AUSTRALIA / JUDGMENT

Kovacevic v Maras [2020] NSWLEC 1584

Source: caselaw.nsw.gov.au · Research copy typeset by Esheria. Not court-issued or certified.

Land and Environment Court

New South Wales

Medium Neutral Citation: Kovacevic v Maras [2020] NSWLEC 1584

Hearing dates: 19 August 2020

Date of orders: 26 November 2020

Decision date: 26 November 2020

Jurisdiction: Class 2

Before: Galwey AC

Decision: The Court orders:

(1) Within 30 days of the date of these orders, the respondents are to engage and pay for a suitably qualified and experienced arborist (minimum AQF Level 3) with all appropriate insurances to prune the large Apple Box ('the tree') near their side boundary to:

(a) remove the lowest overextended branches on the southern side of the crown, pruning to the branch collar at the stem;

(b) reduce other overextended branches to suitable lateral branches, or prune to the branch collar at the stem if there are no suitable lateral branches;

(c) remove deadwood greater than 50 mm in diameter; and

(d) inspect the crown during these pruning works and identify and remove any other branches that are likely to fail in the near future.

(2) These works must be carried out in accordance with AS 4373-2007 'Pruning of amenity trees' and the 2016 Safe Work Australia 'Guide to managing risks of tree trimming and removal work'.

(3) The respondents are to engage the arborist who carries out the pruning works to prepare a brief report describing the completed works.

(4) The respondents are to give the applicant at least two days' notice of the works.

(5) The applicant is to provide all reasonable access required for completing the tree pruning works during reasonable hours of the day.

(6) The respondents are to provide the applicant with a copy of the arborist's report from Order (3) within 14 days of completion of the works.

(7) The exhibits are returned apart from Exhibits A, B and C.

Catchwords: TREES (DISPUTES BETWEEN NEIGHBOURS) – damage caused by neighbouring tree – whether the tree has damaged the fence – whether the tree is likely to cause damage or injury – implications of proposed development – orders for pruning

Legislation Cited: Dividing Fences Act 1991

Trees (Disputes Between Neighbours) Act 2006

Uniform Civil Procedure Rules 2005

Cases Cited: Freeman v Dillon [2012] NSWLEC 1057

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'

Land and Environment Court, 'COVID-19 Pandemic Arrangements Policy' (July 2020)

NSW Rural Fire Service, 'Planning for Bush Fire Protection' (November 2019)

Safe Work Australia 'Guide to managing risks of tree trimming and removal work' (July 2016)

Category: Principal judgment

Parties: Nada Kovacevic (Applicant)

Natalie Maras (First Respondent)

Nathaniel Maras (Second Respondent)

Representation: N Kovacevic (Litigant in person) (Applicant)

N Maras (Litigant in person) (Respondents)

File Number(s): 2020/94462

Publication restriction: No

Judgment

Background to the application

1. Nada Kovacevic (the 'applicant') has development consent for a two-lot subdivision on her residential Queanbeyan property, which currently holds a single dwelling. On the neighbouring property owned by Natalie Maras and Nathaniel Maras (the 'respondents') a large native eucalypt ('the tree') stands near the common boundary between the two properties, its broad crown spreading over both properties.

2. The relationship between these neighbouring parties is acrimonious. Police have been called to the properties. The dispute between the parties may extend to other matters, but currently the tree is at its centre.

3. Ms Kovacevic applied to the Court pursuant to s 7 of the Trees (Disputes Between Neighbours) Act 2006 ('the Trees Act') seeking the following orders (copied here from her application without editing):

" (1) Order the Tree's branches that overhang the Applicant's property be pruned so that they do not overhang the boundary line onto the Applicant's property.

(2) Order the Tree's roots that encroach the Applicant's property be removed so that they do not encroach the boundary line onto the Applicant's property.

(3) Authorise the Applicant (and/or the Applicant's contractor/arborist) to enter the Respondents' property undertake works to the Tree.

(4) Order the Respondents to pay the costs associated with works to the Tree.

(5) Order the Respondents replace the portion of the dividing fence that was damaged by the Tree.

(6) Order the Respondents to pay the full cost of replacement of the fence damaged and/or bent out of alignment by the Tree.

(7) Order to Respondents pay 50% of the cost of replacement of the portion of the dividing fence that currently consists of a cream colourbond fence and steel mesh wire fence to a 2100mm high paling timber fence."

1. Both parties prepared assiduously for this Court hearing, between them filing hundreds of pages of affidavits, reports and plans, much of which is not relevant to my decision. As a result, parts of their evidence and submissions are not addressed below, although they were read and heard, and despite their relevance to each party.

2. The Trees Act provides a limited jurisdiction, enabling neighbours to resolve, through the Court, disputes involving trees that have caused, are causing, or are likely in the near future to cause, damage to the applicant's property, or are likely to cause injury to a person. The Court can make orders as it sees fit to remedy or restrain damage caused by a neighbouring

tree, or to prevent damage or injury caused by the tree. Some limited jurisdiction also extends to making orders pursuant to the Dividing Fences Act 1991. The Court cannot make orders to resolve other issues.

3. If I can summarise Ms Kovacevic's issues with the neighbouring tree, they are:

* This large tree grows close to the boundary, with at least half of its crown spreading over her property, and its roots growing into her property;

* Branches may fall from the tree and cause injury;

* The tree increases the fire risk to her property;

* Branches will interfere with building works in the approved building envelope and may cause injury to workers;

* Roots will interfere with building works, and building works will require root removal;

* The tree has damaged the fence; and

* Apart from replacing the damaged section of the fence, Ms Kovacevic wants the remainder of the boundary fence replaced.

1. Each of these issues must be considered within the jurisdictional framework of the Trees Act.

Framework for this decision

1. The Court's jurisdiction to make orders is limited at s 10 of the Trees Act.

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.

1. The Court can make orders, such as those at s 9 of the Trees Act, to remedy, restrain or prevent damage to property, or to prevent injury to a person, as a consequence of the tree. Before determining the nature of any orders, the Court must consider a range of matters set out at s 12.

The hearing

1. Due to COVID-19 restrictions on travel and gatherings, the hearing took place via audio-visual means according to the Court's COVID-19 Pandemic Arrangements Policy. I was satisfied from the extensive material filed with the Court, to be considered along with the parties' submissions, that I could determine the matter on its merits and that this decision would not suffer due to the lack of a site inspection.

The applicant has made reasonable effort and given notice

1. Ms Kovacevic and her husband have considerable effort to reach the outcome they want. They have spoken with the respondents, spoken with the arborist and others at Queanbeyan-Palerang Regional Council ('Council'), written to the respondents, and put together an extensive range of documents to support her application. Looking over the content and nature of some of these communications, some of their efforts have perhaps been unreasonable, but overall I am satisfied that Ms Kovacevic has made reasonable effort to reach her preferred outcome.
2. Ms Kovacevic gave the required notice of her application.

The tree

1. The respondents engaged Nathanael du Boulay, arboricultural consultant of Canopy the Tree Experts, to assess and report on the tree. Mr du Boulay agreed in his report (in Exhibit 1) to be bound by the Expert Witness Code of Conduct in Schedule 7 of the Uniform Civil Procedure Rules 2005. Mr du Boulay's report is essentially an update to an earlier report done by another arborist at Canopy the Tree Experts. The report includes a monetary valuation of the tree, which does not assist the Court but may be of use to the respondents in future should the tree be damaged by others.
2. Mr du Boulay described the tree as an 18-metre tall Eucalyptus bridgesiana (Apple Box) in excellent health with good structure. He noted "...evidence of one large branch failure occurring some time ago" (p 6). He did not identify or comment on any other structural defects, although photographs filed by the applicant show there might be some minor defects on the stem.

3. Photographs appear to verify that the tree is an outstanding specimen. Nothing in the photo or in Mr du Bourlay's report suggests problems with roots or the lower stem that might lead to failure of the entire tree. Overall crown structure appears good. On the available evidence, it appears that the most likely parts of the tree to fail are the long branches in the lower crown, due to their overextension.

4. The material filed with the Court demonstrates that Ms Kovacevic has claimed, in her communications with the respondents, that she has a common law right to remove all branches and roots growing from the tree onto or over her land. Ms Maras has countered that there is protection granted to the tree that would require Council permission for any pruning, and further, that such crown or root pruning would remove so much of the tree that it would no longer be viable.

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

The dividing fence

1. Ms Kovacevic claimed that the tree has damaged the timber paling fence on that part of the common boundary adjacent to the tree. This paling fence has been in place for some time. It appears weathered and shows the usual signs of wear and tear. Ms Kovacevic's photographs show that the fence is slightly out of alignment in places, including near the tree. The extent of movement appears minor, at most, and does not affect the fence's function. Ms Kovacevic blamed the tree for the fence's condition. Ms Maras suggested the misalignment was due to the fence having a section with rails on the opposite side compared with other parts of the fence.

2. Even if the tree had contributed to any movement of the fence, I might not make orders as the issue appears without consequence. However, photographs from both sides of the fence show that the tree's stem is not against the fence at any point. In fact, there is some gap between the tree and the fence, and various materials are stacked near or against the fence between the fence and the tree. These photographs do not suggest any likelihood that the tree has contributed to the fence's condition.

3. Ms Kovacevic seeks orders for replacing the entire boundary fence. At s 13A of the Dividing Fences Act 1991, the Land and Environment Court is granted the power to make orders under that Act when determining a tree dispute, but only in proceedings where the tree is found to have caused, be causing, or be likely to cause, damage to the dividing fence.

4. I find that the tree has not damaged the dividing fence. It follows that I cannot make orders for any works to that part of the fence near the tree, nor can I make orders for any other part of the dividing fence.

5. Ms Kovacevic does not claim that the tree has damaged any other part of her property.

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

1. There is no difference between the situation described above and the current situation. Just as I have found that the tree has not caused damage to Ms Kovacevic's property in the past, I find it is not causing damage in the present.

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

1. Ms Kovacevic's approved Development Application for her land is for the demolition of buildings (including the existing dwelling) and subdivision of land into two residential lots. The "approved building platform" of Lot 1 on the approved subdivision plan (in Exhibit C) is shown to encroach slightly beneath the south-eastern part of the tree's outer crown. Ms Kovacevic's own plans then show a pergola and patio to the west of the approved building envelope, encroaching further beneath the tree's crown. Further to the west, and also partly beneath the tree's crown, her plans show a dividing fence between approved Lots 1 and 2.
2. Ms Kovacevic claims that branches from the tree are likely to cause damage to the proposed dividing fence, to the proposed dwelling on Lot 1, and to the proposed pergola and patio on Lot 1. Her photographs show that long branches in the tree's lower crown extend toward the approved building envelope and overhang the area of the proposed pergola and patio.
3. Ms Kovacevic submitted that she intends to begin construction of the dwelling on Lot 1 within 12 months, so the tree is likely to cause damage to her property in the near future.
4. Ms Maras argued that there can be no certainty that any construction will begin within 12 months on the applicant's property. She argued that Ms Kovacevic has had consent since May 2019 and has not taken any action towards developing Lot 1. Ms Maras submitted that the erection of a 'For Sale' sign on Lot 1 indicated that Ms Kovacevic might sell, rather than construct on, the property. The timeframe for any construction is unknown.
5. When determining whether the tree is likely to cause damage in the near future, I apply here the principle established in Yang v Scerri [2007] NSWLEC 592, where the Commissioners considered that a period of 12 months might ordinarily represent the 'near future' in proceedings under the Trees Act.
6. Overextended branches in the lower crown appear, to me, likely to fail within the next 12 months. They are large branches. Those that extend to the south, over the applicant's property, are likely to damage the existing dividing fence. This could be prevented by removing the lowest branches and reducing other long branches that extend beyond the principal crown area. Large deadwood might also damage the fence. Other parts of the tree are unlikely to fall and cause damage to the fence within the near future.
7. Determining whether the tree is likely to damage the applicant's proposed dwelling, pergola and patio on Lot 1 in the near future requires, to some extent, determining the likelihood that Ms Kovacevic, or a purchaser of the property, will begin construction within 12 months. Of course, this cannot be predicted by the Court, but if I take Ms Kovacevic's case at its highest – if I accept her assertion that she will begin construction within 12 months – then any damage likely to be caused to the new dwelling would result from the same branches

that might damage the existing dividing fence. If the risk of damage to the fence is mitigated, as it should be, then the risk of damage to the proposed dwelling is mitigated at the same time.

8. Ms Kovacevic opined that branches would also obstruct building works, and that roots might need removal within the building envelope. These are not matters for the Court to consider, as any development consent would ordinarily include all conditions required to deal with site conditions, including trees. Such conditions often include specifications for crown or root pruning, tree protection measures and further assessments or supervision by an arborist if necessary.

Is the tree likely to cause injury?

1. Branches I have identified as being likely to fail are those in the lower crown that are overextended. Any large deadwood in the crown could also fall. Failure of such branches over the respondents' property would be likely to result in injury, as the respondents frequently use the area beneath the tree, which includes a studio for work. Failure of branches to the south, over the applicant's property, would be unlikely to result in injury at present because this area appears to be used infrequently. However, taking Ms Kovacevic's case at its highest again, and accepting the expected construction and use of a dwelling and garden on Lot 1, branches that fail would be likely to cause injury to people on the newly developed property. The risk of injury would be mitigated by the pruning already discussed above – that is, the removal or reduction of overextended branches, and removal of large deadwood. Other parts of the tree are unlikely to fail, so they cannot be likely to cause injury.

2. Ms Kovacevic argued that branches will both obstruct, and be likely to injure, workers during construction of a new dwelling. The possible obstruction of future works is not a trigger for orders in the Trees Act. As I described above, it would fall to the responsible authority, when issuing a development consent, to provide any conditions necessary to enable the works and to protect trees that might be impacted. Branches are unlikely to cause injury to workers if pruning to minimise the likelihood of branch failure is carried out.

Risk of fire

1. The other potential cause of damage or injury identified by Ms Kovacevic was bushfire. She obtained, and filed with the Court, a Bushfire Assessment Report by Rob McGregor, of Ember Bushfire Consulting, dated 13 January 2019 (in Exhibit E). In that report, the overall bushfire threat to the property was described as "low". The tree was not specifically identified in the report, nor were any specific recommendations made for the tree. The report found that the proposed development complied with relevant regulations. Following a letter of approval from the NSW Rural Fire Service Mr McGregor's subsequent report dated 9 June 2020 (Exhibit F) noted the condition that the entire property shall be managed as an "inner protection area" (IPA), which comes with guidelines including maximum canopy

cover of 15% and a recommendation that trees should not overhang the building (NSW Rural Fire Service: 'Planning for Bush Fire Protection'). It is not clear from the plans provided how much of the tree's crown may extend over the proposed dwelling. However, pruning the tree to comply with these guidelines is a matter to be dealt with by Council in any conditions within a development consent.

2. Within the context of the Trees Act, the risk of damage or injury must arise from the tree, not from other factors such as fire. If damage or injury is caused by animals attracted by a tree, it is not the tree that has caused damage: see Robson v Leischke (2008) 72 NSWLR 98; [2008] NSWLEC 152 at [189]. The same principle extends to damage caused by fire: see Freeman v Dillon [2012] NSWLEC 1057 at [84]-[86]. If a branch falls from a burning tree onto a house, damage would be caused by the tree. However I am not satisfied on the adduced evidence that, firstly, the tree is likely to catch fire in the near future and, secondly, that parts of the tree would then fall and cause damage to the applicant's property or injury to a person. Therefore orders shall not be made to address risk arising from bushfire.

The tree is likely to cause damage to the applicant's property

1. Having filtered Ms Kovacevic's extensive concerns regarding the tree through the jurisdiction enabled within the Trees Act, I find that the tree is likely to cause damage to the existing dividing fence as a result of branch failure. Failure of the same branches may also cause damage or injury if development of Lot 1 proceeds.

Consideration of relevant matters

1. Before determining the application, and the nature of any orders, I must consider the matters at s 12 of the Trees Act. Relevant matters are discussed below.

2. The tree is close to the common boundary but does not grow against the dividing fence. It is well away from the applicant's existing dwelling. It may overhang the proposed building envelope on Lot 1, but not significantly. It is not above any other assets on the applicant's land.

3. Pruning or removing the tree would require Council consent. Therefore, any pruning of branches or roots required for development would also require Council consent. This requirement for Council consent takes precedence over what Ms Kovacevic sees as her 'common law right' to prune to the boundary.

4. Pruning the tree to the boundary, above and below ground, as proposed by Ms Kovacevic, would severely damage the tree and make it unviable for retention. Pruning the tree to mitigate the risk of branch failure, if done according to AS 4373-2007 Pruning of amenity trees, would not adversely affect the tree.

5. The tree contributes to the landscape character of the respondents' garden. It provides shade and cooling. It is a large example of a species that occurs naturally in the area, contributing to the local ecosystem and biodiversity.

6. The applicant has spoken with the respondents and with Council representatives in an effort to reach her desired outcome. She has prepared an extensive application to the Court. The respondents have spoken with Council, obtained an arboricultural report, obtained quotes and gathered relevant information. The respondents' actions have not increased the risk of their tree causing damage or injury. The applicant's proposed construction of a dwelling beneath part of the tree's crown would increase the risk of damage or injury.

Conclusion

1. Overextended branches and large deadwood falling from the tree's crown are likely to cause damage or injury. Parts of the applicant's property that might be damaged include the dividing fence and, if it is constructed, the proposed dwelling on Lot 1. People on both the applicant's property and the respondents' property could be injured. The risk can be sufficiently mitigated by pruning, for which I will make orders. These orders negate the need for Council consent for the works being ordered. Other issues of concern to Ms Kovacevic cannot be resolved within the jurisdiction of the Trees Act, although some are bound to be resolved as part of any consent for construction of a dwelling on her property.

Orders

1. For the reasons given above, the Court orders that:

1. Within 30 days of the date of these orders, the respondents are to engage and pay for a suitably qualified and experienced arborist (minimum AQF Level 3) with all appropriate insurances to prune the large Apple Box ('the tree') near their southern boundary to:

1. remove the lowest overextended branches on the southern side of the crown, pruning to the branch collar at the stem;

2. reduce other overextended branches to suitable lateral branches, or prune to the branch collar at the stem if there are no suitable lateral branches;

3. remove deadwood greater than 50 mm in diameter; and

4. inspect the crown during these pruning works and identify and remove any other branches that are likely to fail in the near future.

1. These works must be carried out in accordance with AS 4373-2007 Pruning of amenity trees and the 2016 Safe Work Australia Guide to managing risks of tree trimming and removal work.

2. The respondents are to engage the arborist who carries out the pruning works to prepare a brief report describing the completed works.

3. The respondents are to give the applicant at least two days' notice of the works.
4. The applicant is to provide all reasonable access required for completing the tree pruning works during reasonable hours of the day.
5. The respondents are to provide the applicant with a copy of the arborist's report from Order (3) within 14 days of completion of the works.
6. The exhibits are returned apart from Exhibits A, B and C.

.....

D Galwey

Acting Commissioner of the Court

****

Amendments

01 September 2021 - Amended jurisdiction to Class 2.

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.

Decision last updated: 01 September 2021

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://www.caselaw.nsw.gov.au/decision/175f772a17865e50ffebaec5

CASE PAGE https://chat.esheria.ai/case-law/australia/kovacevic-v-maras-2020-nswlec-1584-2020

Prepared on 29 October 2026 · Esheria