

AUSTRALIA / JUDGMENT

Polycarpou v Mao [2021] NSWLEC 1187

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Land and Environment Court New South Wales

Medium Neutral Citation: Polycarpou v Mao [2021] NSWLEC 1187 Hearing dates: 16 April 2021
Date of orders: 16 April 2021 Decision date: 16 April 2021 Jurisdiction: Class 2 Before: Galwey AC
Decision: See orders at [20] Catchwords: TREES (DISPUTES BETWEEN NEIGHBOURS) -- damage to property caused by neighbouring tree – the tree has been removed – rectification works
Legislation Cited: Trees (Disputes Between Neighbours) Act 2006, Pt 2, ss 4(4), 7, 10(1)(a), 10(2)(a), 12 Category: Principal judgment Parties: Nonie Polycarpou (Applicant) Liying Mao (First Respondent) Nan Shao (Second Respondent) Representation: N Polycarpou (Litigant in Person) (Applicant) L Mao (Litigant in Person) (Respondents) File Number(s): 2021/4306 Publication restriction: No

Judgment

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

Background to the application

1. Nonie Polycarpou ('the applicant') 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 rectification of damage to her Broadmeadow property caused by a neighbouring tree. The tree, which has been removed, grew on the adjoining property belonging to Liying Mao and Nan Shao ('the respondents').

History

1. A Camphor Laurel ('the tree') grew on the respondents' land, adjacent to the common boundary with Ms Polycarpou's property, a short distance from their front boundary.
2. During 2018 the applicant noticed cracking and lifting of a concrete path near the tree and tried unsuccessfully to contact the respondents.
3. In July 2019 the applicant wrote to the respondents. This is the first time that the respondents were aware of the damage.
4. In August 2019 the respondents removed the crown of the tree, leaving only the lower stem. The applicant asked for the remainder of the tree to be removed.

5. In January 2021 the remainder of the stem was removed and the stump was ground out.
6. The respondents replaced part of the applicant's path, without her permission.

The applicant made reasonable effort

1. Based on the history described above, the applicant has made reasonable effort to resolve the issue, satisfying the test at s 10(1)(a) of the Trees Act.

The tree damaged the applicant's property

1. A 6-metre (approximately) section of the low brick wall along the common boundary has been affected by the tree. The wall leans into the applicant's property, most obviously near the tree's location, with a vertical crack in the wall adjacent to the tree's location. The wall further along the boundary, toward the rear of the properties, is perfectly upright. There is no other apparent cause of the damage. On the balance of probabilities, I am satisfied that the damage was caused by the tree.
2. On Ms Polycarpou's property a concrete path runs from the front boundary next to the common boundary. The section closest to the front boundary, for approximately 6 metres, was badly cracked. Further back, between her dwelling and the boundary, the path is relatively uncracked, despite its age. Damage was worst near the tree. The first 2-3 metres remains in poor condition. The respondents removed the next few metres, replacing most of that with a new concrete path before further works were stopped, as they had no permission for the works. I am satisfied the applicant's path was damaged by tree root growth.
3. According to s 10(2)(a) of the Trees Act, then, the Court can make orders, after considering matters at s 12.
4. Ms Polycarpou wants the 6-metre section of path replaced, including the section recently installed by the respondents. She wants roots beneath the path removed. She wants the 6-m section of boundary wall replaced. She wants the respondents to pay for these works because their tree caused the damage.

Findings

1. The tree damaged both the boundary wall and the concrete path. Affected sections are those within approximately 6 metres of the front boundary.
2. Were it not for the tree, it appears that both the wall and path would be in fair-good condition and suitably functional for many more years. It is not clear if the path would meet current standards for a path of this nature.
3. Although the tree has been removed, the Court can still make orders for rectification (s 4(4) of the Trees Act).

4. The respondents first became aware of the damage in July 2019. They removed the tree's crown the following month, leaving only its lower stem. It is unlikely that the extent of damage changed significantly following this. The stem and stump were removed shortly after.
5. Prior to July 2019 the respondents had no reason to expect that their tree might be causing damage to the applicant's path. However, it is reasonable to expect that they might have noticed damage to their own property, such as the boundary wall, and taken steps to prevent further damage. Had they removed the tree when the wall was first affected, some of the damage to the applicant's path might have been avoided.
6. On the basis of the above, I find it reasonable that the respondents pay for rectification of the boundary wall, and for half the costs of rectification to the path. Ms Polycarpou explained that her insurer will pay for replacing the section removed, and partly replaced, by the respondents, other than for a \$500 excess she will incur.
7. Having considered the matters at s 12, with any relevant matters discussed briefly above, I make orders below.

Orders

1. The Court orders that:
 1. The application is granted.
 2. Within 6 months of the date of these orders, the applicant is to engage a suitably experienced contractor with all appropriate insurance to replace the approximately 3-metre front section of her original concrete path (separate from the ~1-metre section of removed path, and the ~2-metre section of recently replaced path) with a concrete path that meets current standards for such a path and that is otherwise of a similar nature to the existing path toward the rear of the property.
 3. Within 14 days of completion of the works, the applicant is to provide the respondents with a copy of a receipted paid invoice for the works in (2).
 4. Within 7 days of receiving the invoice in (3), the respondents are to pay the applicant 50% of the cost of the invoice amount and, if the adjacent section of the path has been replaced, an additional amount of \$250.
 5. Within 30 days of the date of these orders, the respondents are to obtain, and provide to the applicant, at least one quote from a registered builder for replacing the approximately 6-metre section of brick wall along their common boundary (to the first pillar) with a brick wall that meets current standards for such a wall and that is otherwise of a similar nature to the existing wall.

6. Within 4 months of the date of these orders, the respondents are to obtain any certification necessary for the works in (5), and are to engage the registered builder to demolish and replace the approximately 6-metre section of brick wall along the common boundary.
7. The respondents are to provide the applicant with copies of the builder's registration and insurance, as well as any certification obtained for the works.
8. The applicant is to sign or otherwise provide consent for any certification or permit required for the works.
9. The respondents are to give the applicant two days' notice of the works.
10. The applicant is to allow all access necessary for the works.
11. The exhibits are returned, except for Exhibits A and 1.

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D Galwey

Acting Commissioner of the Court

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