
AUSTRALIA / JUDGMENT

Gough v O'Sullivan [2016] NSWLEC 1178

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Land and Environment Court

New South Wales

Medium Neutral Citation: Gough v O'Sullivan [2016] NSWLEC 1178

Hearing dates: 6 May 2016

Date of orders: 06 May 2016

Decision date: 06 May 2016

Jurisdiction: Class 2

Before: Durland AC

Decision: The application is upheld

Catchwords: Trees (Disputes Between Neighbours); injury; jurisdictional tests; deadwood: pruning

Legislation Cited: Trees (Disputes Between Neighbours) Act 2006

Cases Cited: Barker v Kyriakides [2007] NSWLEC 292

Gough v O'Sullivan [2009] NSWLEC 1027

Gough v O'Sullivan [2009] NSWLEC 1341

Category: Principal judgment

Parties: B Gough (Applicant)

M O'Sullivan (Respondent)

Representation: B Gough, litigant in person (Applicant)

M O'Sullivan, litigant in person (Respondent)

File Number(s): 20096 of 2016

Judgment

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

1. This is an application pursuant to section 7 of the Trees (Disputes Between Neighbours) Act 2006 (the Act) concerning two mature Eucalyptus microcorys (Tallowwood) trees located on the respondent's (Ms O'Sullivan) property at Penshurst in Sydney.
2. The trees are located in the northern rear corner of the respondent's property. The northern most tree is located approximately 500mm from the common boundary fence and the southern most tree is approximately 2.5 metres from the common boundary fence. Both of the trees have a trunk diameter of greater than 700mm and are over 20 metres in height.
3. The trees contribute significantly to the amenity of the surrounding landscape and are likely to be contributing to the biodiversity and ecology of the local area.
4. The applicant (Mrs Gough) is seeking orders for the pruning of the trees to remove the branches that overhang her site. Mrs Gough would like the trees removed if the amount of pruning is not viable due to the detrimental impact it would have on the trees. The orders are sought because the applicant contends that the trees pose a risk of injury to her.
5. The respondent wants the trees to remain and is willing to have the trees maintained on a regular basis to mitigate the likelihood of falling branches.
6. When asked if she could point out any particular limb that was causing concern Mrs Gough stated that there are not any particular branches that are of concern. Mrs Gough is concerned about all of the branches that overhang her property.
7. There are currently Orders relating to the trees as a result of an application made in 2009, Gough v O'Sullivan [2009] NSWLEC 1027. Orders require that at periods of no more than 5 years (until 2020) deadwood up to 20mm be removed. A second application in 2009, Gough v O'Sullivan [2009] NSWLEC 1341, was dismissed.
8. The respondent and applicant agree that the trees have been pruned in accordance with the orders twice since 2009. The most recent pruning was undertaken in 2014.
9. The provisions of section 10(2) of the Trees Act require that I be satisfied that one or more of four tests are met with respect to each tree subject to the application, before I have jurisdiction to consider the application.

These tests are:

Has the tree caused damage to the applicant's property?

Is the tree now causing damage to the applicant's property?

Is the tree likely in the near future to cause damage to the applicant's property?

Is the tree likely to cause injury to a person?

Only if one or more of the tests is satisfied can I move on to consider what orders, if any, I should make in respect to each of the trees.

The Trees

1. The trees are both in good health and the form of both are within what is considered typical for the species.
2. With the expertise that I bring to the Court, and to the extent that could be determined from a ground based visual inspection, it appears that the branch unions are sound.
3. There is very little deadwood in the canopies with only a couple of very small dead branches being sighted. The deadwood looked to be less than 20mm in diameter. Deadwood of the dimensions sighted would not be likely to cause injury if they were to fall and make contact with a person.
4. It is considered likely that the low amount of deadwood is due to the pruning that has been undertaken in accordance with the Orders currently relating to both trees and that it is therefore appropriate that the removal of deadwood continues to be undertaken on a regular basis.
5. There is a long (more than 5 meters) vertical wound on a second order limb within the canopy of the southern tree. The upright limb is located above the grassed open space area at the rear of the respondent's property. It is possible that this wound was caused by a lightning strike that impacted the tree in 2010. The wound looks to be closing over fairly well and the tree has laid on reaction wood to strengthen the attachment of the impacted limb however an aerial inspection is required to determine if there is any associated decay and to clarify the structural integrity of the limb.
6. Should the limb supporting the long vertical wound fail and come in contact it with a person it is likely that injury would occur. It is also likely that if the wounded limb was to fail it would impact the canopy of the northern tree causing branches to fail.
7. I am satisfied that the requirements under s10 (2) of the Act have been met in relation to future injury that may be caused by the trees and therefore in relation to likely future injury the jurisdiction of the Court is enlivened.

Debris and Leaves

1. At the hearing the applicant raised concerns about the amount of leaves and small twigs in the narrow passage at the rear of the garage and in the courtyard at the rear of the site. In addition the applicant raised concerns about the debris from the trees that falls into the guttering.

2. The applicant contends that every few months she engages a contractor to clean up the outdoor areas and also regularly has the guttering cleared.
3. In relation to the deposition of leaves I am guided by the Tree Dispute Principle in *Barker v Kyriakides* [2007] NSWLEC 292 that says: "For people who live in urban environments, it is appropriate to expect that some degree of house exterior and grounds maintenance will be required in order to appreciate and retain the aesthetic and environmental benefits of having trees in such an urban environment. In particular, it is reasonable to expect people living in such an environment might need to clean their gutters and the surrounds of their houses on a regular basis. The dropping of leaves, flowers, fruit, seeds or small elements of deadwood by urban trees ordinarily will not provide the basis for ordering removal of or intervention with an urban tree."

Pruning all overhanging limbs

1. The removal of large diameter, healthy and well attached limbs as sought by the applicant is considered to be inappropriate. The impact on the tree would be detrimental from an arboricultural perspective and could increase the potential for future branch failure due to increased exposure.

Orders

1. On the basis of the foregoing, the Orders of the Court are:
 1. The application to remove the two *Eucalyptus microcorys* (Tallowwoods) is dismissed.
 2. The application to prune all branches that are overhanging the applicant's property is dismissed.
 3. Within 60 days of the date of this order the respondent is to engage and pay for an AQF Level 3 Arborist with appropriate insurances to undertake an aerial inspection of the southern most tree to determine the structural integrity of the second order limb that supports a long vertical wound. The arborist is to undertake remedial pruning if required.
 4. Within 60 days of the date of this order the respondent is to engage and pay for an AQF Level 3 Arborist with appropriate insurances to prune the deadwood (if any) from both trees. All deadwood with a diameter of greater than 20mm at the point of attachment (branch collar) is to be removed from the area of the canopy that overhangs the applicant's property and to a distance of 2 metres within the respondents' property.
 5. All work shall be carried out in accordance with AS 4373 'Pruning of Amenity Trees' and the WorkCover NSW Code of Practice for the Amenity Tree Industry.

6. The applicant is to provide reasonable access (if required) for the purpose of quoting and for the safe and efficient carrying out of the works in order (3) and (4). The applicant must provide the respondent with contact details and work is to be carried out during reasonable hours of the day.
7. The respondent is to give the applicant written notice of the works in order (3) and (4) a minimum of one week prior to the works being undertaken.
8. Every 2 years, within 14 days of the anniversary of the date of these orders, the works as specified in (3) and (4) shall be undertaken in accordance with (5), (6), and (7).

L Durland

Acting Commissioner of the Court

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