

AUSTRALIA / JUDGMENT

Fu v Leung [2025] NSWLEC 1067

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Land and Environment Court

New South Wales

Medium Neutral Citation: Fu v Leung [2025] NSWLEC 1067

Hearing dates: 16 September 2024

Date of orders: 11 February 2025

Decision date: 11 February 2025

Jurisdiction: Class 2

Before: Douglas AC

Decision: The Court orders:

- (1) The application to prune the tree is granted.
- (2) The applicant is to engage and pay for a suitably qualified and experienced arborist (minimum Australian Qualification Framework (AQF) level 3) with all relevant insurances to prune branches overhanging the applicant's land to appropriate branch collars near the common boundary. Some final pruning cuts will be above the applicant's land in order to preserve live, sound ascending branches from which the overhanging branches extend. Other final pruning cuts may be above the respondent's land. Upon completion of the pruning, the arborists shall remove all debris from the pruning from the respondent's land.
- (3) The works in Order (2) shall be completed within 60 days of the date of these orders and during reasonable daytime working hours.
- (4) All pruning shall comply with AS4373:2007, Pruning of amenity trees, and the Safe Work Australia, Guide to Managing Risks of Tree Trimming and Removal Work, 2016.
- (5) The arborists will likely need to access the tree from the respondent's land. The respondent shall provide all reasonable access to his property for undertaking the works upon receipt of at least 72 hours' notice from the applicant by email, advising the date and approximate start time.

Catchwords: TREES (DISPUTES BETWEEN NEIGHBOURS) – damage to dwelling roof – significant s 12 considerations – pruning ordered at applicant's cost

Legislation Cited: Environmental Planning and Assessment Act 1979

Trees (Disputes between Neighbours) Act 2006

Pt 2: s7, s8, s9 s10, s12

State Environmental Planning Policy (Biodiversity and Conservation) 2021, Ch 2, Pt 2.3

Cases Cited: Black v Johnson (No 2) [2007] NSWLEC 513

McPherson v Lake [2017] NSWLEC 1081

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

Yang v Scerri [2007] NSWLEC 592

Texts Cited: AS 4373:2007. Pruning of amenity trees

AS 4970:2009, Protection of tree on development sites

Parramatta Development Control Plan 2023

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

Category: Principal judgment

Parties: Shanlin Fu (Applicant)

Hubert Leung (Respondent)

Representation: S Fu (Self represented) (Applicant)

H Leung (Self represented) (Respondent)

File Number(s): 24/260331

Publication restriction: Nil

Judgment

Background

1. COMMISSIONER: Since 2008, Hubert Leung, the respondent, has owned and occupied a property in Dundas Valley, which has a large Lemon Scented Gum (*Corymbia citriodora*) (the tree), growing in the rear yard.
2. The tree is located about 3 metres (m) from a boundary shared with Mr Leung's south side neighbour, Shanlin Fu, the applicant. Mr Fu purchased his property before the respondent and leased it to tenants until about 2019. Mr Fu's existing dwelling was subsequently demolished and replaced. Mr Fu then occupied the new two-storey dwelling, the north side wall of which was located parallel with the common boundary and about 2 m distant. The north-east corner of the new dwelling was about 7-8 m from the tree.

3. The tree was mature and long established. It exceeded 20 m in height and its trunk diameter was about 900mm at breast height (DBH). About 2 m above ground level, the tree bifurcated into two primary trunks, one of which supported branches that encroached over the common boundary and overhung parts of Mr Fu's rear yard and new dwelling.
4. Mr Fu contended that a live branch, which fell onto his dwelling roof on 4 October 2023, broke roof tiles and caused splits in the sarking under broken tiles. Additionally, Mr Fu claimed he was nearly struck by a dead branch that fell from the tree when he was lawn mowing on 29 October 2022, and that a live branch that broke from the tree, landed near a builder working on his house in or around 2020.
5. Mr Fu claimed Mr Leung refused an initial request to prune overhanging branches after the "near miss" of 29 October 2022, but after Mr Fu's roof was damaged on 4 October 2023, Mr Leung requested permission for tree removal in an application lodged with City of Parramatta Council (Council). Council rejected the application for tree removal or live branch pruning, thus restricting permission to pruning of deadwood. Mr Fu alleged that Mr Leung then advised that he "was not going to do anything with the tree" and refused to discuss the matter further.
6. Consequently, Mr Fu made an application, pursuant to s 7 of Part 2 of the Trees (Disputes between Neighbours) Act 2006 (the Act), seeking an order from the Court for, "[p]runing of overhanging branches to prevent further damage to property or risk of injury to people."

The onsite hearing

1. Both Mr Fu and Mr Leung were self-represented at the onsite hearing, which commenced with an inspection of the tree. In the absence of either party having submitted evidence from an 'expert' arborist, I relied on the arboricultural expertise which I bring to the Court.
2. My inspection of the canopy from ground level was limited by the tree's height, but residual wounds were visible along both live and dead secondary branches that had previously overhung the applicant's land. Though the wounds appeared relatively small, they were nonetheless numerous. Further, a moderate to high level of mainly small deadwood was present, especially in the upper canopy of the trunk closest to Mr Fu's property.
3. Near ground level on the side of the trunk closest to the common boundary, there were two wounds that looked similar to inverted V's. The wounds exhibited dead bark and sapwood, and white fungal mycelium that released a yeasty odour. These characteristics are symptomatic of *Armillaria luteobubalina* (*Armillaria*), a root rot disease.
4. Mr Leung conceded that the most recent damage had been caused by a branch falling from the tree, but he disputed that he should pay for remedial pruning, arguing that Mr Fu had been aware of the tree's presence but had nonetheless located his dwelling close to the tree and under the tree's established canopy.

Jurisdictional framework

1. The following provisions of the Act apply to the application:

Part 2 Court orders - trees that cause or are likely to cause damage or injury

...

7 Application to Court by affected land owner

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.

8 Notice of application for order to be given to owners of affected land

- (1) An applicant for an order under this Part must give at least 21 days notice of the lodging of the application and the terms of any order sought to:
 - (a) the owner of the land on which the tree is situated, and
 - (b) any relevant authority that would, in accordance with section 13, be entitled to appear in proceedings in relation to the tree, and
 - (c) any other person the applicant has reason to believe will be affected by the order.

9 Jurisdiction to make orders

- (1) The Court may make such orders as it thinks fit to remedy, restrain or prevent damage to property, or to prevent injury to any person, as a consequence of the tree the subject of the application concerned.
- (2) Without limiting the powers of the Court to make orders under subsection (1), an order made under that subsection may:
 - (a) require the taking of specified action to remedy damage to property, or
 - (b) require the taking of specified action to restrain or prevent damage or, if damage has already occurred, further damage, to property, or
 - (c) require the taking of specified action to prevent injury to any person, or
 - (d) require the making of an application to obtain any consent or other authorisation referred to in section 6 (1) (a), or
 - (e) authorise the applicant concerned to take specified action to remedy, restrain or prevent damage or (if damage has already occurred) further damage to property, or
 - (f) authorise the applicant concerned to take specified action to prevent injury to any person, or

- (g) authorise land to be entered for the purposes of carrying out an order under this section (including for the purposes of obtaining quotations for the carrying out of work on the land), or
- (h) require the payment of costs associated with carrying out an order under this section, or
- (i) require the payment of compensation for damage to property, or
- (j) require the replacement of a tree that the Court orders to be removed and for the new tree to be maintained to a mature growth.

10 Matters of which Court must be satisfied before making an order

- (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.

...

12 Matters to be considered by Court

Before determining an application made under this Part, the Court is to consider the following matters:

- (a) the location of the tree concerned in relation to the boundary of the land on which the tree is situated and any premises,
- (b) whether interference with the tree would, in the absence of section 6 (3), require any consent or other authorisation under the Environmental Planning and Assessment Act 1979 or the Heritage Act 1977 and, if so, whether any such consent or authorisation has been obtained,
- (b1) whether interference with the trees would, in the absence of section 25 (t) (Legislative exclusions) of the Native Vegetation Act 2003, require approval under that Act,
- (b2) the impact any pruning (including the maintenance of the tree at a certain height, width or shape) would have on the tree,

(b3) any contribution of the tree to privacy, landscaping, garden design, heritage values or protection from the sun, wind, noise, smells or smoke or the amenity of the land on which it is situated,

(c) whether the tree has any historical, cultural, social or scientific value,

(d) any contribution of the tree to the local ecosystem and biodiversity,

(e) any contribution of the tree to the natural landscape and scenic value of the land on which it is situated or the locality concerned,

(f) the intrinsic value of the tree to public amenity,

(g) any impact of the tree on soil stability, the water table or other natural features of the land or locality concerned,

(h) if the applicant alleges that the tree concerned has caused, is causing, or is likely in the near future to cause, damage to the applicant's property:

(i) anything, other than the tree, that has contributed, or is contributing, to any such damage or likelihood of damage, including any act or omission by the applicant and the impact of any trees owned by the applicant, and

(ii) any steps taken by the applicant or the owner of the land on which the tree is situated to prevent or rectify any such damage,

(i) if the applicant alleges that the tree concerned is likely to cause injury to any person:

(i) anything, other than the tree, that has contributed, or is contributing, to any such likelihood, including any act or omission by the applicant and the impact of any trees owned by the applicant, and

(ii) any steps taken by the applicant or the owner of the land on which the tree is situated to prevent any such injury,

(j) such other matters as the Court considers relevant in the circumstances of the case.

Findings

1. Mr Fu owns his property and the tree is on adjoining land, therefore s 7 of the Act is engaged.
2. Subsequent to both party's attendance at the initial procedural hearing of 20 August 2024, I am satisfied that the timeframe set down by the Court allowed for the required notice of the application and proposed orders, at s 8(1)(a) of the Act. Mr Fu noted serving the application documents on Council in satisfaction s 8(1)(b). While the file contained no evidence of such service, given that councils rarely engage with proceedings under the Act and officers from Council had inspected the tree relatively recently in response to Mr Leung's tree removal application, I am not convinced that ambiguity around such service should inhibit the

resolution of this matter.

3. The Court's ability to make orders is limited, at s 10 of the Act.
4. Within the Application Claim Details (Form H), at question 32, Mr Fu noted having initially asked Mr Leung to prune the tree following his 'near miss' by a fallen branch whilst mowing the lawn in October 2022. Though Mr Leung applied Council permission for tree removal after the roof damage incident in October 2023, for more than 11 months afterwards, Mr Leung had allegedly taken no action regarding deadwood pruning after Council's rejection of his tree removal application. This was not disputed by Mr Leung. Therefore, there was little more that Mr Fu could do.
5. Although both parties conducted themselves with civility at the hearing and the respondent did not oppose pruning of overhanging branches, Mr Leung resisted paying for the pruning works, primarily because Mr Fu had knowingly built his dwelling under the tree's canopy and thus had allegedly contributed to the tree's propensity to cause damage or risk of injury.
6. Consequently, I am satisfied the applicant made a reasonable effort to reach agreement with the owner of the land on which the tree is situated, such that s 10(1)(a) was engaged. Section 10(1)(b) was also engaged by satisfaction of s (8) of the Act.
7. The principal jurisdictional tests are at s 10(2).

Damage caused by the tree

1. With respect to the claim that a fallen branch caused dwelling roof damage in October 2023, at question 4 of Form H, Mr Fu included an excerpt from an insurance report titled "Ensure Roof Report Inspection Form" dated 5 October 2023. The report noted, "Leak 1: Upon inspection I found a Tree limb fallen down and broken 7 tiles. The sarking was slightly split from the impact in 2 places." The report included 5 small photographs of the roof damage.
2. Consequently, I am satisfied that the tree was the cause of the damage, such that s 10(2)(a) of the Act is engaged.
3. Though deadwood in the tree was generally relatively small, it was extensive. Considering that branches may fall about 15 m and thus gain fairly high velocity before potentially impacting the dwelling or the adjacent lawn and paving, I am also satisfied that further damage is likely in the near future. In the decision of *Yang v Scerri* [2007] NSWLEC 592, at [14], the near future is defined, as a rule of thumb, to be a period of one year. Therefore, s 10(2)(a) was again engaged.

Risk of injury to persons

1. Based on the decision in *McPherson v Lake* [2017] NSWLEC 1081; [at 10], the Court may assess and determine 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.
2. Branches and stubs arising from the trunk closest to the applicant's property showed signs of past breakage, relatively sparse foliage, and a high level of deadwood in the upper canopy. In form H, at question 9, Mr Fu said, "I have also noticed that the tree trunk leaning towards my backyard carries less than 10% of green leaves and more than 90% of deadwoods of the whole tree, which may suggest poor health of this trunk leading to frequent branch failures." He noted "[t]hese overhanging branches represent safety hazards and risk of injury in the future."
3. Mr Fu presented no evidence of past injuries, but he reported near misses from falling branches in 2020 and 2022.
4. The applicant's dwelling is probably frequently occupied. However, the dwelling roof and roof structure should provide adequate protection for people within the dwelling. I was not satisfied that either dead or live branches apparent on the tree were likely to pierce through the roof and ceiling and cause injury to persons. Though the insurance report provided evidence that a branch had damaged tiles and caused minor tearing to roof sarking, no evidence was provided of branches penetrating through the roof.
5. Mr Fu reported one branch falling near him whilst lawnmowing more than two years ago and a second branch landing near a builder more than four years ago. The applicant made no representation suggesting the 'target zone' under and near the tree's canopy was used regularly, such as by children playing in the back yard. In the absence of evidence to the contrary such as play equipment or tables and chairs in the 'target zone', human occupation of this area appeared likely to be occasional. Further, Mr Leung made no report of branches having fallen onto his land.
6. Nonetheless, the branch breakage wounds and deadwood in the canopy above the 'target zone' caused unpredictability. When the considerable height of the canopy was factored in, I considered the risk of injury to be relatively low, but sufficient to engage s 10(2)(b) of the Act.
7. If the jurisdictional tests at s 10 of the Act are satisfied, the Court can make orders such as those at s 9 to remedy, restrain or prevent damage to property, or to prevent injury to a person, as a consequence of the tree. In making an order, the Court must consider relevant matters in s 12 of the Act, as follows:

Discretionary matters – s 12

1. The tree is located in the rear yard of the respondent's property about 3 m from the common side boundary (s 12(a)).

2. Under s 12(b), contrary to Mr Fu's answer at question 18 of Form H, in the absence of s 6 of the Act, tree removal or pruning of live branches requires consent from Council under the Environmental Planning and Assessment Act 1979 (EP&A Act).
3. The Parramatta Development Control Plan 2022 (DCP), at Part 5.3.4 (Tree and Vegetation Preservation), is made in accordance with Chapter 2 of the State Environmental Planning Policy (Biodiversity and Conservation) 2021 (Biodiversity and Conservation SEPP), which is made under the jurisdiction of the EP&A Act.
4. Part 5.3.4 of the DCP "describes the trees and vegetation that require a permit or approval for clearing to occur to a tree specified in these controls. The trees and vegetation declared by this section of the DCP are protected under Part 2.3 of the Biodiversity and Conservation SEPP and consent from Council must be obtained before any works can occur to a tree as specified in these controls". Within this section of the DCP, the definition of 'Tree Works' includes, "any alteration (excavation, compaction or fill) to the natural ground and soil level within the Tree Protection Zone of a tree on the land or an adjoining land".
5. Table 5.3.4.1, 'Type of Tree Application required', notes that a Tree Permit is required for "tree removal and pruning" and "work within a Tree Protection Zone of a protected tree and/or a tree located on other land". Work includes Construction (driveways, concrete slabs, retaining walls) and earthworks (changes in soil levels, embankments, trenching).
6. At Control C.01, [p]rescribed trees and vegetation which are so protected include, "[a]ny tree or palm, whether indigenous, endemic, exotic or introduced species with a height equal to or exceeding five (5) metres". At Control C.05, the tree did not satisfy any noted exemption condition, nor is it within the list of Exempt tree species in Table 5.3.4.2.
7. Therefore, Part 5.3.4 of the DCP requires protection of roots within a tree's Tree Protection Zone (TPZ) on both the land under development and in adjoining properties. The TPZ is defined in Australian Standard 4970:2009, Protection of tree on development sites, as a circular area around a tree with a radius of DBH x 12, which in this case was approximately $0.9 \text{ m} \times 12 = 10.8 \text{ m}$.
8. In preparation for the hearing, I consulted 'maps' to clarify the location and I viewed an image of the site. The 'street view' image showed the applicant's property, likely soon after construction of the new dwelling, given that some residual building materials remained in the front yard. Based on the tree's dense foliage cover throughout its protruding canopy, it appeared to be particularly healthy.
9. At the hearing, however, about four years later, the foliage density had reduced appreciably, and the tree's upper canopy displayed a high level of deadwood. Progressive dieback of foliage and branches from outer tips down and in towards the primary branches and trunks is a distinctive indicator of root damage.

10. Mr Fu's land sloped gently upwards from front to back. The rear of the new dwelling was well within the tree's TPZ, and the dwelling was based on a concrete slab, the minimum thickness of which must accord with current building regulations. To accommodate Mr Fu's upward sloping land, it appeared that excavation had been undertaken for installation of the concrete slab at the rear of the dwelling. Further, soil below concrete slabs is often mechanically compacted in preparation for slab installation and surfaces surrounding buildings under construction are often incidentally compacted.
11. Broadly accepted foundational arboricultural knowledge is that primary roots usually grow laterally from the base of a tree – akin to the spokes of a wheel, and branch into secondary and tertiary roots. The resultant root web generally occupies an area far larger than the tree's canopy. Most roots, and especially fine feeding roots, are found in the upper 400mm of the soil as their survival is dependent on absorption of oxygen for respiration and effective diffusion of carbon dioxide, a process referred to as gaseous exchange.
12. The Armillaria flares located on the common boundary side on the tree's lower trunk were above and adjacent to a primary root growing towards Mr Fu's property. It is not uncommon for Armillaria to inhabit soil for decades, latently ticking over, then enter and spread into damaged roots when the opportunity arises.
13. It was probable that the tree's extensive dieback, significantly reduced live foliage cover, and symptoms of Armillaria on the common boundary side of the trunk was caused by damage to the tree's roots during dwelling construction. Such damage was likely to have comprised both physical destruction and soil compaction which prevented or inhibited gaseous exchange.
14. The symptoms were 'classic' and there was no other reasonable explanation for the tree's decline.
15. The damage impact was unlikely to have been restricted to the building apron alone, but almost certainly included part of the area between the tree and the north-east corner of Mr Fu's new dwelling. Infestation by root rot is generally exacerbated by stress caused by insufficient water and carbohydrate production consequent of root damage.
16. Pruning of live foliage compromises tree health and vigour by reducing photosynthetic capacity, which is the basis for production of carbohydrates that support all the tree's essential functions. Notwithstanding that pruning of live foliage should thus be minimised, the past occurrence of roof damage and 'near misses' as a result of branch shedding, and unpredictability implied by the presence of multiple wounds from broken branches high in the canopy above Mr Fu's dwelling and back yard, made mitigation imperative (ss 12(b2)).
17. The tree provided protection from the sun and wind and contributed to Mr Leung's landscape and the amenity of the land on which it is situated (ss 12(b3)).

18. Regardless that *Corymbia citriodora* is endemic to Queensland, the tree's flowers, fruit, trunks, and branches can be expected to provide food and shelter for native fauna. It is renowned as an important food source for rainbow lorikeets and flying foxes and is a long-lived species. Therefore, the tree is likely to make an important contribution to the local ecosystem and biodiversity (ss 12(d)).
19. Considering its size, age, and prominence when viewed from the street, the tree provided considerable intrinsic public amenity, which Mr Fu acknowledged (ss 12(f)).
20. Section 12(h)(i) of the Act considers 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 the impact of any trees owned by the applicant. It is appropriate to consider who pays for orders arising through the prism of s 12(h)(i), which Preston CJ discusses in *Robson v Leischke* (2008) 72 NSWLR 98; [2008] NSWLEC 152 (Robson); at [204]-[208]:

"204 The matters in s 12(h) and (i) require the Court to consider whether there are any contributing causes of the damage or the likelihood of damage to property or the likelihood of injury to any person, other than the tree. The phrase "anything, other than the tree, that has contributed, or is contributing..." is wide.

205 It evidently includes "any act or omission by the applicant" and "the impact of any trees owned by the applicant" because both of these are specified to be included in the wider phrase. Thus, in *Horn & Anor v Latter* [2007] NSWLEC 744 (23 October 2007) (Moore C, Thyer AC) at [17], found that the reason why a tree required removal was because the applicants had poisoned the tree's roots, killing part of the tree and rendering it "likely in the near future to cause damage" to the applicants' property. As a consequence of this fact, although the Court ordered removal of the tree, it required the cost of removal to be borne by the applicants rather than the tree's owner.

206 The phrase also would include any act or omission by the owner of the land on which the tree is situated, which has contributed or is contributing to the damage or the likelihood of injury to any person.

207 The considerations that arise in the tort of nuisance concerning fault, the nature of the conduct and the state of knowledge of a person on whose land a tree which causes a nuisance is situated (see discussion above at paragraphs 44-90), would be relevant in ascertaining whether any act or omission of that person has contributed or is contributing to the damage or injury. Thus, it would be relevant to consider whether the person created the nuisance constituted by the tree having caused, causing, or being likely to cause damage, or whether the person adopted or continued that nuisance. Such conduct could be said to be "anything, other than the tree, that has contributed, or is contributing to any such damage".

208 ... Although these matters have not been included as express matters in the *Trees (Disputes Between Neighbours) Act 2006*, they may fall within the ambit of "anything, other than the tree, that has contributed, or is contributing to" the damage or the likelihood of damage to property or the likelihood of injury to any person."

1. Section 12(h)(i) also considers if 'the tree was there first'. When a dwelling is installed under or near an established tree, 'the tree was there first' should be considered if the tree causes subsequent property damage. In *Black v Johnson (No 2)* [2007] NSWLEC 513 (Black), a Tree Disputes Principle was established for such situations; at [15]:

"The existence of a tree prior to the construction of a structure which has subsequently been damaged by the tree is not a matter likely to be taken into consideration on the question of whether or not some order should be made for interference with or removal of that tree or other remedial work. On that question, the seriousness of the damage and any attendant risks are the primary matters for consideration.

If interference with or removal of the tree or other work is warranted because of the extent of the damage the tree has caused or risks now posed by the damage, the fact that the tree was already growing in the vicinity at the time the structure was built is a matter which may be relevant and appropriate to take into account on the question of who should undertake any work and/or apportionment of the cost of such work..."

Findings

1. Section 10(2)(a) of the Act was engaged by the branch that damaged Mr Fu's dwelling roof in October 2022 and the likelihood of similar damage in the near future. Section 10(2)(b) was engaged by unpredictability of live and dead branches overhanging Mr Fu's back yard.
2. In Form H, Mr Fu questioned whether the trunk closest to his property should be removed but neither party sought to have the tree removed. The relatively rapid rate of dieback in the tree's canopy was disconcerting but the rate of decline caused by *Armillaria* root rot is not necessarily constant, nor predictable. I have observed many Lemon Scented Gum trees with similar *Armillaria* symptoms, where such dieback has stabilised and new foliage has established. Currently, the tree's trunks, major branches, and primary branch junctions appeared structurally sound. Though the presence of deadwood in the upper canopy is symptomatic of reduced root function and some likely structural deterioration such that the tree should be monitored by an arborist, I am not satisfied that tree removal need be considered in the short term.
3. Therefore, orders shall be made for pruning of live and dead branches overhanging the applicant's dwelling roof and back yard, notwithstanding that pruning of live branches is contra indicated whilst the tree is attempting to limit the spread of *Armillaria*. All pruning shall comply with Australian Standard, AS4373:2007, Pruning of amenity trees. So as to minimise tree stress, the diameter of live branches selected for pruning should be as small as practicable.
4. Under the Act, it is usual for respondents to pay for the execution of orders unless there is a sound reason to make an exception. Here, there are two key issues that determine who pays for the execution of the orders.

5. Firstly, the respondent's tree was in situ long before the applicant's new dwelling, yet Mr Fu elected to locate the rear of his dwelling under the canopy of the existing mature tree. With reference to the Tree Disputes Principle, at [15] of Black, "the seriousness of the damage and any attendant risks are the primary matters for consideration" as to "whether or not some order should be made" by the Court. However, "[i]f interference with or removal of the tree or other work is warranted because of the extent of the damage the tree has caused or risks now posed by the damage, the fact that the tree was already growing in the vicinity at the time the structure was built is a matter which may be relevant and appropriate to take into account on the question of who should undertake any work and/or apportionment of the cost of such work..."
6. Secondly, the tree is a prescribed tree under Part 5.3.4 of the DCP which is protected under Part 2.3 of the Biodiversity and Conservation SEPP. The north-eastern corner of Mr Fu's dwelling was located on a concrete slab, well within the tree's Tree Protection Zone which had a radius of approximately 10.8 m.
7. Table 5.3.4.1 of the DCP noted that a Tree Permit is required for "work within a Tree Protection Zone of a protected tree and/or a tree located on other land, where 'Construction' work includes concrete slabs and earthworks.
8. While I am unaware as to whether Mr Fu gained such a Tree Permit from Council, the primary issue is that the required tree protection of the tree's roots appeared not to have occurred. Based on the distinct symptoms of root damage currently exhibited by the tree relative to the outstanding health and vigour the tree displayed soon after Mr Fu's dwelling was constructed, it is highly probable that serious root damage occurred as a consequence of the dwelling's construction.
9. At [207] of Robson, his Honour said,

"... Thus, it would be relevant to consider whether the person created the nuisance constituted by the tree having caused, causing, or being likely to cause damage, or whether the person adopted or continued that nuisance. Such conduct could be said to be "anything, other than the tree, that has contributed, or is contributing to any such damage"; and at [205], "It evidently includes "any act or omission by the applicant".
1. While Mr Fu may have been unaware of the root damage so caused, under the DCP, he was required to get a Tree Permit for 'Tree Works' in the TPZ. Usually, tree protection and arborist supervision would be specified under the Tree Permit. Given the gravity of the tree's decline due to probable root damage, I am satisfied that the lack of adequate protection of the tree's roots was an "omission by the applicant".

Conclusion

1. In Robson, the respondent was found to not be responsible for a tree falling on Mrs Robson's house. At [228], his Honour stated: "In these circumstances, the justice of the situation is to leave the loss where it falls, namely on Mrs Robson. An order shifting that loss to Mr Leischke by requiring him to pay compensation to her would not be fit or just."
2. Similarly, responsibility here rests with Mr Fu for the consequences of locating the new dwelling under the tree and for apparently omitting to adequately protect the tree's roots during the dwelling's construction.
3. Therefore, Mr Fu shall pay for the execution of the following orders, particularly given that Mr Leung is likely to face future costs for arborists to monitor the tree and, at least, to prune deadwood from the tree's upper canopy.

Orders

1. The Court orders that:
 1. The application to prune the tree is granted.
 2. The applicant is to engage and pay for a suitably qualified and experienced arborist (minimum Australian Qualification Framework (AQF) level 3) with all relevant insurances to prune branches overhanging the applicant's land to appropriate branch collars near the common boundary. Some final pruning cuts will be above the applicant's land in order to preserve live, sound ascending branches from which the overhanging branches extend. Other final pruning cuts may be above the respondent's land. Upon completion of the pruning, the arborists shall remove all debris from the pruning from the respondent's land.
 3. The works in Order (2) shall be completed within 60 days of the date of these orders and during reasonable daytime working hours.
 4. All pruning shall comply with AS4373:2007, Pruning of amenity trees, and the Safe Work Australia, Guide to Managing Risks of Tree Trimming and Removal Work, 2016.
 5. The arborists will likely need to access the tree from the respondent's land. The respondent shall provide all reasonable access to his property for undertaking the works upon receipt of at least 72 hours' notice from the applicant by email, advising the date and approximate start time.

J Douglas

Acting Commissioner of the Court

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