisfied:
 - (a) that the applicant has made a reasonable effort to reach agreement with the owner of the land on which the tree is situated, and

- (b) if the requirement to give notice has not been waived, that the Applicant has given notice of the application in accordance with section 8.
- (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.
- 1. It is clear from details in the application, and from correspondence contained in submissions from both parties, that this dispute has been bitter and protracted. It is also patent that considerable 'homework' was required for Mr Franco to clarify that the tree is owned by, and is located on Ms Mazzetti's land, rather than Body Corporate property. At the time when Mr Franco was under the apprehension that all trees were on Body Corporate property, he unsuccessfully sought to engage in Community Justice Centre guided mediation with Body Corporate representatives to help resolve the dispute. The Applicant also needed to pursue a successful notice of motion before a judge of the Court, for substituted service of documentation to the Respondent at her Melbourne address, after initial attempts to serve the documents in Sydney proved fruitless.
- 2. Regardless of these requirements, based on the documentation provided by both parties, the history of events preceding the hearing, and the online hearing itself, I am satisfied that the requirements of s 10(1) of the Trees Act have been met.
- 3. By way of clarification, the following commentary provides explanation of the 'reasonable effort required to reach agreement'. In *Robson v Leischke* (2008) 72 NSWLR 98; [2008] NSWLEC 152 ('R & L'), at [194 – 195], Preston CJ notes:

"194 The Trees (Disputes Between Neighbours) Act 2006 does not specify any particular time at which the applicant must make a reasonable effort to reach agreement with the tree landowner, other than fixing the end point by requiring that the Court cannot make an order under the Act unless it is satisfied that the applicant has made a reasonable effort to reach agreement with the tree landowner. Hence, although it would be preferable for an applicant to make a reasonable effort to reach agreement with the tree landowner before making application to the Court, so as to avoid court action, there is no requirement to do so and a reasonable effort to reach agreement can be made after making the application at any time up until the Court determines the application.

195 The language in s 10(1)(a) of the Trees (Disputes Between Neighbours) Act 2006 that the applicant has made "a reasonable effort to reach agreement" is less demanding than the language used in provisions of other statutory enactments which require parties to make reasonable attempts to reach agreement in relation to matters claimed in the court originating process."

1. Though correspondence provided by Ms Mazzetti alleged extreme behaviour by the Applicant in manifesting his grievances, the casting of such aspersions is regrettably common in protracted tree disputes but is of little relevance to the Court.
2. With respect to s 10(2)(a) of the Trees Act, Mr Franco claimed that roots from the tree have caused, are causing, or are likely in the near future to cause damage to his property.
3. In *Stevens v Russell* [2016] NSWLEC 1233 at [40], Fakes C notes that "it is a common assumption that the mere presence or proximity of a tree is sufficient to conclude that the tree is the cause of the damage. It is not. It is necessary to find evidence to substantiate the assumption that the tree has caused the damage. In the case of alleged root damage, some excavation is usually required."
4. Mr Franco undertook excavation, and a photograph reproduced in the Laws' report (Figure 3 at Appendix D) clearly showed a root, which Ms Laws noted as about 130mm in diameter, protruding through the boundary wall directly below an expansion joint.
5. The report also detailed a crack, visible from the Respondents' side, where the gap at the expansion joint was wider at the top relative to the bottom of the wall by about 20mm. This is consistent with uplift of relatively light structures such as free-standing masonry walls, caused by root impact. Though the Respondent contended that Mr Franco "would exert considerable pressure on any consultants he engages to support his position", the evidence provided clearly shows a nexus between this root, and physical damage to the wall resulting from uplift.
6. Ms Laws noted that the tree's trunk base is "offset approximately 1.5-2.0m from the exposed structural root", and, because the tree has an estimated Structural root zone of 2.3m (based on guidelines from Protection of trees on development sites AS4970:2009), "it is not considered feasible to root prune Tree 1 without diminishing overall vitality, life expectancy or stability". Drawing on the arboricultural expertise that I bring to the Court, I concur with this conclusion.
7. Ms Mazzetti provided a letter to the Court dated 11 October 2021, the majority of the content of which emphasised Mr Franco's alleged inappropriate behaviour, and aspersions about his character. I again stress that this is largely irrelevant to the issues before the Court. Beyond this content, there is little evidence provided to support her case for tree retention.
8. Ms Mazzetti claimed that the tree was a similar size when she bought her property in February 2003, to its size as at October 2021. Considering that various photographs display the tree appearing healthy and vigorous, and that it is still relatively young for this species, it is in fact likely to have grown substantially in this interim. Ms Laws reported the tree as 9m tall, while Ms Mazzetti said it was "above 3m in height".

9. Ms Mazzetti submitted that she had been proactive in investigating the tree matter over the past 18 months by consulting with the Applicant's arborist and other arborists, but she provided no evidence to substantiate that she had obtained such professional advice.
10. She claimed that Ms Laws had advised her "that the tree is fully grown and will not cause any further damage", but I find this unlikely, given that Ms Laws noted at 4.2.3 of her report that "Considering mature growth, it is expected Tree 1 has the potential to increase in size and root development". I agree with this statement at 4.2.3, because this species is normally long-lived and the tree is no older than the mid-point of its anticipated lifespan. Therefore, based on its apparent health and vigour, it is likely, in the absence of intervention, to progressively grow larger and thicker structural roots.
11. In her letter of 11 October 2021, Ms Mazzetti said;

"It is incorrect to state that the tree is the sole cause of damage between properties and this damage occurred two years ago. The wall is over 20 years old and exposed to the elements. There are many factors which has (sic) contributed to the widened gap in the common wall, including (potentially) the applicant himself using it as a walkway on a regular basis."
1. Though the tree may not be the sole cause of wall damage, when an owner of land applies to the Court, with respect to s 7 of the Trees Act, for an order to remedy, restrain or prevent damage to property on the land, as a consequence of a tree to which this Act applies that is situated on adjoining land, there is no requirement under the Trees Act for the tree to be the sole cause of such damage, but merely a cause.
2. Both parties provided engineering reports. Inhouse Consulting Engineers, in a letter to Mr Franco dated 9 July 2019, noted that the wall remained in alignment and was stable, but they concluded that "the growth of the tree roots has pushed up the wall and opened the wall control joint about 40mm at the top". They "strongly recommend that the offending tree and its roots be removed".
3. Ms Mazzetti contracted Mc Kee and Associates Pty Ltd, Structural Engineers, who, in a report dated 1 November 2021, said the widening gap in the wall expansion joint was caused by environmental effects and roots of a tree previously removed. They recommended either doing nothing more at the in-line joint of the common boundary wall, (subject to investigation in the Applicant's property), severing the tree's roots and installing a root barrier at the side of the wall footings in response to alignment damage to the rear wall, or, removing the tree within one year.
4. Ms Mazzetti also provided a Building Condition and Maintenance report from Integrated Building and Engineering Consultancy, dated 3 May 2021, commissioned by the Strata Manager of her property. Recommendation 8, within 'Essential Priority' maintenance to be completed within 3 years or as required, included monitoring wall displacement every 6 months. Ms Mazzetti highlighted this recommendation. In the detail informing this, the report notes "lateral in plane displacement of 25 mm at the top" of the expansion joint, and

in plane east-west rotation of 0.6%. This is directly above the location of the exposed 130mm tree root. It also says; "tree growth may be limited due to the age of the tree?", and "if rotations reach 4% the tree needs to be removed and the walls reinforced".

5. Recommendation 11, also under 'Essential Priority' maintenance, in response to "invasive tree roots" from the north tree located near townhouses 3 and 4 (the Respondent's dwelling), is Tree Removal. Ms Mazzetti omitted the pages from the report which detailed and informed this recommendation, and this is likely to have been intentional, as the detail she did include focused on her preferred option of wall monitoring, rather than on the recommendation of tree removal, which was provided by Ms Laws, and appeared in both engineering reports.
6. Considering this adduced evidence, and particularly the nexus between the tree's exposed root and the raised boundary wall, I am satisfied that the tree has caused damage to the Applicant's property, and is likely to cause additional damage in the near future. As a consequence, the requirements of s 10(2)(a) of the Trees Act are met, and thus s 10 is engaged.
7. With s 10 satisfied with respect to damage or injury, I am required to consider relevant discretionary matters in s 12 of the Trees Act.
1. Ms Laws noted the exposed 130mm diameter tree root as 1.5-2m from the tree. Photographs provided in the engineering reports appear to show that the tree is located within 1m of the wall (ss 12(a)).
2. In the absence of s 6(3) of the Trees Act, interference with the tree would likely require consent under the Environmental Planning and Assessment Act 1979 (ss 12 (b)).
3. Pruning the tree regularly or to a significant extent would not prevent additional wall damage, but rather, is more likely to promote additional damage in the medium term (ss 12 (b2)).
4. The tree provides aesthetic and amenity benefit to the Respondent and may contribute to privacy and shading from the sun. It would, however, provide minimal benefit to the local ecosystem and biodiversity, the natural landscape of the locality, public amenity, soil stability, or to the water table, and it is not of historical, cultural, social or scientific value (ss 12 (b3), (c), (d), (e), (f) and (g)).
5. The Respondent has not taken steps to prevent or rectify wall damage caused by the tree, notwithstanding that the Laws' report was produced in August 2019, and was provided to her properties' Body Corporate. She claimed in oral evidence to not be refusing tree removal, but in her written submissions provided many reasons for the delay up to this point, and justifications for why tree removal should be delayed for some years into the future. The Respondent selectively emphasised her engineers' recommendations for wall monitoring, but withheld detail which underpinned their concurrent recommendation for tree removal.

6. Ms Mazzetti claimed COVID lockdowns, the Applicant's 'aggressive' behaviour, other work priorities at the property, time needed for consultation with her tenants, and their need for respite from disruptions resulting from other Body Corporate work, as justifications for not taking action for resolve this damage. In oral evidence at the hearing, Ms Mazzetti submitted that the reports don't say to "rush the tree out", and because the wall had been deemed stable, she preferred to continue monitoring the wall, while engaging in further discussion with her tenants and addressing the issue in a "careful and considered way" (s 12 (i)).

Conclusion

1. I have examined the tree and the site and have reached the following conclusions:
 1. Excavation of concrete and soil was undertaken by the Applicant, and a structural root of approximately 130mm diameter was found emerging through or under the wall, directly below wall uplift at a vertical expansion joint. This provides a clear causal link between the tree roots and the wall damage, which satisfies s 10 of the Trees Act.
 2. A report provided in August 2019, by Glenyss Laws, a suitably qualified and experienced arborist, recommended tree removal to prevent additional wall damage, because alternative options were not viable in this site context.
 3. Regardless that the Laws' arborist report from 2019 recommended tree removal, and that two engineering reports recommended tree removal subject to monitoring the wall for additional damage, the Respondent has obfuscated, and delayed taking action to assist in the resolution of the dispute. To the contrary, she has provided documents of little relevance to the issues before the Court which primarily cast aspersions on the Applicant's behaviour and character, and has listed a range of excuses which, individually and collectively, fail to provide reasonable justification for past delays in taking appropriate action, and particularly, do not begin to justify future delays.
 4. While the tree provides some environmental services, as discussed in consideration of s 12 of the Trees Act, they are not more important than the imperative to remove the tree in the near future, so as to prevent further wall damage, and increasing expenses for rectification. Therefore, orders will be made for removal of the tree. These orders will include severing the relevant structural root growing from the base of tree, and removing the root to a point as close to the boundary wall as practical, on the Respondent's side, so as to enhance environmental conditions which favour decay of the root portion currently within or under the wall.

5. Both parties claimed orders for reimbursement of the cost of reports, Court filing fees, and in the case of Ms Mazetti, loss of income. Commissioners do not have powers to order such costs. Claims for items such as these require lodgement of a Notice of Motion to the Court, which is heard before the Registrar, or a Judge. Considering the outcome of the dispute, I would suggest that the Applicant rather than the Respondent may be more likely to be successful in this respect.

Orders

1. The Court orders that:
 1. The application is granted.
 2. Within 45 days, and at her expense, the Respondent shall remove the tree to at least 300mm below existing ground level, ensuring that all roots emerging from the stump of the tree, to this depth, are separated from the stump.
 3. The structural root growing towards and under the common boundary wall, identified in the Laws' report as being about 130mm diameter where it emerges into the Applicant's property, shall be removed to a point as close to the base of the wall as is practical, on the Respondent's side of the wall.
 4. All works shall be completed by an AQF level 3 arborist, with all appropriate insurances.
 5. All works shall comply with the Safe Work Australia Guide to Managing Risks of Tree Trimming and Removal Work 2016.
 6. All works are to be completed during normal work hours. Should access be required into the Applicant's property to undertake these works, or for removal of refuse, such right to access shall be granted, subject to 48 hours written notice.

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J Douglas

Acting Commissioner of the Court

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Decision last updated: 24 February 2022

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