

AUSTRALIA / JUDGMENT

Michaels v Lei [2023] NSWLEC 1168

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Land and Environment Court

New South Wales

Medium Neutral Citation: Michaels v Lei [2023] NSWLEC 1168

Hearing dates: 23 January 2023

Date of orders: 12 April 2023

Decision date: 12 April 2023

Jurisdiction: Class 2

Before: Douglas AC

Decision: The Court orders:

(1) The application is refused.

Catchwords: TREES (DISPUTES BETWEEN NEIGHBOURS) – damage claimed - apprehension of further damage and of injury – no damage proven – maintenance expectation is reasonable – risk of injury is low – significant s12 considerations

Legislation Cited: Trees (Disputes Between Neighbours) Act 2006, Pt 2 ss 7, 8, 9, 10, 12

Cases Cited: Barker v Kyriakides [2007] NSWLEC 292

Gardiner v Bisley [2021] NSWLEC 1176

Hendry & anor v Olsson & anor [2010] NSWLEC 1302

Le Bron v Chidiac [2019] NSWLEC 1194

McPherson v Lake [2017] NSWLEC 1081

Robson v Leischke (2008) 72 NSWLR 98; (2008) 159 LGERA 280; [2008] NSWLEC 152

Yang v Scerri [2007] NSWLEC 592

Texts Cited: Ku-ring-gai Development Control Plan

Category: Principal judgment

Parties: Allen Michaels (Applicant)

Alberto Lei (First Respondent)

Wai Au (Second Respondent)

Representation: Counsel:

A Michaels (Self-represented) (Applicant)

A Lei (Self-represented) (First Respondent)

W Au (Self-represented) (Second Respondent)

File Number(s): 2022/286579

Publication restriction: Nil

JUDGMENT

Background

1. The respondents, Mr Lei and Ms Au, occupied their dwelling in Gordon in 2012, while the applicant, Mr Michaels, purchased the neighbouring property to the west in about 2014. The parties share a rear north-south boundary.
2. A mature *Ulmus parvifolia* (Chinese Weeping Elm) (the tree) is located in the back yard of the respondents' property, about 3 metres (m) from the common rear boundary, and about 1m from the respondents' northern side boundary.
3. In 2017, the applicant demolished his existing dwelling and built a new dwelling and also installed an inground swimming pool in his back yard, partly under the canopy of the tree. Based on aerial photographs included at question 2 of the Tree Dispute Claim Details (Form H), it appeared that at the time of the pool's installation, the tree's canopy extended over the common boundary by about 4 – 5m. This was consistent with an aerial photograph from Metromap, dated 1 April 2018, which was supplied by the respondents.
4. The eastern side of the pool is about 3m from the common boundary, with tiled pool surrounds extending to this boundary. The pool filter was installed in the north-eastern corner of the yard, adjacent to the common boundary. Therefore, the tree's canopy primarily overhung the tiled pool surrounds but also encroached above the pool by about 2m.
5. The house and pool construction were completed in 2019, and in August 2019, the applicant contacted the respondents, advising that:

"we need you to trim all your tree branches sticking into and above our property ASAP and before any further damages caused and/or dirt accumulation from your falling leaves above our property and swimming pool."

1. In a subsequent message to the respondents in August 2019, the applicant advised that he had confirmed with Ku-ring-gai Council (Council) that it was the respondents' "responsibility to trim your tree (extending above our property) to avoid causing further damages to our properties and avoid causing injuries to us". The applicant also provided notice of his intention to make an application to the Land and Environment Court (LEC) including a claim for legal fees and charges, should the respondents "refuse to prune your tree branches above our property", to avoid causing further damages.
2. The respondents sought clarification from the applicant of "what damages the tree has caused you so far" but appeared to have had no response. Subsequently, the respondents organised mediation through a Community Justice Centre which both parties attended at Hornsby Court, but no agreement was reached.
3. On 25 September 2019, after the mediation, the applicant emailed the respondents and advised that the pool was now in use and the "Chinese Elm tree branches are stretching unlawfully about 6 metres above our swimming pool area which is a great danger (i.e. very high life and personal injury risks)". The applicant put the respondents on notice of liability for any "dangerous consequences", and again threatened legal action should the respondents fail to "maintain your tree in a proper condition by law".
4. On 4 October 2019, the respondents had the tree assessed for risk by Mr Alexis Anderson, an Australian Qualification Framework (AQF) Level 5 arborist, who rated the tree's risk as low. Nonetheless, apparently frightened of liability for injury the tree may cause, the respondents applied to Council to remove the tree, but this was refused. Permission was granted, however, for pruning a maximum of 10% of the tree's foliage.
5. On 4 November 2019, the applicant confirmed to Ms Au that the extent of pruning he required was to the common boundary. This would have constituted about 25% of the tree's foliage, thus much more than allowed by Council.
6. On 26 November 2019, a severe storm impacted the Ku-ring-gai Local Government Area (LGA), uprooting and damaging trees and cutting electricity to about 45,000 households. The LGA was declared a natural disaster area.
7. Two mid-sized branches on the applicant's side of the tree broke in this storm but remained partially attached. The respondents called the State Emergency Service (SES) who, upon attending the site, advised that the tree was "a lower priority and no immediate danger". This branch damage prompted a further request from the applicant for intervention with the tree, so on 9 December 2019, the respondents requested that a Council Tree Management Officer reassess their application for tree removal. Mr Garton, an AQF level 5 arborist from Council, assessed photos of the damage provided by the respondents and advised that:

"It appears the tree will make a full recovery. Removal cannot be approved on 2 failed branches caused by a weather event. Please remove the hanging branches to reduce the risk."

1. The respondents engaged contractors to remove the hanging branches and reduce the extent of the canopy overhanging the applicant's land, as advised by Mr Anderson in his risk assessment of 4 October 2019, and in keeping with Council permission allowing maximum pruning of 10% of the tree's foliage.
2. On 6 August 2020, the applicant advised the respondents that he would proceed with legal action if the "tree branches stretching above our property and damaging our property and pool" were not removed. The applicant offered to finance these proposed works because the respondents had paid for the previous pruning.
3. The respondents provided conditional consent to the applicant, the primary conditions being adherence to Council's Tree Preservation Order, no pruning of branches larger than 50mm at their branch collar so as to comply with Ku-ring-gai Council's Development Control Plan (DCP) for permission exempt pruning, no access to their property for the works, and prior agreement as to a date and time for the works. The applicant accepted said conditions and the works were completed on 26 August 2020, notwithstanding that the respondents submitted that they received no notification of the date and time for the works and were absent when the pruning was undertaken.
4. On 6 September 2022, the applicant notified the respondent that "it's time to prune your Chinese Elm branches located above our property before these start to damage our swimming pool or fall on our pool again". In a series of terse emails, the applicant insisted that Council permission was not required if the pruning was restricted to less than 10% of the tree's foliage, while the respondents claimed that Council permission was needed for the desired pruning.
5. The parties reached an impasse, and consequently, the applicant lodged an application to LEC, pursuant to s 7 of Pt 2 of the Trees (Disputes between Neighbours) Act 2006 (the Trees Act), in order to remedy damage that the tree has caused, is causing, or is likely to cause in the near future, and risk of injury.
6. The applicant proposed that the Court makes the following orders:
 1. To immediately allow applicant to prune, at applicant's cost, the branches of the tree hanging above applicant's swimming pool in accordance with Ku-ring-gai Council's DCP Part 13.
 2. The respondents to pay the applicant the amount of \$1,217.43 being compensation for damages to the applicant swimming pool caused by the respondents' tree/tree branches hanging above the applicant's swimming pool.
 3. To continuously adhere to Ku-ring-gai Council DCP Part 13, Clause 13.2, Control Item 3, "Minor pruning" applies.

The on-site hearing

1. The hearing commenced in the respondents' rear yard, with both parties in attendance. The tree is about 11m tall, with no apparent sign of structural weakness in the trunks, nor indication of faults at branch junctions. Based on my external inspection, the tree appeared to be strong, sound and healthy.
2. The Court moved to the applicant's back yard to assess the extent of damage attributable to the tree, then to the applicant's al fresco area for submissions.
3. Moderate to heavy past pruning had been undertaken on the tree. The majority of the lower overhanging canopy had been pruned quite heavily, leaving the upper canopy overhanging the common boundary and the northern corner of the tiled pool surrounds. The length of these higher branches had been reduction pruned so that the canopy no longer encroached over the pool surface.
4. The applicant noted the leaves, seeds, bark and small twigs on the tiles and in the pool that had fallen and blown from the tree and spoke of them clogging the skimmer box. The applicant claimed that the maintenance required to clean this tree debris from the pool and its tile surrounds, in order to keep the pool healthy, sanitary and useable was excessive and unreasonably time consuming.

Jurisdictional requirements

1. With respect to s 7 of the Trees Act, 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. The applicant has satisfied the requirement under s 8 of the Trees Act: to serve notice to the respondents more than 21 days prior to the proceedings.

Reasonable effort to reach agreement

1. Section 10(1)(a) of the Trees Act requires that the applicant has made a reasonable effort to reach agreement with the owner of the land on which the tree is situated. The respondents were upset by the applicant's conduct and the nature of his negotiations and suggested that the applicant's efforts to reach agreement were unreasonable. Preston CJ provides extensive commentary on this issue in *Robson v Leischke* (2008) 72 NSWLR 98; (2008) 159 LGERA 280; [2008] NSWLEC 152 (Robson). At [191] – [194], his Honour says:

"191 The requirement in s 10(1)(a) of the Trees (Disputes Between Neighbours) Act 2006 that the applicant make a reasonable effort to reach agreement with the tree landowner is consistent with the recommendations of the New South Wales Law Reform Commission that neighbours should endeavour to settle a dispute about trees between themselves before taking court action. The Law Reform Commission had noted in its Report 88, Neighbour and Neighbour Relations that:

"[t]he remedies proposed in this Report should be regarded as remedies of last resort. Talking to the neighbouring land owner and trying to find a mutually acceptable solution should be the first step when a dispute arises." para 1.13, p 7.

192 The Trees (Disputes Between Neighbours) Act 2006 does not prescribe any particular means by which an applicant must make a reasonable effort to reach agreement with the tree landowner. The New South Wales Law Reform Commission had recommended in its report a process whereby the affected landowner would write a letter before taking any court action to the tree landowner telling them what problems the tree is causing and asking them to abate the problem and, if the affected landowner has suffered damage, asking the tree landowner to pay the amount needed to compensate for the damage caused: see para 2.45, p 33. Through this mechanism, the affected landowner could negotiate. If the tree landowner did not respond to the notice within the specified time, the affected landowner could then apply to the Local Court for an order: para 2.46, p 33.

193 The Trees (Disputes Between Neighbours) Act 2006 did not adopt the procedural requirement of giving notice before commencing legal action, either as a precondition to taking action or as the means by which the applicant must make a reasonable effort to reach agreement. The notification requirement under s 8 of the Trees (Disputes Between Neighbours) Act 2006 is of lodging of the application and the terms of any order sought. Of course, such notification may prompt discussions between the parties, but it serves a different function to the Law Reform Commission's recommendation of giving notice before taking court action.

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 applicant repeatedly contacted the respondents by text messages and emails between 2019 and 2022 and made clear his requirement that he wanted the overhanging tree branches pruned back to the common boundary. Though the tone and content of the applicant's correspondence would generally not be considered friendly or civil, as his Honour says at [192] of Robson, the Trees Act "does not prescribe any particular means by

which an applicant must make a reasonable effort to reach agreement with the tree landowner", nor the manner of the applicant's negotiations.

2. During the hearing's oral submissions, I had cause to caution the applicant for disdainful conduct towards the respondents, and proposed adjourning to a recorded hearing at the LEC in Macquarie Street. Subsequently, the applicant was more constructive towards resolution of the dispute. As his Honour said at [194] of Robson;

"...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. In this context, I am therefore satisfied that the requirements of s 10(1)(a) of the Trees Act have been met; that the applicant has made a reasonable effort to reach agreement with the owners of the land on which the tree is situated.

Damage as a consequence of the tree

1. The next major test that is posed, by s 10(2) of the Trees Act, is that the Court must be satisfied that the tree concerned has caused, is causing or is likely, in the near future, to cause damage to the applicant's property, or is likely to cause injury to any person.

Debris dropping in and around pool

1. At Question 4 of Form H, which required a detailed description of the damage the tree has caused, is causing, or is likely to cause in the near future, the applicant submitted that "the tree and its branches hanging directly over our property/swimming pool has been causing continuous damages". The applicant detailed this damage as; "this tree dumps its leaves, small and medium sized branches, seeds and tree skin particles onto our pool which causes blockage to our pool filters, contamination to our swimming pool water and requires extraordinary cleaning the pool and pool equipment to be able to keep it in an acceptable sanitary condition and healthy to use". The applicant also noted that "we need to continuously clean (i.e. sweep or hose off with water) the pool deck areas located underneath their tree branches".

2. The applicant claimed that:

"The stuff falling (from the tree) is damaging/staining our swimming pool surfaces and our pool deck, we needed to drain our pool completely and had a professional pool maintenance company clean it by applying special liquid acid and we needed to hire a water pressure pump/gurney in order to remove the stains off our tiled pool deck."

1. The applicant further submitted that "we need to keep our pool cleaning pumps running for at least 10 hours a day as opposed to 4-6 hours maximum recommended by the professional swimming pool maintenance company". He claimed that "this is costing us much more on our electricity bill and is aging/ overloading our pool pumps unnecessarily".

2. The applicant noted that:

"Finally, we need to extraordinarily and continuously monitor our swimming pool and its chemicals to ensure that the stuff falling from their tree/tree branches (especially the stuff that our pool pumps can't clear due to large amounts and/or large sizes of stuff falling on the pool) is not contaminating the pool water if left in the water for more than an hour or two – as such we need to manually remove the above stuff at least three times a week for ten months a year."

1. The applicant concluded that:

"We have been having an ongoing nightmare since we built our swimming pool in 2017 due to their tree and their deliberate ignorance of the council's rules and controls relating to tree maintenance etc".

1. The applicant claimed \$1,217.43 compensation in relation to the aforementioned claims, comprising \$431.43 for excessive electricity expenses, \$450 for acid wash to remove stains, \$250 for additional arborist fees and \$86 for gurney hire.
2. Following the initial directions hearing on 15 November 2022, the applicant made an additional compensation claim for \$1,971.58 because the respondents "failed to give us the go ahead" at the directions hearing to prune the branches of the tree (less than 50mm in diameter) overhanging the applicant's property.
3. This additional compensation claim comprised \$81.58 for excess electricity usage up to the date of the onsite hearing, \$1,640 for a pool cover and \$250 for additional swimming pool chemicals.

Findings

1. Annoyance or discomfort from debris dropping or blowing from a tree onto neighbouring land is a common theme in many applications made under Pt 2 of the Trees Act, and his Honour provides the following commentary at [171] of Robson:

"However, annoyance or discomfort to the occupier of the adjoining land occasioned by nuisances of the third kind, is not "damage to property on the land" within s 7 of the Trees (Disputes Between Neighbours) Act 2006. Hence, leaves, fruits, seeds, twigs, bark or flowers of trees blown onto a neighbour's land might cause annoyance or discomfort to a neighbour, but unless they also cause damage to property on the neighbour's land they will not be actionable under s 7."

1. The related issue of encroachment of branches over neighbouring land is addressed at [56] of Robson where his Honour, discussing the issue of nuisance, states that "mere encroachment into the neighbour's land is insufficient to complete a cause of action" under the Trees Act.
2. The applicant provided no invoices for pump repairs, no expert report relating to recommended pump usage, nor any other evidence to support his claim of "overloading our pool pumps" as a result of debris that fell or blew in from the tree, nor did he provide a report from a qualified arborist.
3. The claim of excessive maintenance that is also commonly made by applicants is addressed in *Barker v Kyriakides* [2007] NSWLEC 292 (Barker), which, at [20], establishes the Tree Dispute Principle;

"It is now appropriate to state these in a more specific form as a principle which may be applied when considering urban trees and ordinary maintenance issues arising from them. We state the principle in the following terms:

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."

1. This tree dispute principle established in *Barker* has been consistently applied by the Court and it applies here with respect to all tree debris described by the applicant, observed on his land, and shown in the extensive portfolio of photographs supplied to the Court by the applicant. Though the applicant claimed that "medium sized branches" regularly fell from the tree onto his land, I saw none on the ground at the onsite hearing, nor in his myriad photographs, nor did I see wounds indicative of such branches having fallen from the tree.
2. The tree had been regularly pruned over recent years and I observed no or very few dead branches on the tree that may be considered larger than "twigs". Therefore, all the general maintenance required to deal with "leaves, small and medium sized branches, seeds and tree skin particles (that the tree dumps) onto our pool" is addressed and refused through the maintenance expectation that arises from the tree dispute principle established in *Barker*.
3. Cleaning of stains that may have arisen from mould and slime associated with tree debris, through high pressure water blasting or application of acid, is also accounted for and refused, as the maintenance expectation arising from *Barker* was extended in *Hendry & anor v Olsson & anor* [2010] NSWLEC 1302 at [11] to [14], to include the cleaning of mould and slime. Claims of excessive mould has been a common theme in applications made under Pt 2 of the Trees Act since 2020. During this period, Australia has experienced 3

successive La Nina weather cycles, and the annual rainfall in Sydney has been markedly greater than average levels. This reality has accounted for the majority, if not all of such claims.

4. Even though mould may also have grown on honey dew excreted by sap sucking insects that may occasionally impact the tree, there is no remedy for this available under the Trees Act. The Court has decided that damage, or risk of injury, must be caused by the tree itself, not by an animal living in or on the tree.
5. This is explained in Robson at [189], where his Honour says:

"Finally, the specification of the tree as being a cause of damage to property or injury to any person excludes damage or injury directly caused by animals, such as mammals, birds, reptiles or insects, which may be attracted to a tree or use it for habitat. Thus, although a tree when it flowers might attract bees seeking nectar in the flowers, and the presence of the bees might increase the risk of persons in the vicinity being stung by bees, it is not the tree itself that is likely to cause such injury of bee sting to any person, but rather it is the bees: see *Immarrata v Mourikis* [2007] NSWLEC 601 (12 September 2007) (Bly C, Fakes AC). Similarly, the fact that an animal which has caused, is causing or is likely to cause in the near future damage to property on adjoining land, uses a tree as habitat, such as for feeding, roosting or nesting, does not result in the tree itself having caused, causing or being likely to cause in the near future damage to the applicant's property: *Dooley v Newell* [2007] NSWLEC 715 (23 October 2007) (Moore C, Thyer AC) at [22]-[23]."

1. Consequently, the claim for \$450 for acid wash to remove stains and \$86 for gurney hire is refused.
2. As to the time and "additional" electricity incurred to clear debris from the pool, to clean filters, and to monitor and balance chemicals, any extra maintenance burden related to the tree is covered by Barker. While the nature of the required cleaning may vary in different contexts, such as where glass skylights were installed under an existing tree, the maintenance expectation arising from the tree dispute principle established in Barker remains.
3. As I said at [71] of *Gardiner v Bisley* [2021] NSWLEC 1176, in a similar situation:

"Additionally, regardless of whether tree debris drops into the applicant's pool, resulting in more cleaning and addition of chemical or other ameliorants to stabilise water requirements than may be the case in their absence, upon purchasing the property about five years ago, it should have been obvious to the applicant that the tree was large and well established, that its canopy extended over the pool, and that such additional maintenance would be required. In such a scenario, it is unreasonable to expect that the tree be removed or severely pruned, to eliminate or reduce this debris, when the tree long predated the pool's installation."

1. Particularly when a neighbour's tree had been long established prior to the applicant choosing to install a swimming pool in close proximity, any "extra" maintenance required by the applicant as a result of the tree is a reasonable expectation. In *Le Bron v Chidiac* [2019] NSWLEC 1194, at [35], the Court found:

"...that it is unreasonable to locate a pool under the canopy of a large, long-established tree, and to not expect to take a level of responsibility for the refuse that will naturally fall from it..."

1. Consequently, the applicant's choice to purchase a pool cover to reduce the tree debris dropping or blowing into the pool and thus the associated maintenance burden is a sensible decision to manage the maintenance expectation that arises from *Barker*, rather than from damage to the pool.
2. The LGA, including the applicant's immediate locality, is characterised by a dense cover of amenity and tall forest trees, and, because of the contribution to privacy and the myriad environmental services that the tree's provide, this is widely known to enhance property values. Even where trees do not directly overhang pools, it is common for residents to employ pool covers to manage debris that may blow in from trees in neighbouring properties.
3. As such, it is a reasonable expectation for the applicant to purchase a pool cover in this context, and I am not satisfied that this expense arose from damage to the pool. Rather, had the pool cover purchase been made prior to March 2022, the applicant's maintenance burden, filter usage, and electricity cost could have been reduced sooner.
4. The applicant claimed \$250 for additional arborist fees, said to have been incurred because the respondents would not allow the applicant's contracted arborists to access the tree from the respondents' land, for pruning in 2020.
5. This \$250 claim is based on an unreasonable expectation. The respondents have a legal right to refuse to permit the applicant or his contracted arborists to enter onto their property. It is not surprising that this occurred considering the tenor of much of the correspondence from the applicant. The respondents noted that the applicant provided no evidence underpinning the quantification of this \$250 claim, and I found this also. Therefore, this \$250 claim is also refused.
6. As a result of all these considerations, none of the applicant's claims constitute past, present or likely near future damage under the Trees Act, where, based on the decision in *Yang v Scerri* [2007] NSWLEC 592, the near future is defined, as a rule of thumb, to be a period of one year.
7. All the applicant's claims of damage arise from maintenance, which the Court is satisfied, in this context, is reasonable maintenance based on the tree dispute principle established in *Barker*. Consequently, no remedy is available under the jurisdiction of the Trees Act.

Risk of injury

1. At Question 9 of Form H, which required a detailed description of the likelihood of injury to people caused by the tree, the applicant noted that:

"Due to the serious fact that they refused and still refuse to carry (out) the essential maintenance on their tree, it is extremely likely that their tree branches can snap off any time and fall onto our swimming pool and deck area directly underneath this tree which means it is an extremely high risk of serious injury to our family members."

Findings

1. Using the guidance decision published in *McPherson v Lake* [2017] NSWLEC 1081, at [10], with respect to injury, the Court considers the risk posed by a tree based on the characteristics of the tree, any history of previous failures and the circumstances of the site apparent at the time of the hearing.
2. While the question of damage as a result of the tree related only to the applicant's land, risk of injury covers both parties' properties, and relevant surrounding areas.
3. Notwithstanding this, there are no obvious characteristics of this tree that cause concern with respect to risk of injury. No evidence of failures of overhanging branches has been submitted, other than the two branches that broke in storm conditions and remained attached to the tree, and even those were without consequence. As noted by Mr Garton of Council, intervention with the tree "cannot be approved on 2 failed branches caused by a weather event", particularly one involving extreme conditions sufficient to uproot many trees and result in the LGA being declared a natural disaster area.
4. Readily available research evidence shows that people are far less likely to go outside for recreation or other reasons during windy conditions, and particularly during storms. Therefore, though branches may be more likely to break from trees during periods of strong winds, the occupancy of outdoor areas is normally much lower than usual, and the likelihood of branches impacting people is thus reduced.
5. Though branches may shed from well-maintained trees, this is unlikely during calm conditions. Research from both Australia and England shows that the probability of serious injury from such trees is extremely low; akin to the probability of serious injury from shark attack or bee stings. This tree has been regularly inspected and, except for excessive pruning, has been well maintained.
6. Should the applicant remain concerned about the risk associated with the tree to people occupying the pool surrounds under the overhanging canopy, readily available means can reduce this already low risk even further. The area under the overhanging canopy is only a small proportion of the total available area surrounding the pool, and thus there is ample opportunity to position oneself elsewhere. Having said this, the tree would provide shading and the risks associated with falling branches may well be less than those associated with

skin cancer from exposure to the sun.

7. Encroaching branches had been reduced by pruning, most recently in 2020, and did not currently extend over the applicant's pool. Even when the tree's canopy did extend over the pool in 2019, when the respondents procured a risk assessment from a suitably qualified AQF level 5 arborist, the outcome of this assessment was low risk.
8. The applicant provided no risk assessment or other reliable evidence to support his claim that the tree presents "an extremely high risk of serious injury to our family members", or that it presents even a moderate risk.
9. Based on the arborist's risk assessment, my inspection, and the arboricultural expertise I bring to the Court, I am satisfied that the tree is sound and safe, and that it presents a low and acceptable risk of injury.
10. As a consequence, s 10(2) of the Trees Act is not satisfied and I have no jurisdiction to make orders.

Discretionary matters – s 12

1. As neither damage nor injury has been proven by the applicant to the satisfaction of the jurisdictional tests at s 10 of the Trees Act, the Court has no powers to make orders such as those at s 9 to remedy, restrain or prevent damage to property, or to prevent injury to a person, as a consequence of the tree. Therefore, there is no requirement for me to address the discretionary matters in s 12 of the Trees Act.
2. However, as the respondents appeared uncertain about their legal rights and responsibilities with their tree, and because the applicant, in an email to the respondents dated 09 September 2022, noted, in summary, that he would not stop until he prevailed in having the canopy of the tree pruned to the common boundary, it is appropriate for me to consider elements of s 12 of the Trees Act, particularly that which relates to pruning.
3. Subsection 12(b2) considers the impact any pruning (including the maintenance of the tree at a certain height, width or shape) would have on the tree. As a rule, trees do not require pruning as part of normal maintenance. Excessive pruning, particularly of mature trees, generally results in stress and reduced health and vigour as leaves are required by trees to produce sugars, as a result of photosynthesis.
4. The tree has been pruned excessively in the past. The extent of pruning involved in canopy raising, undertaken in 2020 by the arborists contracted by the applicant, was quite severe. The applicant's photographs of the works attest to that. The cumulative impact of this pruning and that required to remove the 2 storm damaged branches constituted a considerable loss of foliage. The canopy raising may also increase the tree's vulnerability to winds swirling under and within the canopy, as noted by Mr Curtis, an AQF level 5 arborist from Complete Arborcare, in his tree report procured by the respondents on 9 December 2022.

5. The Council's exemption for "Minor pruning" for branches less than 50mm diameter should also be considered in the context of the form and nature of branches of the tree. Most of the branches on Chinese Weeping Elms are relatively thin and less than 50mm at their branch collars. If all branches that meet this specification were pruned, the tree would be devoid of almost all its foliage. This would not be "Minor pruning" and would be contrary to the intention of Council's "Minor pruning" exemption.
6. No further pruning is required over either parties' property. Should the respondents choose to allow additional pruning, in the interest of tree health and longevity, this should be limited to minimal live foliage removal, and ideally, at least three years should be allowed between pruning events to assist the tree in recovering from the excessive pruning previously endured.
7. The tree provides protection from sun and wind and makes an aesthetic contribution (s 12(b3) and s 12(e)). It is also deciduous and would drop most of its foliage in autumn, thus significantly reducing the maintenance burden until bud burst the following spring.
8. Subsection 12(i) considers anything, other than the tree, that has contributed, or is contributing, to any such damage or likelihood of damage, including any act or omission by the applicant and the impact of any trees owned by the applicant.
9. Preston CJ discussed general issues concerning this provision in Robson at [204] to [210]. The fact that "the tree was there first" is considered here and, arising from this is "poor design", where structures built beneath existing trees may be of a design that fails to take account of an existing adjacent tree and thus exacerbate problems. In this case, installation of the pool directly under the tree's canopy when there was ample space in the back yard to locate it in a position well clear of the tree is considered "poor design" under the Trees Act.

Conclusions

1. The applicant has not provided substantive evidence of past, present or likely future damage to his swimming pool or pool surrounds to engage the jurisdiction of the Trees Act, as his claims all arise from the dropping of refuse and the annoyance and cost of associated reasonable maintenance. These issues are resolved and refused through consideration of the Tree Dispute Principle established in Barker.
2. Similarly, the applicant provided no evidence or substantiation of his claim of an "extremely high risk of serious injury", or of any genuine risk of injury. The respondents provided a report from 2019 by a suitably qualified AQF level 5 arborist which assessed the tree's risk to be low, and an arboricultural assessment by another AQF level 5 arborist from December 2022, which discouraged further pruning. Based on the arboricultural expertise that I bring to the Court, I concur with these findings. No genuine risk with this tree has been proved, so this element is also refused.

3. The tree is long established. It is likely to be at least 50 years old. The weeping form of the tree and the mottled appearance of trunk bark, both of which do not emerge until the tree reaches maturity, make it aesthetically appealing. The tree has suffered excessive pruning in the past and further pruning threatens to compromise both its health and its desirable form. Ideally, it should be avoided. The tree provides many environmental benefits, as noted in consideration of discretionary factors in s 12 of the Trees Act.
4. As a result of these factors, s 10(2) of the Trees Act has not been satisfied, and therefore the Court has no powers to make orders.
5. By their very nature, disputes between neighbours over trees are often difficult and unpleasant for both parties. Consequently, the details of negotiations between the parties are generally irrelevant to the Court, other than those which relate to the satisfaction of s 10(1)(a) of the Trees Act, being the requirement that the applicant made a reasonable effort to reach agreement with the tree owner/s.
6. However, this case was exceptional, and Ms Au made oral submissions regarding the emotional distress said to have resulted from the applicant's conduct over the protracted period since August 2019, particularly with respect to the respondents' legal liability and the applicant's threats of legal action, which were made in writing on 12 occasions. Based on the content of the application, both parties' submissions, and the applicant's conduct at the hearing, I consider it reasonable to address the respondents' concerns.
7. Many of the applicant's texts and emails were dismissive of and disrespectful towards the respondents, particularly regarding the respondents' interpretations of Council's requirements. This appeared particularly egregious considering that, prior to the onsite hearing, the applicant had based his demands for pruning on an incorrect interpretation that Council's exemption for "Minor pruning" allowed for removal of up to 10% of the tree's foliage, and that satisfaction of the terms of the "Minor pruning" exemption provided him with an entitlement to prune the tree, regardless of the tree owners' preferences with the tree. This is incorrect.
8. Clause 13.2, Control 3(i) of Part 13 of the DCP describes works exempt from the need for Council permission but places no requirement for pruning on the tree owner. Council's tree management controls are permissive, not coercive. Further, even where pruning works are exempt from Council's permission, Council's tree DCP requires the tree owner's written permission for any works on the owner's trees.
9. Perhaps informed by the belief that "he was the victim", which the applicant claimed during the tree inspection, the applicant's conduct towards the respondents during oral submissions was sufficiently disdainful and lacking civility that I had cause to caution him, as I noted above at [27], in my consideration of s 10(1)(a) of the Trees Act.

10. Having said this, while I refute the applicant's claim that he was the victim here, nor were Mr Lei and Ms Au victims. The respondents presented a considered, thorough, logical written response to the applicant's case, and both parties were selective with the texts and emails they submitted to the Court, in support of their submissions.
11. By the time I reached my final decision, based on evidence adduced from the parties' written and oral submissions and from my observations on site, I found that the applicant had assembled no expert reports or other substantive evidence to support his claims, and nor did he appear to have familiarised himself with the requirements of the Trees Act or relevant case law, regardless of the fact that the onus is on the applicant to prove his case.
12. As a consequence of the foregoing, the Orders of the Court are:
 1. the application is refused.

J Douglas

Acting Commissioner of the Court

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