

AUSTRALIA / JUDGMENT

Mcpherson v Mak

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Land and Environment Court New South Wales Medium Neutral Citation: Mcpherson v Mak [2026] NSWLEC 1596 Hearing dates: 3 September 2026 Date of orders: 3 September 2026 Decision date: 03 September 2026 Jurisdiction: Class 2 Before: Galwey AC Decision: The Court orders:

- (1) The application is granted to the extent of the following orders.
- (2) Every two years during October, commencing October 2026, the Respondents are to engage and pay for a suitably qualified (minimum AQF level 3) and insured arborist to inspect the lemon-scented gum and prune it to remove all dead branches greater than 25 mm in diameter and any other branches with a failure likelihood assessed as ‘probable’ within 2 years or ‘imminent’. These works must be done in accordance with Australian Standard 4373:2007 ‘Pruning of amenity trees’ and the SafeWork NSW (2026) ‘Tree works’ Code of Practice.
- (3) The Respondents are to provide the Applicant with at least 7 days notice of the works in Order (2).
- (4) On at least 7 days notice from the Respondents, the Applicant is to allow access to their property during reasonable hours of the day for the purpose of completing the works in Order (2). Catchwords: TREES (DISPUTES BETWEEN NEIGHBOURS) — Pt 2 application — neighbouring tree — a large tree affects several properties — whether the tree has caused damage — whether the tree is likely to cause damage or injury — amount of debris falling from the tree — benefits of the tree — orders for regular tree maintenance Legislation Cited: Trees (Disputes Between Neighbours) Act 2006 (NSW), ss 6, 7, 8, 9, 10, 12 Cases Cited: Barker v Kyriakides [2007] NSWLEC 292 Texts Cited: Australian Standard 4373:2007, Pruning of amenity trees SafeWork NSW ‘Tree works’ Code of Practice (March 2026) Category: Principal judgment Parties: Jacqueline Suzanne Mcpherson (Applicant) Jonathan Mak (First Respondent) Elizabeth Mak (Second Respondent) Representation: Counsel: K Lorden (Agent) (Applicant) J Mak (Self-represented) (First Respondent) No appearance (Second Respondent) File Number(s): 2026/295174 Publication restriction: Nil

Judgment

This decision was given as an extemporaneous decision. It has been revised and edited prior to publication.

Background

COMMISSIONER: A large and mature lemon-scented gum (*Corymbia citriodora*) (the tree) grows in the small rear courtyard of Jonathan and Elizabeth Mak's Balmain property at 22 Mort Street (No 22). The tree's stem is next to the Maks' side boundary; the tree's broad crown spreads over at least three neighbouring dwellings as well as the Maks' own dwelling. Jacqueline Mcpherson owns the adjoining property at 48 Curtin Road (No 48). Ms Mcpherson has applied to the Court pursuant to s 7 of the Trees (Disputes Between Neighbours) Act 2006 (NSW) (the Trees Act) seeking orders for the Maks to remove all tree branches overhanging No 48 and to maintain the tree so that no branches overhang or fall onto No 48. The on-site hearing allowed the Court to inspect the trees and both properties. Kate Lorden, managing agent of No 48, represented the Applicant; Mr Mak spoke for the Respondents. Jurisdiction to make orders The orders that Ms Mcpherson seeks to prevent the tree causing damage or injury are orders the Court could make pursuant to s 9 of the Trees Act if all jurisdictional tests are met, although the Court may make different orders as it sees fit in the circumstances. Reasonable effort to reach agreement Pursuant to s 10(1) of the Trees Act, the Court must not make an order in these proceedings unless it is satisfied that the Applicant has made a reasonable effort to reach agreement with the Respondents and has given the required notice of the application. Ms Lorden has met with the Maks and another neighbour affected by the tree to negotiate a suitable outcome. All agreed that the tree should be maintained so as to avoid it causing damage or injury, but could not agree on who should bear the cost of any works. I am satisfied that the Applicant has made a reasonable effort to reach agreement with the Respondents. The timeframe for the final hearing allowed Ms Mcpherson to provide notice of the application as required by s 8 of the Trees Act. Damage or injury The Court may only make orders in these proceedings if the hurdle at s 10(2) of the Trees Act is passed. 10 Matters of which Court must be satisfied before making an order

- (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. The tree appears to be in typical condition for the species. Relying my own arboricultural expertise, I observed no structural defects in its stem and main branches. Small deadwood is present throughout the crown. One or two larger dead branches are present, but they are not over Ms Mcpherson's property. The tree drops copious amounts of leaves, dead twigs and small branches, buds and fruit. The quantity of debris is a result of the tree's size rather than any decline in its condition. Ms Lorden submits that both the owner and the tenant of No 48 suffer from the amount of debris. The owner has installed gutter guard, but must still pay for regular removal of debris from the roof and gutters. Pavers in the courtyard must be pressure-washed regularly. The tenant cannot use the narrow paved courtyard between No 48's dwelling and the boundary fence due to the amount of debris. The clothesline is in this courtyard. The dwelling at No 48 suffered water ingress some months ago. Ms Lorden submits that this resulted from the

tree's debris blocking gutters. A report and invoice from Max Plumbing – Building and Roofing Group in March 2026 notes: "Upon inspection, it was identified that the box gutter was completely blocked with accumulated debris, preventing the effective drainage of rainwater. This obstruction was found to be a significant contributor to water overflow and subsequent moisture ingress along the hallway." But this was not the only factor contributing to water ingress. The report continues: "A detailed examination of the roof flashings revealed several gaps and loosened joints along the top flashing, providing clear points where water could penetrate into the building fabric." This is not to say that debris did not contribute to water ingress, only that other factors also contributed. I am satisfied that debris from the tree caused damage to property at No 48 by blocking gutters and causing them to overflow, contributing to water ingress to the dwelling. Ms Lorden submits that a branch fell through the skylight of a neighbouring townhouse. She says it is possible that branches could fall and cause similar damage to the townhouse at No 48. I accept that small dead branches that are likely to fall within the near future could cause minor damage to the roof at No 48 or more severe damage to a skylight. I am satisfied that the tree is likely to cause damage in the near future. Pursuant to s 10(2) of the Trees Act, orders can be made in these proceedings to prevent further damage or injury. Relevant matters The Court is to consider matters at s 12 of the Trees Act before determining the application. The tree is close to the common boundary; almost a quarter of its crown overhangs the Applicant's dwelling. The tree is within a Heritage Conservation Area. Inner West Council's consent via a Development Application would ordinarily be required to prune or otherwise interfere with the tree. Pursuant to s 6(3) of the Trees Act, Council's consent would not be required for any tree works ordered in these proceedings. The Court is to consider the tree's various environmental and social benefits. The tree contributes significantly to the amenity of the Respondents' land and to public amenity. The tree provides significant shading, cooling and other ecosystem services. The tree provides habitat for fauna. The tree was present when the townhouse at No 48 was constructed. The likely effects of tree debris were known at the time the dwelling's roof and gutters were designed and installed. The Maks say they maintain the tree. They had it pruned every few years up until five years ago. They say they regularly send photos of the tree to a tree-lopper friend for an assessment of its safety. Ms Mcpherson wants a proper long-term maintenance regime for the tree. She arranged for an arborist to quote to prune the tree, but Mr Mak was reluctant to apply for Council's consent as he believed Council would not approve the extent of pruning requested by the Applicant. While small dead branches are likely to cause damage, on my assessment the tree otherwise appears unlikely to cause damage or injury. The risk can be managed by regular maintenance. Removal of larger branches over No 48 is unnecessary and is disproportionate to the risk. Regarding debris that falls onto No 48, removing all branches above No 48 would also be disproportionate to the nuisance caused to the owner and occupant. In *Barker v Kyriakides* [2007] NSWLEC 292 at [20], the Court established the following principle. "For people who live in urban environments, it is appropriate to expect that some degree of house exterior and grounds maintenance will be required in order to appreciate and retain the aesthetic and environmental benefits of having trees in such an urban environment. In

particular, it is reasonable to expect people living in such an environment might need to clean the gutters and the surrounds of their houses on a regular basis. The dropping of leaves, flowers, fruit, seeds or small elements of deadwood by urban trees ordinarily will not provide the basis for ordering removal of or intervention with an urban tree.” Applying that principle here, the debris that falls onto No 48, including onto the roof and into gutters, does not provide the basis for ordering removal of branches over No 48. Although the Maks have a friend who looks at photos of their tree, that falls short of the level of professional inspection that a tree of this size and in this location warrants. For this reason, orders will be made for the Maks to have the tree professionally inspected and maintained regularly, every two years.

Orders

The Court orders: The application is granted to the extent of the following orders. Every two years during October, commencing October 2026, the Respondents are to engage and pay for a suitably qualified (minimum AQF level 3) and insured arborist to inspect the lemon-scented gum and prune it to remove all dead branches greater than 25 mm in diameter and any other branches with a failure likelihood assessed as ‘probable’ within 2 years or ‘imminent’. These works must be done in accordance with Australian Standard 4373:2007 ‘Pruning of amenity trees’ and the SafeWork NSW (2026) ‘Tree works’ Code of Practice. The Respondents are to provide the Applicant with at least 7 days notice of the works in Order (2). On at least 7 days notice from the Respondents, the Applicant is to allow access to their property during reasonable hours of the day for the purpose of completing the works in Order (2). D Galwey Acting Commissioner of the Court

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