

AUSTRALIA / JUDGMENT

Kwan v Wilbraham [2024] NSWLEC 1581

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Land and Environment Court

New South Wales

Medium Neutral Citation: Kwan v Wilbraham [2024] NSWLEC 1581

Hearing dates: 19 June 2024

Date of orders: 23 September 2024

Decision date: 23 September 2024

Jurisdiction: Class 2

Before: Douglas AC

Decision: The Court orders that:

- (1) The respondents, at their expense, shall employ a roofing contractor, with public liability insurance of at least \$10,000,000.00, to supply and fit two new gutter clips and refit one existing gutter clip, to the applicant's side gutter. Mr Wilbraham may undertake these works, provided he meets the insurance requirements of Order 1, and provides a copy of his Insurance Certificate of Currency to the applicant, prior to undertaking the works.
- (2) The respondents, at their expense, shall engage Australian Qualification Framework (AQF) level 3 arborists, with all appropriate insurances, to prune the two lowest branches from T1 which are growing towards Ms Kwan's side neighbour's land, to their branch collars.
- (3) The works in Orders 1 and 2 shall be completed within 60 days of the date of these orders.
- (4) All tree works shall comply with Safe Work Australia, 'Guide to managing risks of tree trimming and removal work', 2016, and Australian Standard, AS 4373:2007, Pruning of amenity trees.
- (5) The applicant shall provide all required access for undertaking the works in Orders 1 and 2, subject to 72 hours' notice from the respondents, by email.
- (6) All works shall be completed during reasonable, daytime working hours.

Catchwords: TREES (DISPUTES BETWEEN NEIGHBOURS) – damage to property – apprehension of injury – damage minor and easily repaired – considerations under s 12

Legislation Cited: Environmental Planning and Assessment Act 1979

Trees (Disputes Between Neighbours) Act 2006

Pt 2 ss 7, 8, 9, 10, 12

Cases Cited: McPherson v Lake [2017] NSWLEC 1081

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

Stevens v Russell [2016] NSWLEC 1233

Yang v Scerri [2007] NSWLEC 592

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

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

Category: Principal judgment

Parties: Wai King Kwan (Applicant)

Blake Eric Wilbraham (First Respondent)

Abbey Rose Livingston (Second Respondent)

Representation: W Kwan (Self-represented) (Applicant)

B Wilbraham (Self-represented) (First Respondent)

A Livingston (Self-represented) (Second Respondent)

File Number(s): 2024/151221

Publication restriction: Nil

Judgment

Background

1. COMMISSIONER: Wai King Kwan, the applicant, owns and occupies a property in Bomaderry, in the Illawarra region. Blake Eric Wilbraham and Abbey Rose Livingston, the respondents, purchased an adjoining property containing a densely vegetated garden in early 2022, which they occupied after settlement of the sale. Mr Wilbraham cleared much of the vegetation but retained three favoured trees, a Sydney Blue Gum (*Eucalyptus saligna*) (T1), an Australian Red Cedar (*Toona ciliata*) (T2), and a Canary Island Date Palm.
2. Though not as tall as the "20 metres or over" claimed by Ms Kwan, T1 was a fairly large tree with a domed canopy of dense, healthy foliage. T1's broad trunk was located close to Ms Kwan's side neighbour's rear boundary, and branches overhung the side neighbour's adjacent dwelling. Ms Kwan contended that T1 had a history of branch breakage and, at question 4 of her Tree Dispute Claim Details (Exhibit B), Ms Kwan noted having "witnessed

at least two incidents whereas huge branches fell on the yard of (her side neighbour) and within 1 to 2 metres from the fence of my property" during 2022 – 2023. Ms Kwan claimed that in an incident between 2014 and 2018, a main branch from T1 fell onto her side neighbour's garage roof and caused tile breakage.

3. Consequently, the applicant sought removal of T1 and procured a quotation from arborists, which she provided to the tree's owner in early 2022. Ms Kwan claimed the then owner advised that the property was sold with settlement imminent and that he was not prepared to deal with the tree.
4. It appeared that Ms Kwan initially approached the respondents with requests for removal of T1 soon after their occupation in 2022. The respondents claimed that the overgrowth of vegetation and four existing sheds on their land prevented them from accessing T1 and they resisted inheriting the legacy of T1's historic branch failures.
5. On the afternoon of 23 February 2024, during or after winds which, according to meteorological evidence from the respondents (Exhibit 1), had included 90km/hr gusts at nearby Nowra, a large branch broke from T1, fell diagonally across Ms Kwan's side neighbour's yard, onto the common boundary timber paling fence between Ms Kwan and her side neighbour, and onto the edge of Ms Kwan's roof and gutter. As displayed in photographs 3, 4 and 5 in Exhibit B, this resulted in damage to the applicant's side boundary fence and the roof gutter.
6. After this incident, Ms Kwan increased requesting intervention with T1 and encouraged the respondents to apply to Shoalhaven City Council (Council) for approval for removal or pruning. The respondents made representations about responsibly managing T1 and noted that Ms Kwan had not sought assessment of the tree by an arborist. Mr Wilbraham and Ms Livingston preferred selective pruning to removal of T1 and claimed they could not afford the cost of the removal quotation.
7. T2 was growing adjacent to the parties' common timber paling boundary fence. The rear of Ms Kwan's dwelling was close to the common boundary and some branches from T2 extended over the dwelling. Ms Kwan contended that, "a major branch (from T2) fell on my gutter in 2023. Unless a qualified roofer is engaged to carry out an inspection, I am not certain about any damage being done to the roof or the gutter by the fallen branch". The respondents strongly disputed that T2 had incurred the alleged branch failure and resisted Ms Kwan's desired removal or heavy pruning of T2. The respondents claimed that Mr Wilbraham had pruned overhanging Red Cedar branches in response to a request from Ms Kwan, rather than as a result of a branch breaking from T2.
8. Having reached an impasse, Ms Kwan made an application, pursuant to s 7 of Part 2 of the Trees (Disputes between Neighbours) Act 2006 (the Trees Act) proposing the Court order the removal of both T1 and T2 from the adjoining neighbouring property and compensation for property damage arising from the branch failure from T1 on 23 February 2024.

The onsite hearing

1. The hearing commenced with an inspection of the trees from the respondents' yard. Ms Kwan was accompanied by a colleague who attended as an observer, and both parties were self-represented. The Court moved to the applicant's property and assessed damage to the fence and the gutter of Ms Kwan's dwelling, a small retaining wall, and the areas perceived to present risk of injury to persons due to potential falling branches.

The respondents' position

1. Mr Wilbraham and Ms Livingston resisted the proposed order for removal of the trees. They said Ms Kwan had not sought advice from a qualified arborist to determine the condition or prognosis of the trees and thus challenged the validity of Ms Kwan's unsubstantiated arboricultural opinion, at question 24 of Exhibit B, about what impact pruning would have on the trees. The respondents emphasised that 'the trees were there first', and that both Ms Kwan's and her neighbour's dwelling had been built unnecessarily close to the existing trees.

Jurisdictional requirements – Part 2

1. With respect to s 7, 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.
2. Section 8(1) of the Trees Act requires that an applicant 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, (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.
3. Ms Kwan provided a Statutory Declaration dated 29 May 2024 which included acknowledgment of receipt of the application documents by Council and affirmed service of same to the respondents' letter box and email. Ms Kwan had no reason to believe any other person will be affected by the order (at; s 8(1)(c)), so s 8(1) of the Trees Act is satisfied.
4. Section 9 of the Trees Act provides the Court with a wide range of powers to remedy, restrain, or prevent damage and/or injury to a person caused by a tree or trees on adjoining land.
5. Pursuant to s 10(1) of the Trees Act, the Court is obliged to consider the following matters:
 - (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.
1. Though the respondents criticised Ms Kwan's persistence and means of negotiation, in *Robson v Leischke* (2008) 72 NSWLR 98; [2008] NSWLEC 152 (Robson), Preston CJ; at [195], notes that "[t]he language in s 10(1)(a) of the Trees (Disputes Between Neighbours) Act 2006 that the applicant has made 'a reasonable effort to reach agreement' is 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." At [194] of Robson, his Honour says:

"194 The Trees (Disputes Between Neighbours) Act 2006 does not specify any particular time at which the applicant must make a reasonable effort to reach agreement with the tree landowner, other than fixing the end point by requiring that the Court cannot make an order under the Act unless it is satisfied that the applicant has made a reasonable effort to reach agreement with the tree landowner. Hence, although it would be preferable for an applicant to make a reasonable effort to reach agreement with the tree landowner before making application to the Court, so as to avoid court action, there is no requirement to do so and a reasonable effort to reach agreement can be made after making the application at any time up until the Court determines the application."

1. The Trees Act does not prescribe particular conduct, or the type of negotiation required of an applicant to satisfy s 10(1)(a) of the Trees Act, nor a deadline for the applicant's reasonable effort, provided it is made before the Court determines the application. Ms Kwan communicated with the respondents over more than two years requesting intervention with the trees and provided a final written offer towards resolving the dispute on 27 February 2024, a few days after the most recent branch failure from T1.
2. Regardless of some ill will, based on the history informing the dispute and other adduced evidence, both parties appear to have invested genuine effort towards reaching agreement. Consequently, I am satisfied the applicant has made a reasonable effort to reach agreement with the owners of the land on which the trees are situated, such that s 10(1)(a) of the Trees Act is engaged.
3. Section 10(1)(b) is also engaged as Ms Kwan satisfied the requirements of s 8 of the Trees Act.
4. The next major test that is posed, by s 10(2) of the Trees Act, states:
- (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. If the jurisdictional test in s 10(2) is satisfied, s 9 of the Trees Act empowers the Court to make any order it sees fit to remedy, restrain, or prevent damage to property or injury to persons. If orders are to be made, the Court must consider a number of discretionary matters in s 12 of the Trees Act.

Findings

Damage caused by T1

1. Ms Kwan's photographs 3, 4, and 5 in Exhibit B displayed a large, densely foliated Sydney Blue Gum branch laying across Ms Kwan's side neighbour's lawn, a timber boundary fence swept by the branch towards the applicant's dwelling, and a gutter section a few metres long bent outwards on the applicant's dwelling roof. Having identified where the branch broke from T1, I was satisfied that s 10(2)(a) of the Trees Act is engaged.
2. Anticipating her side neighbour would pay for 50% of the fence repairs, Ms Kwan claimed \$1386.00 as compensation from the respondents, being 50% of a \$2772.00 quotation for installation of 7.2 metres (m) of new hardwood fence with timber posts. Mr Wilbraham, who had repaired the fence prior to the hearing, alleged that the fence was relatively unstable before the branch damage, and indicated evidence of historic bracing and reinforcement of fence posts. During the hearing, Ms Kwan accepted Mr Wilbraham's claim that his repairs had reinstated the fence to as good a condition as existed prior to the branch impact, and Ms Kwan withdrew her compensation claim for fence damage.
3. Ms Kwan had submitted a tradesman's estimate of about \$1200.00 for replacement of a section of the gutter. Mr Wilbraham, who worked as a roofer, alternatively contended that the gutter could be reinstated to its former condition by insertion of gutter clips and did not require replacement. I conducted a close-up inspection of the gutter damage and saw it had been largely reinstated in the interim. The gutter appeared fully functional and was positioned correctly and attached firmly to the barge board. In the only section where the front of the gutter was visibly sagging, Mr Wilbraham indicated where two gutter clips were missing, and one was misplaced. Consequently, I accepted Mr Wilbraham's submission that gutter repair was a sufficient and appropriate remedy for the damage.

Damage caused by T2

1. T2 was a relatively small tree about 8 - 9 m tall, located close to the common boundary and Ms Kwan's dwelling. Though Ms Kwan contended, at question 4 of Exhibit B, that a major branch from T2 fell on her gutter in 2023, and that any consequent damage was yet to be clarified, the respondents disputed that a branch had broken from T2. The respondents substantiated this contention on the basis that, in contrast to T1, Ms Kwan had provided no photographs or other evidence in support of her claim, and there was no visible evidence of roof or gutter impact or damage.

2. The respondents alternatively contended that Mr Wilbraham had pruned branches extending from relatively low on T2 over Ms Kwan's land in response to the applicant's requests, and that T2 exhibited no broken branches prior to such pruning works. Though the pruning was poorly executed with bark tears and retained branch stubs, no visible or submitted evidence supported a conclusion that T2 had likely caused damage. Further, as branches from T2 had been pruned away from Ms Kwan's dwelling and the canopy of T2 was quite fastigiate, I considered damage in the near future due to T2 to also be unlikely. In a guidance decision in relation to damage, published in *Yang v Scerri* [2007] NSWLEC 592, as a rule of thumb, the 'near future' is deemed to be a period of 12 months from the date of the determination.
3. It appeared that land at the rear of the applicant's property had been excavated and the level lowered during preparation for the relatively recent construction of Ms Kwan's dwelling. Ms Kwan claimed the trunk base and roots of T2 were damaging a small timber retaining wall located parallel to the common boundary, which bridged the consequent level change between the properties. This claim did not arise in Ms Kwan's application and no evidence indicating a causal link between T2 and any alleged heaving or other damage to the retaining wall was provided by the applicant.
4. Though the retaining wall may have incurred damage, Ms Kwan's evidence was insufficient to prove a causal link to T2. In *Stevens v Russell* [2016] NSWLEC 1233 at [40], Commissioner Fakes notes that "it is a common assumption that the mere presence or proximity of a tree is sufficient to conclude that the tree is the cause of the damage. It is not. It is necessary to find evidence to substantiate the assumption that the tree has caused the damage. In the case of alleged root damage, some excavation is usually required."
5. A mature hedge of *Murraya paniculata* a few metres south of T2 was growing within Ms Kwan's narrow garden bed behind the retaining wall. A mature *Hymenosporum flavum* (Native Frangipani tree) was also growing within the applicant's property, a few metres north of T2. As any of these trees had the capacity to impact structures and cause damage, individually and collectively, it is unreasonable to assume or infer that one, or another may be responsible for damage without substantiating such a claim. In some instances, discerning between tree species requires root microscopy or analysis of root DNA.

Risk of injury to persons

1. Historic branch breakage wounds on T1 displayed that the broken branches, including the two that caused damage, had grown from two major branches, low on the trunk. The branch breakage locations were relatively close to the trunk, and I observed various signs of wood decay fungus within the large wounds.
2. Though the source of such decay fungi is speculative and somewhat academic, a reasonable assumption is that roots that extended laterally and shallow from T1's trunk base were probably heavily damaged during excavation and construction at the rear of both Ms Kwan's

and Ms Kwan's neighbour's dwellings. Such root damage reduces a tree's capacity to absorb enough water and nutrients to produce sufficient sugars to power all necessary functions. The tree becomes stressed and relies on finite stored carbohydrates and becomes more vulnerable to the spread of fungal hyphae. Thus, the root damage provides an easy conduit facilitating entry of wood decay fungi and the compromised tree function consequent of the root damage inhibits the tree's protective capacity to limit the spread of the fungi.

3. Having endured past branch failures, the size and bulk of foliage and stems overhanging Ms Kwan's neighbour's land was much reduced, though slim branches growing from one main branch ascended diagonally upwards above the side neighbour's land for about 3-4m. Orders shall be made for removal of the residue of T1's two lowest branches.
4. Based on the guidance decision published in *McPherson v Lake* [2017] NSWLEC 1081; at [10], the Court considers the risk of injury to persons posed by a tree 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.
5. The applicant emphasised that Bombaderry experienced strong winds and torrential rain, and noted "great concern about soil stability where the trees are located". Though Ms Kwan apprehended, at question 9 of Exhibit B, in the worst-case scenario, that the entirety of T1 may "fall through the roof", there were no soil cracks, signs of root plate heaving, or other soil disturbance indicative of problems with T1's root anchorage. Further, T1's dense canopy and vigorous growth was suggestive of a healthy, functional root system.
6. Though a broken branch from T1 had previously reached Ms Kwan's house, it appeared to have been T1's longest, closest branch to the applicant's dwelling. In considering other branches that may break towards the applicant's land, I assessed their potential arc and distance of fall, and likely pattern of impact. It appeared unlikely that branches from T1 would reach the applicant's dwelling, even with moderate wind assistance. In the worst case in average storm conditions, leaves and small branchlets at the tip end of a branch may slap a roof or gutter but the roof structure of a dwelling is engineered to protect dwelling occupants.
7. Although its foliage was fairly dense, T2 mainly comprised small to medium sized, slim branches, consistent with its semi-mature life cycle stage. Should such branches break in storms, the applicant's roof structure should provide ample protection from injury. Therefore, I am not persuaded that there is genuine risk of injury presented by the trees to persons within the applicant's dwelling.
8. While assessment of damage under the Trees Act relates only to the applicant's property, consideration of injury can relate to other areas surrounding the tree, such as Ms Kwan's neighbour's lawn. Considering Ms Kwan's submissions and wounds observed on T1's branches, over a period of about ten years, two large branches had broken and caused dwelling damage, and two or three large branches had broken without consequence onto Ms Kwan's neighbour's lawn. At least one of the branch failures occurred during heavy winds.

The frequency of branch breakage was thus about every two years. Human occupancy near the tree appeared infrequent and research results consistently reveal that human outdoor occupancy rates are much lower during storms. Therefore, as was the case inside Ms Kwan's dwelling, the risk of injury to persons on Ms Kwan's neighbour's lawn is determined to be low.

9. By way of clarification, given that Ms Kwan was a risk assessor, in quantifying risk of serious injury in this scenario, one factors in the total minutes a resident or visitor occupies the target zone under the tree across a two-year period, and divide that figure by the number of minutes in two years = 1,051,200. The resultant fraction is multiplied by the probability of being impacted by the branch within the target zone, and multiplied by the probability that the consequence of impact is severe injury. Based on an assumption that people would rarely congregate in the target zone, the risk is probably between about 1:100,000 and 1:1,000,000, akin to the risk of serious injury from shark attack, which is extremely low but often perceived to be much higher.
10. Although alleged damage by T2 failed to engage the jurisdiction and the Court determined that neither T1 nor T2 presented a genuine risk of injury to persons, s 10(2) of the Trees Act is engaged by damage to Ms Kwan's roof gutter and dividing fence caused by the February 2024 branch breakage from T1. With s 10(2) satisfied, orders may be contemplated, but the Court must first consider relevant discretionary elements in s 12 of the Trees Act.

Discretionary matters – s 12

1. In making orders, the following s 12 matters are relevant:

* The trees are located in the respondents' property but the trunk base of T2 is close to the common boundary. T1 is located in a corner of the respondents' land. Parts of its canopy encroached over two adjacent properties, but not over the applicant's land (subs 12(a)).

* It is likely that both trees are subject to Council's Tree Management controls, the jurisdiction of which is derived from the Environmental Planning and Assessment Act 1979. In Exhibit C, Ms Kwan included a letter from Mr Josh Melleuish, Council's District Environmental Health Officer. In the letter, Mr Melleuish said, "the tree would likely fall under the 45-degree exemption tool under Chapter G4 of Shoalhaven City Council's DCP, thus not (requiring) consent for removal". However, the letter failed to specify which tree was being considered and satisfaction of the 45-degree exemption tool's requirements had not been tested on site for either T1 or T2. Further, Mr Melleuish suggested "Ms Kwan may have to consult an arborist" regarding questions 24 and 27 of Exhibit B. These questions respectively considered the impact of pruning on the trees, and the trees' contribution to the local ecosystem and biodiversity (subs 12(b)).

* Sydney Blue Gum is a long-lived species. Though T1 appeared very healthy and was technically at a life cycle stage of mid-maturity, it had probably suffered considerable root damage and growth stress during and following excavation for Ms Kwan's, and her neighbour's dwellings. It is a testament to the genetic resilience of the species, and good fortune arising from four recent

high rainfall years, that allowed T1 to reestablish strong foliage and root growth, and consequent good health. In the absence of diagnostic equipment, I could not ascertain the presence or extent of decay fungi in other areas of the tree, but the restriction of branch breakage locations to two major low branches was an encouraging sign with respect to T1's structural integrity and longevity. In this context, as T1 was long established, and likely to be allocating considerable energy towards limiting and excluding wood decay fungi, pruning of non-essential live foliage should be avoided (subs 12(b2)).

* Having not been maintained for many years, T1 also retained a fairly high level of large deadwood. Though not essential, nor an order of the Court, I recommend that the respondents prune major deadwood overhanging their south side neighbour to mitigate risk to neighbouring children. Where dead branches join live branches, final pruning cuts should be made near the termination of deadwood, not into live tissue (subs 12(b2)).

* Both trees, but particularly T1, provide privacy, shade, and protection from the impacts of prevailing south-westerly winds. Though branch breakage in winds may cause damage, amenity trees perform a vital role slowing and modifying winds and reducing potential property damage in the face of fierce storms. Readily available evidence supports this notion, with obvious examples being windbreaks, and tree planting around dwellings in exposed rural areas. The trees contribute to the natural landscape and the scenic value of the land on which they are situated, and soften the hard lines of buildings on neighbouring properties. Australian Red Cedar also has historical and cultural value, as it formerly grew plentifully on the Illawarra escarpment and was an important source of early colonial timber. Ms Kwan was under the apprehension that growing of Red Cedar was illegal or restricted, but Red Cedar's, from seedlings through to advanced trees, are readily available for sale from specialist nurseries and are a moderately common amenity tree (subss 12(b3), (c) and (e)).

* A combination of fertile alluvial soils and relatively high rainfall provided favourable growing conditions for T1 and T2. *Eucalyptus saligna* is a key emergent species of Blue Gum High Forest Critically Endangered Ecological Community (CEEC) in the Sydney Bioregion, and both species are endemic within the broader region. Hence, both trees are likely to contribute to the local ecosystem by providing food and habitat for native fauna (subs 12(d)).

* T1 is highly visible from neighbouring houses and has intrinsic value to public amenity (subs 12(f)).

Conclusion

1. A large branch that broke from T1 on 23 February 2024 during strong winds caused damage to Ms Kwan's roof gutter and displaced a timber paling fence shared with her side neighbour. Both these elements of damage have largely been rectified and an order requiring insertion of gutter clips will finalise gutter repair.

2. In an incident that occurred between 2014 and 2018, a branch that fell onto Ms Kwan's side neighbour's roof broke some tiles, which required replacement. Ms Kwan noted she witnessed at least two other large branches fall on her neighbour's lawn, within 1 to 2 metres of her side fence, but otherwise without consequence. I readily acknowledge such events may be dramatic and disconcerting, but particularly when considered across a ten year time span, the total damage caused by T1 was minor.
3. Further, risk of injury to persons was determined as low and acceptable, within the applicant's dwelling, on the applicant's neighbour's lawn, and with respect to Ms Kwan's apprehension about the trees uprooting. There were no apparent indications around either tree's base to arouse reasonable concerns about stability of anchorage.
4. Though the branch failures occurred, at least in part, as a result of reduced wood strength caused by fungal decay in T1's lower branches, considering the excellent health and foliage density currently displayed by the tree, it is reasonable to expect T1 to optimise sugar production and direct ample energy towards limiting fungal decay spread, and increasing trunk and branch strength with sufficient reaction wood in response to force from wind and gravity.
5. Considering that the damage caused by T1 was minor, the low risk of injury the tree presents to people, the myriad environmental services that T1 provides, and its excellent and likely improving health and vigour, removal of T1 would be a disproportionate and unnecessary response.
6. Wounds on T1's residual branch stubs indicated that the branch failures reported by Ms Kwan occurred in growth from the two lowest branches, and little of the branches remained. Nonetheless, orders shall be made for pruning of the two low residual branches on T1, at the respondents' expense, and this will further mitigate likelihood of damage or injury due to T1.
7. The parties disputed whether a branch from T2 fell onto the applicant's roof gutter in 2023 but Ms Kwan submitted no photographs or other evidence to substantiate her claim. In any case, no damage was apparent, and Ms Kwan had opted not to have the gutter or roof checked for damage in the interim. Should a branch fall onto Ms Kwan's roof from T2, considering the relatively small scale of the tree, the applicant's roof structure should provide ample protection from injury. T2 failed to engage the jurisdiction and no orders are appropriate. Nonetheless, given the historical and cultural significance of the species, the respondents may consider having the arborists undertake minor pruning to remediate Mr Wilbraham's pruning.

Orders

1. The Court orders that:

1. The respondents, at their expense, shall employ a roofing contractor, with public liability insurance of at least \$10,000,000.00, to supply and fit two new gutter clips and refit one existing gutter clip, to the applicant's side gutter. Mr Wilbraham may undertake these works, provided he meets the insurance requirements of Order 1, and provides a copy of his Insurance Certificate of Currency to the applicant, prior to undertaking the works.
2. The respondents, at their expense, shall engage Australian Qualification Framework (AQF) level 3 arborists, with all appropriate insurances, to prune the two lowest branches from T1 which are growing towards Ms Kwan's side neighbour's land, to their branch collars.
3. The works in Orders 1 and 2 shall be completed within 60 days of the date of these orders.
4. All tree works shall comply with Safe Work Australia, 'Guide to managing risks of tree trimming and removal work', 2016, and Australian Standard, AS 4373:2007, Pruning of amenity trees.
5. The applicant shall provide all required access for undertaking the works in Orders 1 and 2, subject to 72 hours' notice from the respondents, by email.
6. All works shall be completed during reasonable, daytime working hours.

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J Douglas

Acting Commissioner of the Court

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Decision last updated: 23 September 2024

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Prepared on 28 October 2026 · Esheria