

AUSTRALIA / JUDGMENT

# Pearce v Karpathakis [2024] NSWLEC 1665

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Land and Environment Court New South Wales

Medium Neutral Citation: Pearce v Karpathakis [2024] NSWLEC 1665 Hearing dates: 15 October 2024 Date of orders: 15 October 2024 Decision date: 15 October 2024 Jurisdiction: Class 2 Before: Galwey AC Decision: The Court orders:

- (1) The application is granted to the extent of the following orders.
- (2) The respondents are to engage and pay for a suitably qualified and experienced arborist (minimum AQF level 3), with all appropriate insurances, to remove the tree to near ground level within 60 days of the date of these orders. These works are to be done in accordance with the Safe Work Australia (2016) 'Guide to managing risks of tree trimming and removal work'.
- (3) The respondents are to give the applicant one week's notice of the works in Order (2).
- (4) The applicant is to allow all access necessary for the works during reasonable hours of the day.
- (5) Within 90 days of the date of these orders the respondents are to plant on their property a tree that will reach at least 8 metres in height.
- (6) Within 90 days of the date of these orders the respondents are to engage a fencing contractor to repair or replace the Colourbond fence on the common boundary shared with the applicant so that the fence is upright, straight and sturdy, and is a sufficient dividing fence consistent with similar fencing on the respondents' property.
- (7) The exhibits are returned, other than Exhibits A and B. Catchwords: TREES (DISPUTES BETWEEN NEIGHBOURS) –whether neighbouring tree has caused damage – compensation – who should pay for tree works – orders for tree removal Legislation Cited: Trees (Disputes Between Neighbours) Act 2006, ss 7, 9, 10, 12 Cases Cited: Smith & Hannaford v Zhang & Zhou [2011] NSWLEC 29 Texts Cited: Safe Work Australia, Guide to managing risks of tree trimming and removal work (2016) Category: Principal judgment Parties: Dean Pearce (Applicant) George Karpathakis (First Respondent) Gail Karpathakis (Second Respondent) Representation: D Pearce (Self-represented) (Applicant) M Karpathakis and A Goult (Agents) (Respondents) File Number(s): 2024/236646 Publication restriction: Nil

## Judgment

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

## Background

1. COMMISSIONER: Dean Pearce has 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 owners of the neighbouring Woollooware property, George and Gail Karpathakis (the respondents), to remove a tree on their land, to repair a dividing fence, and to pay him compensation for property damage.
2. At the onsite hearing, the Court inspected the tree and relevant parts of both properties. The applicant was self-represented; the respondents were represented by their son Michael Karpathakis and daughter Anthea Goult.

### Framework for this decision

1. Pursuant to s 7 of the Trees Act, Mr Pearce applied to the Court for orders to remedy and prevent damage to his property as a consequence of a tree on adjoining land. He wants the respondents to remove the tree and to compensate him for damage to his property.
2. The orders sought are orders that the Court may make according to s 9 of the Trees Act. Before making such orders, the Court must be satisfied of certain matters at s 10 of the Trees Act: 10 Matters of which Court must be satisfied before making an order
  - (1) The Court must not make an order under this Part unless it is satisfied:
    - (a) that the applicant has made a reasonable effort to reach agreement with the owner of the land on which the tree is situated, and
    - (b) if the requirement to give notice has not been waived, that the applicant has given notice of the application in accordance with section 8.
  - (2) The Court must not make an order under this Part unless it is satisfied that the tree concerned:
    - (a) has caused, is causing, or is likely in the near future to cause, damage to the applicant's property, or
    - (b) is likely to cause injury to any person.
1. If the tests at s 10 are satisfied, the Court must consider a range of matters at s 12 of the Trees Act before determining the application.

### Reasonable effort to reach agreement

1. Mr Pearce has done his best to get the issue resolved. The parties almost reached an agreement before the hearing. I am satisfied that Mr Pearce made a reasonable effort to reach agreement and that the required notice was given (s 10(1) of the Trees Act).

#### The tree

1. The subject tree is a tall *Araucaria heterophylla* (Norfolk Island pine) (the tree) close to the common boundary between the two properties. It is over 20 metres tall with a stem diameter of approximately one metre. It appears to be healthy and structurally sound.

#### The tree has damaged the applicant's property

1. The Colourbond dividing fence on the parties' common boundary is significantly out of alignment. The respondents do not dispute that this has been caused by the tree. The base of the tree has pushed the fence laterally and its roots have pushed parts of the fence upwards. My observations during the onsite hearing confirmed that the tree has damaged this fence, which is partly the applicant's property.
2. The tree has damaged pipes on the applicant's property. Photographs show a trench dug by Mr Pearce exposing tree roots against a PVC pipe that was misshapen. Mr Pearce submitted that roots blocked stormwater pipes, leading to flooding at the back of his property. Roots shown in Mr Pearce's photos, and roots that he has cut and retained, have the distinctive bark of Norfolk Island pine roots. I accept that the tree's roots have damaged Mr Pearce's stormwater pipes.
3. Mr Pearce submitted that roots have damaged the foundation of his dwelling. His photographs show roots growing next to the foundation. Mr Pearce submitted that when roots blocked his stormwater pipes, flooding caused the clay soil to swell and put upward pressure on the foundations. However, none of the evidence before the Court demonstrates that the foundation has been displaced or damaged. Even if it has been damaged, evidence before the Court does not demonstrate that tree roots caused such damage. While Mr Pearce explained how this type of damage might occur, as Craig J wrote in *Smith & Hannaford v Zhang & Zhou* [2011] NSWLEC 29 at [62]: "...something more than a theoretical possibility is required in order to engage the power under the [Trees Act]." I cannot be satisfied that the tree's roots have damaged Mr Pearce's dwelling.
4. Mr Pearce seeks compensation for some turf that was damaged in his back garden. Absent of any evidence demonstrating the loss and its cause, the Court cannot make orders for this.

#### Relevant matters considered

1. I have considered those matters at s 12 of the Trees Act that are relevant to these proceedings.

2. The tree is close to the common boundary and overhangs Mr Pearce's property. The tree's base is against the dividing fence, which it has damaged. It will cause further damage to the fence as it grows.
3. Removing the tree would ordinarily require consent from Sutherland Shire Council (Council). On 29 August 2024, Council granted consent to remove the tree.
4. The tree makes a positive contribution to environmental values and public amenity. It shades and cools both properties.
5. Installing a root barrier, as Mr Pearce had once planned to do, would require significant roots to be cut. This would not be a suitable outcome.
6. The tree has outgrown the space in which it grows, so that it would be difficult to retain the tree and prevent further property damage. An order will be made to remove the tree. Mr Pearce, via his actions or omissions, has not contributed to the need for tree removal, so there is no reason to shift any of the cost of tree removal to him. The respondents will bear the cost of tree removal.
7. Although the fence was partly damaged when Mr Pearce came to his property in 2013, that damage, and further damage since then, are only attributed to the Karpathakis' tree. They will therefore be responsible for repairing the fence.
8. The Karpathakis were unaware in 2020 that roots of their tree were blocking or damaging Mr Pearce's pipes. Mr Pearce submitted that he informed Mr Karpathakis that such a scenario was likely, and that they should have assumed this to be so, but without any evidence to demonstrate it at the time, the respondents had no reason to take any action, and certainly no reason for taking the significant action of removing their tree. They have not knowingly created or continued a nuisance. Their acts and omissions did not result in damage. They will not be ordered to pay any compensation for pipe damage. As I am not satisfied that foundations are damaged, no order will be made for any compensation.

## Orders

1. The Court orders:
  1. The application is granted to the extent of the following orders.
  2. The respondents are to engage and pay for a suitably qualified and experienced arborist (minimum AQF level 3), with all appropriate insurances, to remove the tree to near ground level within 60 days of the date of these orders. These works are to be done in accordance with the Safe Work Australia (2016) 'Guide to managing risks of tree trimming and removal work'.
  3. The respondents are to give the applicant one week's notice of the works in Order (2).

4. The applicant is to allow all access necessary for the works during reasonable hours of the day.
5. Within 90 days of the date of these orders the respondents are to plant on their property a tree that will reach at least 8 metres in height.
6. Within 90 days of the date of these orders the respondents are to engage a fencing contractor to repair or replace the Colourbond fence on the common boundary shared with the applicant so that the fence is upright, straight and sturdy, and is a sufficient dividing fence consistent with similar fencing on the respondents' property.
7. The exhibits are returned, other than Exhibits A and B.

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D Galwey

Acting Commissioner of the Court

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