

AUSTRALIA / JUDGMENT

Knox v Love (No 2) [2011] NSWLEC 1277

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Land and Environment Court

New South Wales

Medium Neutral Citation: Knox v Love (No 2) [2011] NSWLEC 1277

Hearing dates: 16 September 2011

Decision date: 27 September 2011

Jurisdiction: Class 2

Before: Dixon C

Galwey AC

Decision: 1. The application is upheld in part.

2. The applicants are to cut and remove a maximum of 6 tree roots within the 13.5m² paved area, up to a diameter of 100mm including the root that grows beneath the dwelling at the family room door.
3. Roots are to be cut no more than 200mm from west of the sewer pipe on the applicants' property.
4. The works in orders 2 and 3 are to be done by an arborist with minimum AQF Level 3 and all appropriate insurances within 21 days of the date of these orders.
5. The respondents are to pay the applicants the sum of \$5000 compensation within 21 days of the date of this order.
6. The applicants are to carry out ongoing pruning, when necessary, to the six roots nominated in order 2 as specified in order 3.

Catchwords: TREES - damage to property; damage to sewers, stormwater drains, paving and walls; quantification of damage

Legislation Cited: Trees (Disputes Between Neighbours) Act 2006

Cases Cited: Barker v Kyriakides [2007] NSWLEC 292

Hinde v Anderson & Anor [2009] NSWLEC 1148

Knox v Love [2011] NSWLEC 1257

Robson v Leischke [2008] NSWLEC 152; 159 LGERA 280

Smith & Hannaford v Zhang & Zhou [2011] NSWLEC 29

Category: Principal judgment

Parties: Mr A Knox (Applicant)

Ms J Knox (Applicant)

Mr J Love (Respondent)

Ms B Love (Respondent)

Representation: Applicants in person

Respondents in person

File Number(s): 20275 of 2011

Judgment

1This judgment deals with Mr and Mrs Knox's application under Part 2 of the Trees (Disputes Between Neighbours) Act 2006 (the Act) in respect of an oak tree located on the eastern boundary of their neighbours' land at 40 Greendale Ave, Pymble. They seek removal of the tree and rectification works to their sewer, stormwater pipes, retaining wall, fence and dwelling. They also seek an order that the respondents pay them monetary compensation in the sum of \$5,000.

2This is the second of two applications filed by Mr and Mrs Knox against their neighbours. Both were listed for an onsite hearing on 11 August 2011 . The first concerned a hedge application under Part 2A of the Act and it was determined by the Court on 17 August 2011. The second, this damages application, proved more complex and the hearing was adjourned so that the parties had an opportunity to obtain further engineering and arboriculture evidence.

3The applicant took up this opportunity and at the resumed hearing relied on a report prepared by T.T McCarthy Consulting Engineer (exhibit EE). It concluded that the tree root in the sub floor near the brick pier (accepted by the Court to be from the respondents' oak tree) was not causing structural damage to the interior of the applicant's dwelling. At paragraph [20] of Exhibit EE Mr McCarthy states: " In my opinion the current damage to the dwelling as a result of the tree is minimal and currently has no impact on the structural stability of the dwelling at the present time." Despite that assessment he added at paragraph [21] that (subject to the opinion of a qualified arborist) " The tree roots in the sub floor are cause for concern and should the tree roots continue to grow further displacement of the foundations and rotation of the pier would be expected ."

4As to be expected the respondents rely upon Mr McCarthy's expert evidence to support their submission that they were not responsible for any structural damage to the applicants' dwelling.

5After indicating to the applicants during the hearing that the Court preferred Mr McCarthy's independent assessment of the cause and extent of the damage to the dwelling over that of the applicants' former builder Mr Hopkins, the applicants did not pursue this part of their claim.

6The only independent arboriculture evidence before Court was that of the respondents prepared by Rain Tree consulting dated 18 February 2011 (exhibit 44). At paragraph 1.5 it describes the oak tree to be in "... fair to good health, expressed by the foliage vigor and content, and is considered in good condition, expressed by the above ground structural features of the tree ." It also assesses that although the tree is deciduous the burden of the leaf fall and maintenance is typical of that found in an urban landscape with trees.

7Although the tree is subject to a Tree Preservation Order (exhibit KK) the Court notes that clause 7 of the Order allows minor pruning of trees where branches pruned are not more than 50mm diameter and roots to be pruned are not more than 30mm in diameter. The only qualification is that the pruning is to be consistent with the ASS for Pruning of Amenity trees (AS 4373-2007). The Court identified this opportunity for minor pruning with the hope it might help address the applicant's concern about leaves on their property.

8Based on the arboricultural evidence before the Court (including Acting Commissioner Galwey's assessment of the tree) the Court decided that removal of the oak tree was not justified on the evidence.

9After this finding was made the applicants advised that their priority was to reinstate their sewer, stormwater pipes and the paving within the 13.5m² area outside their family room. To facilitate this work they asked to be allowed to cut up to 6 oak tree roots located within that 13.5m² area. They also affirmed that they wanted their neighbours to contribute \$5000 by way of compensation toward the costs of those works.

10The Court's inspection of the tree roots in the vicinity of the sewer and pipes and under the uplifted concrete supports a finding that the roots were from the oak tree. The location and diameter of the roots, according to Acting Commissioner Galwey supports this conclusion.

11Accepting that the oak tree roots have caused damage to the applicants' property the Court must assess whether anything else has contributed to that damage: s12 (h) (i) and (ii) of the Act. The respondents made a number of submissions on this point. They submit that the age of the house; its state of repair; the natural deterioration of the old clay pipes and the excavation work by the applicants in readiness for renovation are all relevant factors when considering what has contributed to the damage: s12 (h).

12While the parties were not legally represented during the hearing, as is usual in these types of proceedings, they had a good understanding of the Act and their obligations under it. By the conclusion of the evidence the following matters were not controversial:

(a)The parties accepted that Part 2 of the Act enables people who consider that their neighbour's tree has caused, is causing, or is likely in the near future to cause damage to their property may make an application to the Land and Environment Court to make orders.

(b)Furthermore, they understood that subject to the Act, the Court may make orders to remedy, restrain or prevent damage to property from a tree that is situated on adjoining land. The Act also permits the Court to order compensation for or rectification of damage to the applicants' property caused by a tree.

(c)They also appreciated that before an order can be made the Court must be satisfied "as to the existence of a causal connection between the tree that is the subject of the application and the damage claimed: Robson v Leischke [2008] NSWLEC 152;(2008) 72 NSWLR 98 [at 179] -[179].

(d)The parties also understood that s10 (2) of the Act does not require the tree, which is the subject of an application, to be the sole cause of the damage alleged. It is sufficient if the tree is a cause of the damage claimed: Smith & Hannaford v Zhang & Zhou [2011] NSWLEC 29 at [30]. Section 12 of the Act sets out matters to be considered by the Court before making an order including any other factor that might have contributed to any damage.

Findings

13Based on the Court's inspection of the site and a consideration of the arboricultural and engineering evidence we are of the opinion that it is probable that the tree roots observed in the 13.5m² area near the pipes and under the house are roots from the oak tree.

14We also accept that the age of the house, the sandy soil in the area of the pipes and concrete paving may also have contributed to the damage. The engineering evidence and the site inspection certainly support such a finding.

15Section 10 of the Act requires the Court to be satisfied that there is a causal nexus between the damage claimed and the oak tree owned by the respondents. After a consideration of the totality of the evidence before us and mindful that the test in Smith & Hannaford v Zhang & Zhou [2011] NSWLEC 29 at [38]) requires a "preponderance of the probability" we accept there is a causal nexus between the damage to the pipes and the pavement from the roots of the oak tree in the applicants' property.

16It is also probably that the oak tree roots have contributed to the collapse of part of the sandstone retaining wall about 2 m either side of the tree.

17While the damage to the house is minimal, according to Mr McCarthy, we accept his opinion that it is probable that structural damage to the house could occur if the oak tree root identified near the brick pier continues to grow in its current direction. Although it is intended that the immediate and on going root pruning regime we are ordering will remove the likelihood of future damage to the sewer and stormwater pipes and pavement and sandstone retaining wall. The applicant appreciates that if the circumstances change it is open to them to make a further application in the future: Hinde v Anderson & Anor [2009] NSWLEC 1148.

18The applicants have capped their claim for compensation to an amount of \$5,000.

19The Court has been asked to determine if that amount is reasonable on the facts and evidence. Assuming that the oak tree roots have caused 100% of the damage to the paving and 50% of damage to the sewer and stormwater (attributing 50% to the age of the pipes and the clay soil) based on the quotes provided the breakdown is as follows:

Paving 100% = \$3,500

Sewer 50% = \$800

Stormwater 50% = \$400

Total \$4,700

20Allowing for past clearing of roots from the pipes and a consideration of the law and facts of this case in the light of the evidence we are of the opinion that \$5,000 compensation is reasonable.

Orders

21Accordingly, the Court orders:

1. The application is upheld in part.
2. The applicants are to cut and remove a maximum of 6 tree roots within the 13.5m² paved area, up to a diameter of 100mm including the root that grows beneath the dwelling at the family room door.
3. Roots are to be cut no more than 200mm from west of the sewer pipe on the applicants' property.
4. The works in orders 2 and 3 are to be done by an arborist with minimum AQF Level 3 and all appropriate insurances within 21 days of the date of these orders.
5. The respondents are to pay the applicants the sum of \$5000 compensation within 21 days of the date of this order.
6. The applicants are to carry out ongoing pruning, when necessary, to the six roots nominated in order 2 as specified in order 3.

Susan Dixon

Commissioner of the Court

D Galwey

Acting Commissioner of the Court

Amendments

27 September 2011 - Insert order 1 "application upheld in part"

Amended paragraphs: [21] Orders

24 November 2011 - Amended paragraphs: Order 3 changing 'stormwater pipe' to 'sewer pipe' and order 6 added

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Decision last updated: 24 November 2011

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