

AUSTRALIA / JUDGMENT

O'Mullane v Wehbe [2022] NSWLEC 1604

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Land and Environment Court

New South Wales

Medium Neutral Citation: O'Mullane v Wehbe [2022] NSWLEC 1604

Hearing dates: 28 July 2022

Date of orders: 02 November 2022

Decision date: 02 November 2022

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 – no damage found - significant s12 considerations

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

Cases Cited: Barker v Kyriakides [2007] NSWLEC 292

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

Gardiner v Bisley [2021] NSWLEC 1176

McPherson v Lake [2017] NSWLEC 1081

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

Smith & Hannaford v Zhang & Zhou [2011] NSWLEC 29

Stevens v Russell [2016] NSWLEC 1233

Yang v Scerri [2007] NSWLEC 592

Category: Principal judgment

Parties: Mark O'Mullane (Applicant)

Kylie Wehbe (Respondent)

Representation: M O'Mullane, (Self represented) (Applicant)

K Wehbe, (Self represented) (Respondent)

File Number(s): 2022/121718

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Judgment

1. COMMISSIONER: The applicant, Mr O'Mullane, has occupied his dwelling in Barden Ridge since about 2016, while the respondent, Ms Wehbe, has owned a neighbouring property, which houses an Early Learning Centre, since about 2013. Mr O'Mullane's rear boundary is the northern side boundary of Ms Wehbe's property.
2. A mature *Melaleuca linariifolia* (Snow in Summer) (the tree), is located in the rear of the respondent's property, close to the boundary adjoining the applicant's land. A Google Earth image (photo) included at question 2 of the Tree Dispute Claim Details shows the applicant's swimming pool located close by across the boundary. Based on this photo, the canopy of the tree does not overhang the pool, but it does overhang the common boundary.
3. Mr O'Mullane says that "the tree for some time has become a nuisance to our property, and particularly our pool", and that "despite a pool cover, it constantly drops seeds, leaves, and also branches into the pool and the backyard". He approached the respondent in early 2022, seeking removal of the tree, but she values various contributions the tree provides, and does not want it removed.
4. As a consequence, Mr O'Mullane lodged an application, 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.

The applicant's case

1. Mr O'Mullane proposes that the Court makes an order for the removal of the tree, and provides the following (summarised) justification:
 1. Sutherland Council (Council) inspected the tree on 10 January 2022 and determined that removal of the tree does not require permission because it is within 3 metres (m) of an existing dwelling or pool. The tree was subsequently pruned by the respondent's arborists, but Mr O'Mullane claims that "no change to the crown of the tree occurred", and that he received "Nil benefit to my property" from the pruning.

2. Ongoing maintenance issues due to dropping leaves and branches, clogging of pool filtration system, and constant upkeep to keep it clean. Tree is within 3 m of pool and (50% of) its canopy overhangs boundary. Fence is bowed close to tree location and tree is close to main sewer pit.
3. Tree is not protected (by Council), and is a nuisance, causing damage to fence, pool equipment, and potentially the main sewer.

The respondents' case

1. Ms Wehbe resists the removal of the tree. In her 'Tree Dispute Application – Response' (Response), filed with the Court on 4 May 2022, the respondent notes that after receiving the Tree Dispute Application on 30 April 2022, she approached the applicant at his home to negotiate a resolution. The respondent claimed that, following an approach from the applicant to the tenant of the Early Learning Centre in the recent past, she had authorised permission to have overhanging foliage trimmed right back..."and the tree was subsequently trimmed – quite significantly", but this failed to satisfy the applicant.
2. In her Response, Ms Wehbe notes that "The (Sutherland) Shire" is a tree filled community, that all residents share in the "upkeep in our yards, paths and pools", and that the tree was in situ long before the applicant occupied his property six years ago. The respondent claimed that the applicant's Google Earth image is at least four years old and that the tree's canopy and overhang has recently been significantly reduced. Ms Wehbe provided contemporaneous photos to illustrate this point, and also to show that the tree was well clear of the fence and was not causing fence damage. The respondent also noted that the tree's role in providing shade was of particular importance, and its contribution to shade was considered with the DA application as a proportion of the Shade ratio required to operate the Early Learning Centre.

The on-site hearing

1. The hearing commenced in the respondent's rear yard, with both parties in attendance for an inspection of the tree. Ms Wehbe was accompanied by a colleague from the Early Learning Centre.
2. The tree is around 9 metres tall, with no apparent sign of structural weakness in the trunks, nor indication of faults at branch junctions. Based on its external appearance, the tree appeared to be strong, sound, and healthy. It had also been well maintained, with only very small deadwood residual in the canopy, and appropriately located pruning wounds. Only a small proportion of the canopy overhung the boundary, contrary to the applicant's claim of 50%.

3. This is a slow growing, long-lived species which is likely to be over 50 years old, possibly well over. It is located about 600mm from the boundary fence. The applicant expressed concern that the tree may be damaging the fence, but its trunk is likely to be thickening at a slow growth rate, and physical contact and damage to the fence from such slow expansion is very unlikely.
4. The Court moved to the applicant's yard to assess the extent of damage attributable to the tree, then inside for submissions.
5. Mr O'Mullane noted the leaves and small branches that had fallen and blown in from the tree, and spoke of them clogging the impeller and chlorinator, and the skimmer box and filter at the pump. He said that cleaning this required about 20 minutes per month under normal conditions or 20 minutes per 1-2 weeks in summer or during windy conditions.
6. Mr O'Mullane said that the pool pump sounded laboured to him, but that he has not had to replace it during his 6 year' occupation. He normally kept the pool cover on the water surface.
7. The applicant's further concern was the proximity of the tree to the sewer line, and the likelihood of sewer pipe damage, though he acknowledged not being aware of any prior damage, or having reasons to justify his concerns, other than the tree's location.

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. 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.
3. Correspondence within the file notes Mr O'Mullane appears to have made little attempt to reach agreement with the respondent prior to lodging his application. However, the hearing revealed confusion over email addresses and communication breakdowns with the Court.

Reasonable effort to reach agreement

1. Preston CJ provides extensive commentary in *Robson v Leischke* (2008) 72 NSWLR 98; [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. In this context, once the preliminary communication obstacles were clarified at the final hearing, both parties worked towards resolving the dispute, and I am thus satisfied that the requirements of s 10(1)(a) of the Trees Act have been met; to make a reasonable effort to reach agreement with the owner of the land on which the trees are situated.
2. 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.
3. Should s 10(2) be satisfied, the Court is required to consider the discretionary matters in s 12, so as to provide balancing of the tree's attributes and benefits, against the imperatives informing intervention.

Debris dropping in and around pool

1. Annoyance 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 is addressed by his Honour in Robson at [171]:

"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 Act, and that "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 or roots onto neighbouring land is also addressed in Robson where his Honour, discussing the issue of nuisance at [56], states that "mere encroachment is insufficient to complete a cause of action."
2. The issue of maintenance that also commonly arises 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 will not ordinarily provide the basis for ordering the removal of or intervention with an urban tree."

1. This tree dispute principle established in Barker has been consistently maintained by the Court and it applies here to all tree debris described by the applicant or seen on his land. As to the time required to clean filters and debris from the pool, particularly where a tree has been in situ prior to a pool, any extra pool maintenance burden related to the tree is covered by the tree dispute principle in Barker.
2. 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. Mr O'Mullane submitted that the tree may cause damage to nearby sewer pipes, largely on the basis of the pipes' proximity. Neither party have mentioned any past occurrence of sewer pipe damage, nor current damage, but the Trees Act does also consider whether the tree concerned is likely, in the near future, to cause damage to the applicant's property. The Court takes guidance from *Yang v Scerri* [2007] NSWLEC 592 (Yang), where the near future is defined, as a rule of thumb, to be a period of one year.
2. In *Stevens v Russell* [2016] NSWLEC 1233 (Stevens) 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."
1. In *Smith & Hannaford v Zhang & Zhou* [2011] NSWLEC 29 at [62], Craig J said "something more than a theoretical possibility is required in order to engage the power under the Trees (Disputes between Neighbours) Act to make an order to remedy, restrain or prevent damage". In this case, the applicant has provided no evidence to advance his claim regarding future sewer pipe damage, beyond a theoretical possibility.
2. The presence of a sewer pipe near the tree, alone, suggests a mere 'theoretical possibility' of future damage, and even less likelihood of near future damage, in the next 12 months. As there is no evidence of prior or current sewer pipe damage, or other sound evidence, I am not persuaded, on the balance of probabilities, that near future damage is likely.
3. My summary findings to the applicant's claims are:
 1. Though Mr O'Mullane believes his pool pump is under strain due to debris from the tree clogging its cleaning system, the pump he inherited at occupation has continued to operate without need for repair or replacement. Therefore, this issue is set aside.
 2. Without evidence of past or current sewer pipe damage, or some other reasonable substantiation, I am not satisfied that sewer pipe damage is likely in the near future.
 3. Though Mr O'Mullane is annoyed and discomforted by its occurrence and by the maintenance burden the tree creates, there is no evidence of damage resulting from leaves, flowers, seeds, sticks or other refuse falling or blowing from the tree onto the applicant's land. This situation is typical of the basis for the tree dispute principle established in *Barker*, where, in the absence of damage, no orders for intervention shall be made under the Trees Act.
 4. There is no evidence to support the applicant's claim that the tree may be causing fence damage. The inspection showed that the tree was well clear of the common boundary fence, not causing damage, nor likely to cause future damage. With consideration for normal wear and tear, the fence appeared to be in good condition.

Risk of injury

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 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, and, in any case, encroaching branches have recently been pruned, and don't extend far over the applicant's land. No evidence of a formal risk assessment has been provided by either party, though the respondent noted that the tree is inspected daily for broken branches or deadwood, as part of the Centre's broader risk management program.
4. Based on my inspection and the arboricultural expertise I bring to the Court, I am satisfied that the tree is sound and safe. It thus presents a low and acceptable risk of injury.
5. Mr O'Mullane has not produced evidence to substantiate damage he claimed was caused by the tree, or damage he claims is likely to be caused by it in future, nor to justify his claim that the tree created an unacceptable risk of injury. 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. If damage or injury had been proven, and the jurisdictional tests at s 10 of the Trees Act were satisfied, the Court can 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.
2. Before determining the nature of any orders, however, the Court must consider a range of matters set out at s 12 of the Trees Act.

* The tree is located in the respondent's property, about 600mm from the common boundary (s 12(a)).

* The application included an email from Mr Hoff, a Council Tree Manager, which advised that Council permission for tree removal was not required as the pool was less than 3 m from the tree. This email from Mr Hoff was surprisingly partisan in support of the applicant's quest for tree removal (s 12(b)).

* The tree contributes to protection from the harsh sun, and from wind, and to privacy. It is the only large tree in close proximity and is the focus of much young activity – the soil compaction from little feet attest to that. The respondent notes that the tree is used each morning for 'Acknowledgement of Country' (subs 12(b3)(c)(e)).

* Being quite a large example of a native species, its flowers and fruit, trunks and branches could be expected to provide food and or shelter for local fauna, and therefore the tree is likely to make a moderate contribution to local biodiversity (s 12(d)).

* Section 12(j) considers matters that the Court considers relevant in the circumstances of the case. The fact that 'the tree was there first' is relevant. In *Black v Johnson (No 2)* [2007] NSWLEC 513 (Black), the Court has published a tree dispute principle which says, in summary, that the fact that the tree was there first should not impact on whether or not some order should be made about the tree but, subject to a range of matters discussed in the principle, the prior existence of the tree may be a relevant matter to be considered when deciding who should meet the cost of carrying out any orders which the Court might make.

* The fact that the applicant retains the cover on the pool as normal maintenance is also relevant under s 12(j) of the Act, and this was stressed by the respondent. As a consequence, the quantity of refuse that may enter the pool, and associated maintenance burden, is relatively small.

Conclusions

1. The onus is on the applicant to prove his case, and the applicant has not provided evidence of past, present or future damage to pool, pool equipment, fence, or sewer pipes to engage the jurisdiction of the Trees Act. Similarly, there was no substantiation for the claim of risk of injury. The issue of the dropping of refuse and the annoyance, and cost of associated maintenance was resolved with consideration of the Tree Dispute Principle in *Barker*.
2. As a result of these factors, s 10 (2) of the Act has not been satisfied, and the Court has no powers to make orders.
3. The tree is long mature. It is likely to have established its stable root structure many years ago, prior to the pool approval of 1998. It provides many environmental, social and educational benefits, as noted in consideration of discretionary factors in s 12 of the Trees Act.
4. 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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