

AUSTRALIA / JUDGMENT

Savell v Munro [2020] NSWLEC 1498

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Land and Environment Court

New South Wales

Medium Neutral Citation: Savell v Munro [2020] NSWLEC 1498

Hearing dates: 20 August 2020

Date of orders: 20 October 2020

Decision date: 20 October 2020

Jurisdiction: Class 2

Before: Douglas AC

Decision: The orders of the Court are:

(1) The application to remove the tree is dismissed.

Catchwords: TREES (DISPUTES BETWEEN NEIGHBOURS) – is the tree situated on neighbouring land – damage from falling branches – apprehension of injury

Legislation Cited: Environmental Planning and Assessment Act 1979

Trees (Disputes Between Neighbours) Act 2006

Uniform Civil Procedures Rules 2005

Cases Cited: Ashworth v Joyce [2007] NSWLEC 357

Awad v Hardie (No 2) [2010] NSWLEC 1258

Chan v McDonald [2018] NSWLEC 1692

Dive v Lin [2017] NSWLEC 1348

Granger v Owners Corporation SP 18494 [2012] NSWLEC 1285

Hinde v Anderson [2009] NSWLEC 1148

McCallum v Riordan [2011] NSWLEC 1009

McPherson v Lake [2017] NSWLEC 1081

Reuben v Lace [2010] NSWLEC 1024

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

Weeks v Mack [2013] NSWLEC 1041

Yang v Scerri [2007] NSWLEC 592

Zangari v Miller (No 2) [2010] NSWLEC 1093

Category: Principal judgment

Parties: Terry Savell (Applicant)

Don Munro (First Respondent)

Julie Munro (Second Respondent)

Representation: Counsel:

S Berveling (Applicant)

T Ward (Solicitor) (Respondents)

Solicitors:

Pikes & Verekers Lawyers (Respondents)

File Number(s): 2020/120339

Publication restriction: No

Judgment

Background

1. Mr Savell, the applicant, owns a property in Oyster Bay, which shares a common side boundary with a property belonging to Mr and Mrs Munro, the respondents. The boundary runs approximately north-south from the waterfront up the sloping site to the road, which both properties front.
2. A mature *Eucalyptus resinifera* (Red mahogany) (the tree), said to be 60 to 80 years old, is growing about halfway between the waterfront and the street, with its trunk base straddling the common boundary. The tree is about 15 metres tall with canopy spread of about 7 metres and trunk diameter at breast height (DBH) of about 650 mm.

3. The applicant's property is subject to a development application, involving a large dwelling, the excavation for which would extend in close proximity to the base of the tree, and almost certainly destabilise it. Mr Savell seeks removal of the tree. An email from Sutherland Shire Council's Development Assessment and Certification Manager, dated 13 February 2020, noted that permission was required from both owners for Council to allow for the tree to be removed.
4. Mr and Mrs Munro did not grant such agreement, and Mr Savell subsequently submitted an application to the Land and Environment Court (LEC), under s 7 of Pt 2 of the Trees (Disputes Between Neighbours) Act 2006 (the Trees Act) seeking orders for tree removal.
5. The applicant's property contains a small house which has been tenanted. The respondents have resided in their house for about 22 years.
6. In making this application, Mr Savell relies on a report prepared for him on 7 April 2020 by Dr Danny Wotherspoon, of Abel Ecology. The respondents submitted a report from Mr Guy Paroissien, from Landscape Matrix, dated 11 August 2020, and Dr Wotherspoon provided a report in reply to Mr Paroissien's expert report, on 13 August 2020.
7. Shortly before the hearing, Dr McDonald, for Abel Ecology, submitted an arborist assessment and QTRA report, dated 19 August 2020.

The on-site hearing

1. The hearing commenced on site on 21 August 2020. Present at this hearing were the parties and their legal representatives. Mr Savell was represented by Dr Berveling of counsel, along with both Dr Wotherspoon and Dr McDonald, while Mr and Mrs Munro were represented by Mr Ward, solicitor, and Mr Paroissien.

Applicant's claim

1. Mr Savell seeks removal of the tree, on the basis that it is likely to fall; that it may thus cause damage to access paths and stairs, the adjacent house, outside toilet, stone retaining walls, and clothes line.
2. The applicant also claims that the tree constitutes a risk of injury, because it "is very large, as per the reports in decline, with only a 1 – 10 year life span, and can fall on the dwelling and surrounding areas where people access the house, clothes line, laundry, yard and access stairs".

Respondents' position

1. The respondents resist removal of the tree, on the basis that the tree is fundamentally sound, and is not a significant risk.

The Court's jurisdiction

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. In applications made under s 7 of Pt 2 of the Trees Act, there are a number of jurisdictional tests that must be satisfied.
3. With the tree appearing to straddle the boundary fairly evenly, the question initially considered was whether the tree was situated on adjoining land.
4. The respondents contended that the applicant had failed to supply a sufficiently accurate survey to clarify whether the tree was situated on adjoining land, that the onus is on the applicant to prove his case, that the Court thus had no powers to make the orders sought in the application, and that the respondents therefore had no case to answer (as found in *Weeks v Mack* [2013] NSWLEC 1041).
5. Rather than adjourning the hearing to enable the applicant to adduce more survey clarity, as I suggested in the interests of a just dispute resolution, the respondents proposed implementing a procedural framework used by Acting Commissioner Galwey in *Chan v McDonald* [2018] NSWLEC 1692 (Chan). In that case, the hearing continued, with resolution of the initial jurisdictional question arising from the tree's location, remaining subject to the evidence provided in a subsequently submitted survey.
6. Upon proceeding in this way, directions were made on the basis of Chan at [8], which stipulated a copy of *Awad v Hardie (No 2)* [2010] NSWLEC 1258 (Awad), be provided to the surveyor to define the level of survey detail required. This compliant survey, lodged with the Court on 1 September 2020, displayed that the tree base was 39.9% on the applicant's property, and 60.1% on the respondents'.
7. While the parties share ownership of trees straddling a boundary, for the purposes of the Trees Act, the tree is situated on adjoining land if it is wholly or principally on that land (s 4(3)). The Court has previously found, as in *Dive v Lin* [2017] NSWLEC 1348, that to be principally situated on land, more than 50% of the areas of the tree's stem, where it enters the ground, must be on that property.
8. As the survey plan showed that more than 60% of the tree base is positioned on the respondents' land, it is principally situated on their land, such that the application for orders may proceed.
9. The next consideration of particular importance is s 10 which states:
 - (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 Court's jurisdiction is engaged, s 9 enables the Court to make any such orders it thinks fit to remedy, restrain or prevent damage to property, or to prevent injury to any person. In order to determine, what, if any, orders should be made, the Court must consider the matters in s 12 of the Trees Act.
- 2. As required by s 10(1), I am satisfied that there has been an attempt by the applicant to reach agreement with the owners of the land on which the tree is situated.

Damage – past and present

- 1. Considering s 10(2)(a) with respect to past damage, Mr Savell submitted that about 3.5 years ago, during a storm, a branch had broken and fallen from the tree, and hit and stretched an electricity service wire. This allegedly resulted in a break of electricity supply to their tenants, and required repairs by an electrician at the point of connection with the house. No documentary evidence, such as a copy of a paid invoice, was provided in support of this claim.
- 2. For the respondents, Mr Ward submitted that this electricity line damage issue had been mentioned for the first time in the belated report of Dr McDonald, and should thus be inadmissible, that the applicant had supplied no evidence that the electricity pole on the property met legislated strength or engineering requirements to be sufficiently strong to support the service wire.

Damage in the near future, and risk of injury

- 1. No claims were made on the basis of current damage, but claims in the application, of damage in the near future, and of the risk of injury (s 10(2)(b)), were both based on the tree failing at or near ground level, and falling onto nearby structures. From a diagram at page 2 of the Tree Dispute Claim Details, the closest of 8 damage locations (D1-D8) appears to be the house, positioned about 10 metres from the tree.
- 2. In a guidance decision published in Yang v Scerri [2007] NSWLEC 592, as a rule of thumb, with respect to damage, the 'near future' is deemed to be a period of 12 months from the date of the determination.

3. In regards to injury, the Court must consider the risk posed by a tree in the foreseeable future based on the characteristics of the tree/s, the history of any failures, any other relevant evidence, and the circumstances of the site apparent at the time of the hearing (McPherson v Lake [2017] NSWLEC 1081 at [10]).

Expert's evidence

1. In his report of 7 April 2020, Dr Wotherspoon did not acknowledge and agree to be bound by the Expert Witness Code of Conduct, contained in Schedule 7 of the Uniform Civil Procedures Rules 2005. He has provided reports to the applicant with respect to development of this property over previous years, but claimed that he was not anticipating this report to be used for Court proceedings.
2. Mr Paroissien acknowledged and agreed to be bound by the Expert Witness Code of Conduct, as did Dr Wotherspoon, in his report in reply. Dr McDonald also failed to acknowledge the Expert Witness Code of Conduct, and I accepted Mr Ward's submission that the weighting applied to the evidence provided in Dr Wotherspoon's initial report, and that of Dr McDonald, should thus be discounted.
3. In his report of 7 April 2020, at page 9, Dr Wotherspoon emphasised that the tree was declining, of poor vitality and condition, with a life expectancy of one to ten years. He recommends removal "sooner rather than later". Drawing on the benefit of inspections of the tree over many years, Dr Wotherspoon claims that the tree has been subjected to repeated pruning of the canopy over more than ten years, primarily to remove dead branches which pose a safety hazard.
4. Contradicting this position, the respondents claimed, during the site inspection, that pruning had been rare. They noted one pruning in 2019, another about 3.5 years ago, but could recollect no others during the 22 years that they have occupied their property. The applicant had not been occupying the property through this period, and did not dispute the respondents' submission. At some stages, however, the tree has had extensive pruning, including lopping of the top leader, at least once, perhaps prior to the respondents' occupation of the property.
5. Using the Institute of Australian Consulting Arboriculturists (IACA) rating system, Mr Paroissien classed the tree as being of "moderate to high landscape significance", and considered that the tree has a Useful Life Expectancy (ULE) on the boundary between short (5 to 15 years) and medium (15 to 40 years).
6. Mr Paroissien submitted that the tree was of moderate health and fair vigour, with moderate to high levels of dieback and moderate levels of epicormic growth. He concluded that a moderate to high proportion of the epicormic growth was likely due to past pruning, as opposed to a decline in health and vigour.

7. To substantiate this view, during the site inspection, Mr Paroissien noted the presence of callus development on wounds, and that the epicormic growth was mainly old, and thus likely quite well attached to the tree, that it had withstood extensive wind impact recently, and thus posed a low risk of failure.
8. He noted a level of deadwood in the canopy of about 15%, but considered this relatively normal for the species. He acknowledged that a branch growing northward from about 10 metres up the trunk was dying back.
9. Mr Paroissien noted that the footprint of the respondents' dwelling has been unchanged since the dwelling was constructed around 60 years ago. This issue was examined during the site inspection, where the respondents clarified that paving recently refurbished near the tree base, had been installed on top of an existing concrete pad or paved surface, and that the works involved minimal soil disturbance or level change. This was unchallenged by the applicant.
10. Similarly, the respondents' submission that planter boxes constructed near the tree base involved minimal excavation or soil disturbance, was cross-examined by the applicant, but in the end unchallenged.
11. In his report in reply, Dr Wotherspoon observed that most of the previous deadwood had been removed by 27 December 2018, that large limbs had been pruned back to the trunk, and that a healthy tree would not have required such intervention. He submitted that poorly attached regrowth indicates low vigour.
12. Dr Wotherspoon interpreted "moderate levels of lineal splits in the lower trunk tissue to 4 metres with associated kino flow" noted in Mr Paroissien's report, as possible "shear fractures from bending of an unbalanced tree by loading forces of wind and canopy weight".
13. Pursuing this position with recourse to wind strength and direction analysis data taken from Kingsford Smith Airport, Dr Wotherspoon postulated that as the canopy was uneven, with branches extending mainly in one direction, and much more exposed to wind, and changes in wind patterns, due to the removal of a large fig tree and other nearby trees, it was exhibiting torsional cracks in the trunk, and was much more prone to branch breakage.
14. Mr Paroissien acknowledged that more wind exposure and changes in wind patterns may impact stability of the tree, but noted that since the absence of the large fig, the tree has withstood many storms including two consecutive 'east-coast lows', which featured strong winds, heavy seas and resulted in significant coastal erosion in areas of Sydney.
15. In clarifying the wide variation of ULE between experts, Dr Wotherspoon noted that his estimation of 1 to 10 years

"was based on a range of years, to enable a reasonable variance of expectation. I expect that with continued decline a lot more dead-wooding will be required. It will be far more reasonable to remove the tree now with easy access than in ten years' time",

and added that "I have large mature trees in my garden that have gone from healthy to dead within one year".

1. Dr McDonald's provided a Quantified Tree Risk Assessment (QTRA) report just prior to the hearing, likely in response to Mr Paroissien's comment that no recognised tree risk assessment had been provided by the applicant.
2. Though the claims and diagram in the application were based on likely damage to D1-D8, or risk of injury, resulting from whole tree failure, Dr McDonald's QTRA analysis focussed instead on three targets present directly below the tree. These are:
 1. The power pole and attached electricity wire;
 2. The resident who walks past; and
 3. The existing residence of the respondent.
1. In his calculations, Dr McDonald noted the parts of the tree canopy likely to fail as a leaning epicormic branch with a branch collar diameter of 150-200mm, various pieces of deadwood with diameters at collars ranging from 50-100mm, plus other epicormic growth as they increase in size.
2. Dr McDonald's QTRA conclusions, on page 26, were that the risk of harm to residents from each nominated falling branch was less than 1 in 1 million, and the risk of harm from damaged electricity wires was 1 in 30,000. Based on the QTRA Advisory risk thresholds (Table 7, p 27), all of these risks were, at worst, in the tolerable range, which is interpreted as: "Control the risk only where a significant benefit might be achieved at reasonable cost".
3. Though he listed it as a target, Dr McDonald completed no calculation on the respondents' residence. Only the applicant's property is considered under the Trees Act with respect to damage, but assessment of risk of injury may relate to the respondents' property and any adjacent public domain. In *Robson v Leischke* (2008) 72 NSWLR 98; [2008] NSWLEC 152, at [175], Preston CJ said,

"the applicant's concern about likely injury can be but does not necessarily have to be injury to a person who would be on the applicants land. Hence, an application can be made when an applicant is concerned that a tree on adjoining land is likely to cause injury to persons on public land in the vicinity."

Ashworth v Joyce [2007] NSWLEC 357 concerns dead trees adjacent to a public reserve. Thus, the nature strip is covered by the jurisdiction of the Trees Act. Additionally, orders have been made for the removal or pruning of trees on the basis they may cause injury to persons on the respondent's land, as in *Reuben v Lace* [2010] NSWLEC 1024.

1. Dr McDonald appears to contradict Dr Wotherspoon with various aspects of his report. In reference to Dr Wotherspoon's rating of the tree structure as poor, Dr McDonald interprets that the trunk appears to be in sound condition, and that the poor rating relates to the relatively high level of epicormic growth.
2. Dr McDonald notes the tree's crown density as reasonable, and that "it appears the tree has adequate stores of food and energy that allow it to produce a leafy crown as well as epicormic growth", however insufficient to allow "callus/woundwood to form over the existing pruning cuts". He thus classifies vitality as moderate.
3. While noting that poor attachment to the tree was a problem associated with epicormic growth, Dr McDonald explained that the attachment improves with time, and that "over the long term epicormic branches can become stable as core of the branch will extend into the trunk".
4. In summarising management options, Dr McDonald initially looks at tree retention. He notes this would require a balance between maintaining as much foliage as possible to optimise health and growth, and pruning deadwood and poorly attached epicormic growth to reduce risk. He says that:

"epicormic growth can be viewed in two different ways. For the recovering tree it assists in providing an adequate number of leaves that will photosynthesise and create foods (carbohydrate) for the tree. Thus if the existing amount of leaves are insufficient then epicormic shoots and their leaves provide an important function".

1. He further notes that, as the tree "appears to be recovering if the tree is retained at least some of the epicormic growth must be retained" and some managed by pruning. The negatives to this approach are noted as the need for any pruning to be completed via climbing access, which he deems as relatively unsafe compared to an elevated work platform (EWP), and the worth of such work relative to the tree's alleged low significance.
2. Considering the tree removal option, Dr McDonald notes that the benefits provided by a reasonably large tree would be lost, but that the costs and risks to tree workers associated with maintenance work on the tree would also be removed.

Reconciling the expert's evidence

1. Mr Paroissien's qualification as an expert arborist, include a Diploma of Horticulture (Arboriculture), an International Society of Arboriculture Tree Risk Assessment Qualification (TRAQ), and a Masters in Applied Science - Environmental Management. He ranked the tree as having "moderate to high landscape significance", and considered that the tree has a ULE on the boundary of short (5 to 15 years) and medium (15 to 40 years).

2. Dr McDonald holds a PhD, a Masters in Agriculture, a Bachelor degree in Agricultural Science, a QTRA qualification from 2014, and he is currently studying towards an Arboriculture diploma.
3. Dr Wotherspoon holds a BSc (Zoology), Masters of Arts, and a PhD based on researching the Cumberland Plain vegetation and fauna habitat, but no arboriculture qualifications are listed.
4. Dr Wotherspoon viewed the tree as having poor vitality and "Poor" condition, with a life expectancy of one to ten years, thus in much poorer condition than Mr Paroissien, or Dr McDonald. In seeking to clarify this discrepancy, I found inadequate evidence to substantiate Dr Wotherspoon's broad life expectancy conclusion, and recommendation that the tree be removed "sooner rather than later" beyond his largely irrelevant anecdotal comment, at 4.2 of his report in reply, that "I have large mature trees in my garden that have gone from healthy to dead in one year".

Summary

1. Returning to consideration of the issues covered by the Trees Act, being likely damage in the near future, and risk of injury, the tree's current health and structure must be considered independent of the pending development application.
2. The application for tree removal was based on likely damage and injury resulting from whole tree failure, and this was poorly pursued by the applicant.
3. Though Dr Wotherspoon interpreted "moderate levels of lineal splits in the lower trunk tissue to 4 metres with associated kino flow" noted in Mr Paroissien's report, as possible "shear fractures from bending of an unbalanced tree by loading forces of wind and canopy weight", this was entirely speculative and unsubstantiated.
4. Though relatively easy to do so, no aerial inspection was undertaken to investigate the trunk, and clarify the cracks.
5. Based on the arboricultural expertise which I bring to the Court, in the absence of additional information, these cracks appear to be growth splits which result from a lack of synchronisation between vascular cambium and bark cambium growth rate. This is commonly observed on trunks when a period of increased rainfall follows a period of low rainfall, as has been the case throughout 2020, with a return to relatively normal rainfall pattern, following a sustained drought. Growth splits alone do not reflect a loss of trunk structural integrity.
6. Of particular significance is the "kino flow" associated with the splits, as this is another positive sign of vigour displayed by the tree.

7. The applicant failed to challenge the evidence that there had been minimal disturbance or level change around the tree base, no root mapping or other investigation was undertaken, and thus there is no evidence suggesting the tree is unstable in the ground.
8. Additionally, as with the trunk assessment, the absence of an aerial inspection of the upper canopy renders the applicant's evidence regarding branch attachment unsubstantiated and thus less persuasive.
9. Overall, based on the site inspection and the evidence adduced, I am not convinced that the tree is likely to fail near ground level, and cause damage in the near future, or likely injury.
10. Similarly, I accept that likely damage in the near future from falling branches, and the likelihood of injury from falling branches is relatively low, and in a tolerable range, as per the applicant's QTRA report. Therefore, these issues are dismissed, and set aside.
11. The remaining issue thus relates to the electricity wires damaged by a falling branch about three years ago. In the absence of a paid invoice, the extent and nature of the damage is unspecified, and questions remain as to the strength and suitability of the supply infrastructure on the property. Nonetheless, the Court's decision in *Granger v Owners Corporation SP 18494* [2012] NSWLEC 1285, indicates that even relatively minor damage engages the Court's jurisdiction, and thus s 10(2)(a) is deemed to be satisfied.
12. Whether the damage is minor or major is irrelevant in answering the jurisdictional tests in s 10(2) but it can be relevant in determining what orders, if any, should be made. This is the question that must be answered. As stated above, s 9 enables the Court to make any such orders it thinks fit to remedy, restrain or prevent damage to property, or to prevent injury to any person. This requires consideration of the matters in s 12 of the Trees Act.

Discretionary matters – s 12

1. In making an order, the Court considers relevant matters in s 12 of the Trees Act.

* The tree is primarily located on the respondents' land (s 12(a)).

* Pruning or removal of the tree requires consent from Council under the Environmental Planning and Assessment Act 1979 (s 12(b)).

* Any removal of live foliage reduces the photosynthetic capacity, and thus the health of a tree. This tree is mature (s 12(b2)).

* The tree contributes to protection from the sun, and from wind, to landscaping, and to the amenity of both properties, and to the immediate locality. The tree is visible from neighbouring houses, and from the waterfront, it is historic, and has intrinsic value to public amenity (subs 12(b3), (c), (e) and (f)).

* Being a species indigenous to this area, the tree's flowers and fruit, trunks and branches could be expected to provide food and/or shelter for local fauna, and thus would contribute to the local ecosystem and biodiversity (s 12(d)).

* Given the size of the tree, and the likely spread of its root system, as the land is sloping, the tree is likely to be providing benefit to soil stability, and to absorbing water and reducing run-off (s 12(g)).

* With respect to 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 (s 12(i)), one must consider that the tree was there first.

Findings and conclusions

1. The respondents' position is that the value of the tree outweighs the concerns of the applicant, particularly when the future damage or likelihood of injury, is unproven, or supported by evidence. The respondents maintain their view that the application should be dismissed and the tree should remain.
2. I am satisfied that the tree has caused damage to an electricity wire. However, I am not satisfied that the damage is sufficient to order the removal of the tree, or indeed any intervention with it at this stage.
3. In regards to the likelihood of whole tree, or branch failure, I agree with Mr Paroissien that there are no signs of structural instability, that would lead me to conclude that the tree is likely to cause damage in the near future, or injury to anyone in the foreseeable future. With the expertise I bring to the Court, notwithstanding the historical heavy pruning, there is nothing particularly disconcerting in the habit of the tree and any increasing level of 'epicormic shoots' are not a sign of increasing stress. More likely they are an indication of improving vigour, consistent with a return to normal rainfall levels and thus improved environmental conditions in the tree's root zone.
4. If the circumstances change, and there is new evidence, it is possible to make a fresh application. This is discussed in *Hinde v Anderson* [2009] NSWLEC 1148. The judgments in *McCallum v Riordan* [2011] NSWLEC 1009 and *Zangari v Miller (No 2)* [2010] NSWLEC 1093 give some indication as to what the Court considers to be 'changed circumstances' and fresh evidence.

Orders

1. Therefore, the orders of the Court are:
1. The application to remove the tree is dismissed.

.....

J Douglas

Acting Commissioner of the Court

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Decision last updated: 21 October 2020

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Prepared on 26 October 2026 · Esheria