

AUSTRALIA / JUDGMENT

## Knight v Simmons [2018] NSWLEC 1231

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Land and Environment Court

New South Wales

Medium Neutral Citation: Knight v Simmons [2018] NSWLEC 1231

Hearing dates: 19 April 2018

Date of orders: 15 May 2018

Decision date: 15 May 2018

Jurisdiction: Class 2

Before: Galwey AC

Decision: The application is dismissed.

Catchwords: TREES (DISPUTES BETWEEN NEIGHBOURS) – damage to property including sewer pipes – terracotta sewer pipes – root identification – one of two trees has been removed – whether the remaining tree has caused damage – compensation sought for past pruning costs – compensation sought for sewer repair – reasonable attempt to reach agreement required at s 10(1) – notice of the application required at s 8 – self-represented litigant – could the respondents have prevented the damage

Legislation Cited: Trees (Disputes Between Neighbours) Act 2006 (NSW)

Cases Cited: Colling v Wilson [2009] NSWLEC 1061

Robson v Leischke (2008) 72 NSWLR 98; (2008) 159 LGERA 280; [2008] NSWLEC 152

Texts Cited: Land and Environment Court of NSW, Practice Note Class 2 Tree Applications

Category: Principal judgment

Parties: Odette Knight (Applicant)

Scott Simmons (First Respondent)

Kylie Simmons (Second Respondent)

Representation: O Knight, litigant in person (Applicant)

M Gilbert, Counsel (Respondents)

Solicitors

Elliot Tuthill Solicitors (Respondents)

File Number(s): 2017/366805

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## Judgment

### Background

1. Mrs Knight ('the applicant') lives at her Woollooware property. Beneath the paved narrow thoroughfare between her dwelling and her side boundary is her sewer pipe. This boundary forms the rear boundary of the neighbouring property to her west, owned by the Simmons ('the respondents'). Two trees grew in the Simmons' back yard near the common boundary – one (a eucalypt) remains but the other (a lilly pilly) has been removed.

### Timeline

1. Below is a timeline of the relevant events.

\* Prior to the following events, the two trees grew in the Simmons' garden.

\* December 2016: Mrs Knight, with the Simmons' permission, engaged arborists at her expense to prune back overhanging branches of the Simmons' eucalypt.

\* Early May 2017: Mrs Knight's sewer pipe was leaking so she engaged a plumber to repair it. The plumber found roots in the pipe. Mrs Knight informed the Simmons that repair works would happen the following day, so that they could see the situation. Mr Simmons saw the pipe once excavation was completed. Mrs Knight told Mr Simmons that she wanted the Simmons to pay for the works as their trees' roots had damaged the pipe. The plumber replaced the damaged pipe with a new section of pipe, backfilled the area, and this section of Mrs Knight's path was repaved with concrete.

\* May 2017: Mr Simmons told Mrs Knight that they wouldn't be paying her for the pipe repair works because they had not been shown that their trees' roots had caused the damage.

\* May 2017: Mrs Knight took root samples collected from within the damaged pipes and shoot samples from the Simmons' two trees to the Royal Botanic Gardens' Plant Disease Diagnostic Unit and paid for their identification services. The roots were identified as a lilly pilly; the shoots were, as expected, a eucalypt and a lilly pilly.

\* 4 December 2017: Mrs Knight filed an application to the Court, pursuant to s 7 of the Trees (Disputes Between Neighbours) Act 2006 (NSW) ('the Trees Act'), seeking orders for the respondents to remove both trees and poison their stumps.

- \* 4 December 2017: a copy of the application was served on the Simmons.
- \* Mid-December 2017: the Simmons applied to their local council to remove the lilly pilly.
- \* 17 January 2018: after they received permission from their local council, the Simmons had the lilly pilly removed.
- \* 23 January 2018: at the preliminary hearing, directions were given to both parties, including dates by which any statements of evidence must be filed and served.
- \* 13 April 2018: the Simmons filed and served an arboricultural report six days before the final hearing.
- \* 19 April 2018: at the onsite hearing leave was granted to Mrs Knight to amend her application to include the order she seeks for compensation from the Simmons of \$4,950, being the total (at question 14 of her claim form) for the 2016 pruning works and the 2017 plumbing works. I also advised Mrs Knight that if she wishes to pursue her additional claim for costs incurred, as she has outlined in her application, she will need to file a Notice of Motion for that matter to be heard by the Registrar or a Judge of the Court.

### **The respondents' arboricultural report**

1. Mrs Knight pointed out that directions made at the preliminary hearing required the Simmons to file any evidence, such as the arboricultural report, well before the hearing. She submitted that, by filing the report six days before the hearing, they had not complied with this. She did not have time to get expert or legal advice on the information in the report.
2. Mr Gilbert, counsel for the Simmons, apologised for the late filing of the report, explaining that it had just been an oversight. He argued that it was in the Court's best interests to be fully informed of all relevant matters when determining whether the Court should make orders to remove a native tree. He said the report contained relevant information that should be considered by the Court.
3. I accepted Mr Gilbert's assertion that the Court should be fully informed. If findings in the report were crucial to the decision, it might be appropriate to allow more time for Mrs Knight to seek advice responding to the report. I asked Mr Gilbert to give me an example of findings in the report that might be relevant to the decision. Given this opportunity, and searching for perhaps the most pertinent of the report's findings, he read a sentence noting the eucalypt's maturity and concluding that if it did not cause damage when it was younger and growing more quickly, it would not cause damage as a mature tree with slow growth. I consider this statement factually incorrect, but more importantly I find it to be a vague theoretical statement that is not based on any investigations (other than as to the tree's age). Being unconvinced of the report's importance to my decision, I saw no reason to stall the process to allow Mrs Knight more time to respond to it.

4. Mrs Knight is self-represented. The Simmons have legal representation and have offered no satisfying reason for the report's late filing, or for the Court to accept it. The report was therefore not tendered in evidence.

### The applicant's submissions

1. When Mrs Knight wanted overhanging branches pruned from her neighbours' tree in 2016, she spoke with the Simmons and obtained their approval before arranging for Bob and Ben the Tree Men to carry out the works at her expense. She said it was only when she received legal advice relating to the sewer damage in 2017 that she was advised she could claim the pruning costs, and so has done this as part of her application.
2. Mrs Knight obtained two quotes for the sewer repair works, the first in writing and a second one over the phone, and she chose the cheaper written quote. She could not wait for the Simmons to obtain further quotes as the leaking sewer was a health risk (her son had already removed sewage from their property with a bucket) and needed to be fixed urgently.
3. Mrs Knight paid for roots to be identified. The findings demonstrated that it was one of the Simmons' trees that damaged her pipes. She argued it is only fair that the Simmons pay for repairing damage caused by their trees.
4. Mrs Knight is a widowed single mother of limited financial means and wants some financial protection.
5. Mrs Knight pointed out that branches of the eucalypt still overhang her property. Debris from the tree falls onto her property. Sections of the path that were not removed and replaced as part of the plumbing works are uneven due to root growth, and will continue to become more so.
6. Mrs Knight's arborist told her the lilly pilly stump did not look like it had been poisoned.
7. The arborist also wrote in a report that the eucalypt's root zone would have a diameter similar to the width of its crown, so Mrs Knight concluded that the tree's roots must extend for some distance beneath her dwelling.

### The respondents' submissions

1. The Simmons allowed Mrs Knight to prune the tree in 2016. They were not asked to contribute to the cost of the works then, nor did Mrs Knight raise this with them at any time since. The first they knew of the claim for pruning costs was when they received Mrs Knight's application to the Court.
2. Mr Gilbert, counsel for the Simmons, appreciates that the Court has taken a lenient approach to the requirement at s 10(1) of the Trees Act that a reasonable attempt be made to reach agreement, but said that some attempt must be made.

3. The root identification evidence within the application demonstrated to the Simmons that their lilly pilly had contributed to Mrs Knight's sewer damage. Once they received this evidence, when served with Mrs Knight's application, they promptly obtained a permit and removed that tree. Mr Gilbert argued that the root identification findings show that only the Lilly Pilly had roots in the pipes. Because there is no evidence that the eucalypt has caused any damage, there is no need to remove it.
4. The Simmons paid for the lilly pilly to be removed and its stump poisoned. They believe its stump has been poisoned.
5. Mr Gilbert argued that the applicant has not satisfied the requirements of s 10(1) and s 8 of the Trees Act. The Simmons did not receive 21 days' notice of the application. There was no effort to reach agreement over the pruning costs, and no opportunity to reach agreement over the plumbing costs. All they received was a demand for the plumbing costs, without being able to assess the need for works nor obtain their own advice or quotes.
6. Mr Gilbert said Mrs Knight did not apply to have the s 8 requirement waived. Although s 8(3) allows the Court to waive this requirement, the Court has not done so.

#### Requirement to give notice at s 8

1. The Trees Act requires at s 8(1) that the applicant gives notice of the application to the respondent.

#### 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.
1. If I understand Mr Gilbert correctly, he argued that the application should be dismissed because the Simmons did not receive 21 days' notice before they were served with the application. The intent of s 8(1) is for the respondents to be notified of the application at least 21 days before the first hearing, a preliminary hearing for setting out directions and a timetable for the parties. It is perhaps most clearly explained in the Court's Practice Note Class 2 Tree Applications, available on the Court's website. The practice note's purpose is described at [4]:
  4. The purpose of this practice note is to set out the process leading up to a final hearing of a tree application to ensure the just, quick and cheap resolution of tree applications.

1. The requirement for giving notice of the application at s 8 of the Trees Act is explained at [12], [13]:
12. Tree applications will be given a date, time and place for a preliminary hearing which corresponds with the next available preliminary hearing after the expiry of the statutory period of 21 days for service of the tree application. This will usually be 4 to 6 weeks after filing of the tree application. The preliminary hearing will usually be before a Registrar of the Court.
13. Tree applications are to be served on the owner of the land on which the tree is situated (and any other person or organisation specified by the Court at the time of lodgment) at least 21 days before the date of the preliminary hearing.

Notes to [13] explain that parties can apply for earlier or later hearings.

1. The practice note clarifies that notice of the application of 21 days is required before the preliminary hearing, not before the respondent is served with the application. This allows the respondent sufficient time to prepare for the hearing. The affidavit of service filed with the Court shows the Simmons were served with Mrs Knight's application on 4 December 2017. The preliminary hearing for directions with the Court's Assistant Registrar was held on 23 January 2018, more than 21 days later. The requirement at s 8 was thus satisfied.

### The lilly pilly

1. Mrs Knight's application seeks orders for the lilly pilly to be removed, which the Simmons did prior to the hearing, and for its stump to be poisoned. Despite Mrs Knight's suggestion that the stump may not have been poisoned, I see no reason to doubt the Simmons' claim that their arborist was paid to poison its stump. Should the stump reshoot, they can poison any new shoots in future. Mr Simmons expressed a willingness to prevent any problems for Mrs Knight when he said he would remove any new low branches growing from the eucalypt toward her property, so I see no reason to doubt he will prevent regrowth of the lilly pilly. I will not make any orders for the lilly pilly.

### The eucalypt

1. Staff at the Botanic Gardens tested one of the root samples collected by Mrs Knight and found it to be a lilly pilly root. Mr Gilbert's confidence that it was therefore only the lilly pilly that had roots in the pipes is unfounded. It is clearly possible that other roots found in the pipes, but not identified, belonged to the eucalypt. However, s 10(2) of the Trees Act, as it applies to this application, states that the Court must not make any orders unless it is satisfied that the tree concerned has caused, is causing, or is likely in the near future to cause, damage to the applicant's property. It is possible that the eucalypt had roots in the pipes, but this has not been demonstrated, and I cannot be satisfied that it is so. It has also not been shown that any of the uneven paving or path surface is due to the eucalypt. Similarly, the other element of this part of Mrs Knight's application, regarding the eucalypt

causing damage in future to the path or pipe, has not been shown. Because this does not engage the Court's jurisdiction at s 10(2) of the Trees Act, I cannot make orders for removing the eucalypt.

### Compensation for pruning costs

1. Mrs Knight had the tree pruned in 2016 but no evidence has been adduced that the tree had caused, or was likely in the near future to cause, any damage to her property. It follows that the Court can't make any orders for this part of the application.
2. Furthermore, I accept Mr Gilbert's submission that this part of Mrs Knight's application fails the jurisdictional test at s 10(1) of the Trees Act: she has not attempted to reach any agreement with the Simmons for this compensation. Mrs Knight did not dispute Mr Simmons' statement that the first they knew of this claim was when they received her application. Preston CJ discussed the requirement of s 10(1) in *Robson v Leischke* (2008) 72 NSWLR 98; (2008) 159 LGERA 280; [2008] NSWLEC 152 ('Robson') at [191]-[196]. While there is no time requirement except that the effort to reach agreement be made before the Court makes an order, I accept that Mrs Knight has made no such effort. Due to my finding in the preceding paragraph, this has not harmed Mrs Knight's case.

### Compensation for plumbing costs

1. Mrs Knight asked the Simmons to pay for the sewer pipe damage at the time of repair works. The Simmons refused. In *Robson*, at [195], Preston CJ found the language of s 10(1)(a) to be "...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." Mrs Knight did not believe she could persuade the Simmons to pay compensation after their initial refusal to do so. I accept that she made sufficient effort to satisfy the s 10(1) test.
2. I accept that roots of the Simmons' lilly pilly were inside, and damaged, Mrs Knight's sewer pipe. The Simmons do not dispute this and have removed the tree. This engages the Court's jurisdiction at s 10(2)(a) to make orders. Where appropriate, according to s 9, this includes orders for compensation. Before making any orders I must consider a range of matters set out at s 12 of the Trees Act, which I have done. Of particular relevance to my decision on this matter is s 12(h):

#### 12 Matters to be considered by Court

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

- (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.
1. Mrs Knight provided photographs of the damaged pipe. Both terracotta pipe and PVC pipe could be seen in the photographs. The Court has dealt with many matters involving terracotta pipes. Their likely condition is considered by the Court when determining apportionment of the costs of any repairs. In *Colling v Wilson* [2009] NSWLEC 1061 at [25] the Commissioners found that the age of terracotta pipes, and the deterioration of the joining material used, led to a reduction in their effective life. Mrs Knight's pipes are likely more than 30 years old, had deteriorated over that time, and it is likely that they leaked. Any leaks increase the surrounding soil moisture, encouraging proliferation of any tree roots that might be growing there. Cracks allow fine roots to enter the pipes, where they further proliferate and thicken, often causing more blockages and damage. Trees therefore often contribute to damage of terracotta pipes, but might not have done so were the pipes or their joints not cracked and leaking.
  2. The Simmons had no warning of the damage prior to the repair works. I understand and accept Mrs Knight's submissions that the damaged pipe was a health issue, and I find her actions to have it repaired immediately were entirely reasonable. Nevertheless, the Simmons were not aware that their trees might be causing any damage below ground. There were no physical signs or events that would have indicated to them that there may be any problem they should investigate. Their trees were not inappropriate species for the site, nor were they located in unsuitable locations. Roots of at least one of their trees have caused a nuisance by damaging neighbouring property, but the Simmons have not been negligent. Once provided with the relevant evidence, they have removed the tree shown to contribute to the damage. They have taken all reasonable steps to prevent further damage.
  3. I have regard for Mrs Knight's financial situation, but with the above in mind, I consider it would be inappropriate to shift any of the pipe repair costs to the Simmons.

## Orders

1. As a result of the foregoing, the Court orders that:
1. The application is dismissed.

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D Galwey

Acting Commissioner of the Court

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Decision last updated: 15 May 2018

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