

AUSTRALIA / JUDGMENT

Li v Richardson [2024] NSWLEC 1634

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Land and Environment Court

New South Wales

Medium Neutral Citation: Li v Richardson [2024] NSWLEC 1634

Hearing dates: 20 August 2024

Date of orders: 11 October 2024

Decision date: 11 October 2024

Jurisdiction: Class 2

Before: Galwey AC

Decision: The Court orders:

- (1) The second respondent's name is corrected to Doreen Finkelstein.
- (2) The application is granted only to the extent of the following orders.
- (3) Within 30 days of the date of these orders, the respondents are to obtain at least two quotes for removing the camphor laurel at their rear boundary (the tree) to no more than 200 mm above ground level. The quotes must be provided by appropriately insured arboricultural contractors with suitably qualified (minimum AQF level 3) arborists who will carry out the work. The quotes must specify areas required for access for the works, including for vehicles. Access may be through either the applicants' or the respondents' properties, whichever is the most efficient.
- (4) Within 30 days of the date of these orders, the respondents are to provide the applicants with copies of the quotes obtained in Order (3) and evidence of their preferred contractor's insurance and qualifications.
- (5) The respondents are to engage the contractor of their choice to remove the tree to no more than 200 mm above ground level within 90 days of the date of these orders. The tree removal works are to be done in accordance with the Safe Work Australia (2016) 'Guide to managing risks of tree trimming and removal work'.
- (6) The respondents are to give the applicants at least one week's notice of the works in Order (5).

- (7) The applicants and respondents are to provide any access for the works in Order (5) to be completed during reasonable hours of the day.
- (8) The applicants are to reimburse the respondents 50% of the cost of the tree removal works within 14 days of receiving a copy of the paid invoice for the works.
- (9) If the respondents do not provide the applicants with a copy of the paid invoice within 30 days of completion of the tree removal works, order (8) lapses.
- (10) The exhibits are returned, other than Exhibits A-C.

Catchwords: TREES (DISPUTES BETWEEN NEIGHBOURS) –whether the tree has caused damage – whether the tree must be removed – who should pay the cost of removing the tree – whether the applicants should be compensated for property damage

Legislation Cited: Trees (Disputes Between Neighbours) Act 2006, Pt 2, ss 7, 9, 10, 12

Cases Cited: Black v Johnson (No 2) [2007] NSWLEC 513

Watt v Menz [2023] NSWLEC 1808

Texts Cited: Burwood Development Control Plan 2012

Safe Work Australia, Guide to managing risks of tree trimming and removal work, July 2016

Category: Principal judgment

Parties: Quan Li (First Applicant)

Shuang Yan Li (Second Applicant)

James Richardson (First Respondent)

Doreen Finkelstein (Second Respondent)

Representation: Q Li (Self-represented) (First Applicant)

S Y Li (Self-represented) (Second Applicant)

J Richardson (Self-represented) (First Respondent)

D Finkelstein (Self-represented) (Second Respondent)

File Number(s): 2024/224430

Publication restriction: Nil

Judgment

Background

1. COMMISSIONER: These proceedings concern a tree dispute between neighbours Quan Li and Shuang Yan Li (the applicants) and James Richardson and Doreen Finkelstein (the respondents). Their Croydon properties share a common boundary, being the rear boundary of each property. Several trees grow in the respondents' garden, including a large camphor laurel (the tree) near their rear boundary. An outbuilding on the applicants' property is close to the tree and beneath its crown. The applicants claim that the tree has damaged their outbuilding. They have applied to the Court pursuant to s 7 (Pt 2) of the Trees (Disputes Between Neighbours) Act 2006 (the Trees Act) seeking orders for the respondents to remove the tree and to pay for repairs to their outbuilding. The respondents wish to keep the tree.
2. Ms Finkelstein's name was mis-spelt on the application and has been recorded incorrectly. An order is made to correct her name.

Framework for this decision

1. Quan Li and Shuang Yan Li applied for orders to remedy damage, and to prevent further damage, to their property as a consequence of a tree on adjoining land (s 7 of the Trees Act). These are orders the Court may make (s 9). The Court is not required to make the orders that are sought, but can make orders as it thinks fit to remedy, restrain or prevent damage to the applicants' property, or to prevent injury to a person. In these proceedings, before making any orders, the Court must be satisfied: firstly, that the applicants have made reasonable effort to reach agreement with the respondents; and secondly, that the tree concerned has caused, is causing, or is likely in the near future to cause, damage to the applicants' property or is likely to injure someone (s 10). The Court must consider the matters at s 12 of the Trees Act before determining the application.
2. Due to the nature of the dispute, the issues to be considered and determined can be summarised as follows:
 - * Is the tree likely to cause injury?
 - * Has the tree damaged the applicants' outbuilding?
 - * If so, should the respondents pay for repairs to the applicants' outbuilding?
 - * Should the tree be removed?
 - * If the tree should be removed, who should pay the cost of its removal?
1. The hearing took place onsite, allowing the Court to view the tree and both properties. The parties were all self-represented. The applicants tendered a property damage report from Jie Yang, an engineer with Capita Yang Engineering, and a quotation for building repairs from George Liu of Lyd Master Pty Ltd. The respondents tendered a report from an arborist, Scott

Gatenby of Apex Tree & Garden Experts, a planning report from their son, Asher Richardson, and an invoice from Plumb Trees for past tree pruning works. I bring my own arboricultural expertise to this decision.

The tree

1. The camphor laurel (*Cinnamomum camphora*) is approximately 20 metres tall with a stem diameter greater than one metre. Its crown overhangs both the applicants' and the respondents' properties. The tree's stem divides above ground level into three stems. The stem unions appeared sound. Some large deadwood could be seen but the crown otherwise appeared free of significant hazards.
2. The tree's root buttress extends across the common boundary such that, at ground level, approximately 20% of the stem's basal area is on the applicants' land. The tree is principally on the respondents' land, so is situated on their land for the purposes of the Trees Act. Having been entirely on their land when it was smaller, the respondents own the tree.

The applicants made a reasonable effort to reach agreement

1. The applicants' first communications with the respondents regarding the tree were via conversation in 2018. The applicants raised their concerns about the tree being hazardous but did not mention damage to their outbuilding. The respondents engaged Mr Gatenby to assess the tree and to prepare a report. Mr Gatenby recommended that the tree is pruned every 3 or 4 years. Relying on this advice, the respondents refuse to remove the tree, while the applicants want nothing less than its removal. It being clear that the parties would not reach agreement, I am satisfied that the applicants made a reasonable effort to reach agreement.

Whether the tree is likely to cause injury

1. The applicants submitted that branches falling from the tree are likely to injure their family members. Having observed the tree, I agree that large dead branches are likely to fall and would cause injury if they struck somebody. This risk could be managed by regular pruning.

Whether the tree has caused damage

1. The rear external wall of the applicants' outbuilding is less than 500 mm from the base of the tree. Bricks in a central section of the wall, nearest the tree, have been removed and replaced with other cladding material. The applicants submitted that this was done by previous owners of their property because that section of the brick wall was damaged by the tree. This is possible, but nothing in evidence supports this.
2. Standing on the elevated rear deck of the respondents' dwelling, I observed that the outbuilding's rear roofline is raised nearest the tree, so that its central section is higher than each end of the roofline, and significantly so. As Mr Yang wrote in the building report

(Exhibit B): "...the metal roof the building has deformed significantly. A clear curved shape has been formed with the peak of the curve centred at the location align with [sic] the tree behind the building." The applicants submitted, and I accept, that firstly, their outbuilding was not constructed with this deformation, and secondly, that the tree is the principal cause of the roofline's current alignment. I find that the central part of the outbuilding's eastern wall, which is parallel with the common boundary, has been lifted by growth of the tree's root crown.

3. I observed the interior of the outbuilding, where the applicants pointed out gaps in internal walls. Mr Yang identified and described these cracks in his report. He surveyed the floor levels within the outbuilding and found the floor sloped downward at an average of 1.9° away from the eastern wall. Mr Yang concluded that the tree caused this damage to the outbuilding. My observations confirmed that the pattern of damage to the outbuilding's wall and floors is consistent with upward pressure from beneath its eastern wall in the area nearest the tree. The tree requires a large root crown that, as it has grown, has caused upward pressure to this part of the building.
4. I find that the tree has caused damage to the applicants' outbuilding. Before determining the remaining issues identified above at [4], I consider the relevant matters at s 12 of the Trees Act.

Consideration of relevant matters at s 12 of the Trees Act

1. The tree is principally on the respondents' land but the basal area of its stem extends across the common boundary onto the applicants' land. The applicants' outbuilding, which is damaged, is less than 500 mm from the base of the tree at ground level. The tree's branches extend over both the applicants' and the respondents' properties.
2. Burwood Council's (Council) consent would ordinarily be required to remove the tree, or to prune more than 10% of its crown, pursuant to the Burwood Development Control Plan 2012 (the Burwood DCP). According to the assessment process for a tree permit application, set out at Clause 6.1.5 of the Burwood DCP, Council will consider the following criteria when determining an application:

"• Whether the tree is causing or is likely to cause structural damage to a building in the near future or damage to Council infrastructure. Council may require that such an application be accompanied by a report from a practicing structural engineer.

- ...
- The trunk of the tree is located within three metres of a building or five metres in the case of the following species:
 - i) Camphor Laurel (*Cinnamomum camphora*).

...

- Whether the tree is a Camphor Laurel (*Cinnamomum camphora*) under 15m in height."
- 1. Evidence before the Court does not demonstrate that Council's consent for the tree's removal has been sought. Were Council required to determine such an application, Council would consider that the tree is a camphor laurel within five metres of a building, that it is causing structural damage to the building, and that a structural engineer has found that the tree damaged the building.
- 2. Pruning branches from the tree's crown would not prevent the tree's roots causing further damage to the applicants' outbuilding. Roots between the building and the tree cannot be cut as they are structural roots that the tree relies on for support. A root barrier cannot be installed between the building and the tree as that would require severing structural roots.
- 3. The tree makes a significant positive contribution to the amenity of both properties. It provides ecosystem services including shading, cooling, reducing water run-off, removing pollutants from the air, and removing and storing carbon. It is tall enough to be seen from streets to the east and west, contributing to public amenity.

Whether the tree should be removed

1. In light of the above, if there were reasonable means by which the tree could be retained without causing further damage to the applicants' outbuilding, they would be worth considering. However there are no reasonable alternatives to tree removal that would prevent further damage, so I find that the tree must be removed.

Compensation and cost of tree removal

1. The history of these properties is relevant to determining who should pay the costs of removing the tree and any costs incurred in repairing the outbuilding.
2. The tree is perhaps 70 years old or more (Mr Gatenby's report). Around 40 years ago the then-owner of the applicants' property obtained development consent from Council to build the outbuilding. In the notice of consent (appended to Mr Richardson's report), Council referred to the outbuilding variously as a brick storage shed and a garage. Conditions of the consent included that the garage not be used for human habitation.
3. The respondents came to their property more than 30 years ago, with the camphor laurel already a large tree in their back garden and the neighbour's storage shed near their common boundary. They submitted that they have always appreciated the tree and its benefits.

4. The applicants came to their property about 10 years ago. According to their own statement made during their submissions, the outbuilding's eastern wall near the tree had already been repaired. Soon afterwards, they carried out improvements to the outbuilding, adding internal walls, plastering the walls, installing a bathroom and a cooking area. The outbuilding then had all the hallmarks of a secondary dwelling, and by my observations at the hearing, it appears to have been used for human habitation.
5. I give little weight to any opinions expressed by Mr Richardson in his 'Expert Report' (Exhibit 1) as he is the respondents' son. He did not declare this within his report. Mr Richardson searched for any further development consents relating to the applicants' outbuilding and found none. I note relevantly that the applicants, given the opportunity, did not dispute this finding. If the applicants have obtained consent to use their outbuilding as a secondary dwelling, rather than as a storage shed, there is nothing in evidence to demonstrate this.
6. Approximately six years ago the respondents built a granny flat in their own back garden. They submitted that this was done with the tree's roots in mind, so that the tree was not damaged during construction and the tree's roots have not damaged their building.
7. In 2018 the applicants asked the respondents to remove the tree. The applicants offered to pay half the cost of its removal.
8. The applicants now want the tree removed to prevent it causing further damage to their outbuilding, and they want the respondents to pay for the cost of repairs to the building.
9. The respondents oppose removal of the tree. They obtained Mr Gatenby's report in 2018 and have had the tree pruned since then to remove hazardous branches, most recently in 2023. If the tree must be removed, the respondents submit that the applicants should pay some, if not all, of the cost of its removal.
10. In tree dispute proceedings that result in orders for tree works, the tree owner usually bears the cost of those works. Exceptions to this might arise when an applicant's acts or omissions have contributed to the need for those orders. This is a matter that the Court must consider, explicitly at ss 12(h) and 12(i) of the Trees Act.
11. In *Black v Johnson (No 2)* [2007] NSWLEC 513 at [15], the Court established the following Tree Disputes Principle:

"The existence of a tree prior to the construction of a structure which has subsequently been damaged by the tree is not a matter likely to be taken into consideration on the question of whether or not some order should be made for interference with or removal of that tree or other remedial work. On that question, the seriousness of the damage and any attendant risks are the primary matters for consideration.

If interference with or removal of the tree or other work is warranted because of the extent of the damage the tree has caused or risks now posed by the damage, the fact that the tree was already growing in the vicinity at the time the structure was built is a matter which may be relevant and appropriate to take into account on the question of who should undertake any work and/or apportionment of the cost of such work.

However, it will also be relevant to consider whether or not the tree was self-sown or was planted. If it was planted, consideration will need to be given to the appropriateness or otherwise of:

- the type of tree planted; and
- the suitability of the location in which it has been planted.

Equally, it will be relevant to consider whether the choice of location for the structure was unnecessary or avoidable or, on the other hand, if it would have been an unreasonable constraint on the development potential of the site had the existence of the tree limited that potential."

1. The Court has applied this principle where relevant when apportioning the cost of tree works; for instance, see *Watt v Menz* [2023] NSWLEC 1808.
2. A previous owner of the applicants' property chose to locate the storage shed very close to the tree. Had the owner considered all site conditions, the outbuilding might have been located further from the tree, or constructed with footings that would allow for the tree's future growth. While I am unaware of other site restrictions present at that time, I note that the north-eastern corner of the applicants' back garden now has clear space well away from the tree for such a building.
3. Although the outbuilding's eastern wall is mostly of brick construction, bricks in the central section nearest the tree have been covered by, or replaced by, other cladding material. During the onsite view, the applicants submitted that this was the situation when they purchased their property. They surmised that this was a result of the previous owner repairing the wall where it was damaged by the tree. Their submission demonstrates that the applicants, at the time they purchased their property, were aware of damage to the outbuilding and past works to repair the damage or, had they not been aware of this, they plainly could have made themselves aware of this at the time of purchase through a routine pre-purchase property inspection. Despite this, they then proceeded to undertake improvement works within the outbuilding. This fact is central to my determination of the issues of compensation for building repairs and the cost of tree removal.
4. Actions on the applicants' property – firstly by previous owners locating the outbuilding close to the tree, and secondly by the applicants undertaking improvements to the outbuilding when they knew, or ought to have known, that it was affected by the tree's growth – have resulted in the damage for which the applicants now seek compensation and have led to the unavoidable need for the tree's removal.

5. Actions on the respondents' property have not contributed to the damage, nor to the need to remove the tree. Considering the nature of the species, the tree was most likely self-sown. It turned out that it was suitably located as it grew to early maturity: near a boundary and at a suitable distance from any buildings for a few decades. The tree has grown, but this was foreseeable. The respondents' own outbuilding was later constructed with the tree in mind.
6. On their claim details form (Form H in Exhibit A) and in their submissions, the applicants intimated that their conversation with the respondents in 2018 identified issues both of branch-drop and building damage. There are no written communications from the time to demonstrate this. On the other hand, the respondents submitted that the 2018 conversation concerned the risk of branch-drop only. They submitted that they only became aware of damage to the applicants' outbuilding two days before they received a copy of the tree dispute application.

No compensation ordered

1. Returning to the principle in *Black v Johnson* (No 2), the situation I have described above does not point to any reason for the respondents to contribute to the cost of repairs to the applicants' outbuilding. They did not create a nuisance, nor did they knowingly continue a nuisance, that resulted in the damage. No orders will be made for compensation.

Tree removal costs shared

1. Although the need for removing the tree now arises from actions on the applicants' property, the tree's age and lifespan should be considered. Were it free of blame in any property damage, the tree would likely need removal within 20 years or so due its age. Some decline is already apparent in its crown, but is likely to develop slowly. In this scenario, at some time in the future the tree's owner would bear the cost of its removal.
2. Cost apportionment in a case such as this cannot be a mathematically precise process using calculations or quantities. It is a rough process, an estimate, a qualitative decision considering the factors described above. Although it should strive for fairness, it still might not be considered reasonable by either party. Here, I consider it fair and reasonable, with all the evidence and submissions in mind, to apportion the cost of tree removal equally between the parties. The respondents will engage an arborist to remove the tree. Access for the works should be wherever it is most efficient, which may well be through the applicants' property. The respondents will provide the applicants with copies of the quotes they obtain, copies of the contractor's insurance and qualifications, and a copy of the paid invoice on completion of the works. The applicants will then reimburse the respondents 50% of the invoice amount.

Orders

1. The Court orders:

1. The second respondent's name is corrected to Doreen Finkelstein.
2. The application is granted only to the extent of the following orders.
3. Within 30 days of the date of these orders, the respondents are to obtain at least two quotes for removing the camphor laurel at their rear boundary (the tree) to no more than 200 mm above ground level. The quotes must be provided by appropriately insured arboricultural contractors with suitably qualified (minimum AQF level 3) arborists who will carry out the work. The quotes must specify areas required for access for the works, including for vehicles. Access may be through either the applicants' or the respondents' properties, whichever is the most efficient.
4. Within 30 days of the date of these orders, the respondents are to provide the applicants with copies of the quotes obtained in Order (3) and evidence of their preferred contractor's insurance and qualifications.
5. The respondents are to engage the contractor of their choice to remove the tree to no more than 200 mm above ground level within 90 days of the date of these orders. The tree removal works are to be done in accordance with the Safe Work Australia (2016) 'Guide to managing risks of tree trimming and removal work'.
6. The respondents are to give the applicants at least one week's notice of the works in Order (5).
7. The applicants and respondents are to provide any access for the works in Order (5) to be completed during reasonable hours of the day.
8. The applicants are to reimburse the respondents 50% of the cost of the tree removal works within 14 days of receiving a copy of the paid invoice for the works.
9. If the respondents do not provide the applicants with a copy of the paid invoice within 30 days of completion of the tree removal works, order (8) lapses.
10. The exhibits are returned, other than Exhibits A-C.

.....

D Galwey

Acting Commissioner of the Court

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Decision last updated: 15 October 2024

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