

AUSTRALIA / JUDGMENT

Schellnack v Burrows [2023] NSWLEC 1717

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Land and Environment Court

New South Wales

Medium Neutral Citation: Schellnack v Burrows [2023] NSWLEC 1717

Hearing dates: 7 August 2023

Date of orders: 28 November 2023

Decision date: 28 November 2023

Jurisdiction: Class 2

Before: Douglas AC

Decision: See Orders at [47].

Catchwords: TREES (DISPUTES BETWEEN NEIGHBOURS) –damage to roof – risk of injury to persons – considerable s 12 considerations

Legislation Cited: Environmental Planning and Assessment Act 1979

Trees (Disputes Between Neighbours) Act 2006, Pt 2, ss 6,7, 8, 9, 10, 12,

Cases Cited: Barker v Kyriakides [2007] NSWLEC 292

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

Yang v Scerri [2007] NSWLEC 592

Texts Cited: Australian Standards, AS 4373:2007, Pruning of amenity trees, March 2007

Safe Work Australia, Guide to Managing Risks of Tree Trimming and Removal Work, July 2016

Category: Principal judgment

Parties: Joan Schellnack (Applicant)

Roger Burrows (First Respondent)

Anne Burrows (Second Respondent)

Representation: J Schellnack (Self-represented) (Applicant)

R Burrows (First and Second Respondents)

File Number(s): 2023/166721

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Judgment

Background

1. COMMISSIONER: The applicant, Joan Schellnack, shares a boundary in Tuggerah with the property of the first and second respondents, Roger and Anne Burrows, which contains a row of ten mature trees growing in close proximity to the common boundary and overhanging the rear of the applicant's dwelling. The properties are accessed from different roads.
2. Ms Schellnack made an application, pursuant to s 7 of Pt 2 of the Trees (Disputes between Neighbours) Act 2006 (the Trees Act), seeking orders for removal of twelve trees, including their roots, and compensation for damage to her house, due to alleged damage that the trees have caused, are causing, and are likely to cause in the near future. The applicant also claimed that the trees present a risk of injury to persons.
3. In 2011, Ms Schellnack occupied her dwelling, which was constructed in 2010 on a previously vacant block. The applicant submitted that limbs regularly dropped from all the trees onto the adjacent section of her dwelling's roof above a bathroom and four bedrooms. The applicant claimed that the damage had been ongoing for ten years but had increased over the last three years. The claimed damage comprised broken tiles and roof sarking, and secondary damage to gyprock cladding, bathroom walls, and floors, along with ongoing mould growth, all allegedly resulting from water penetrating through the roof. The applicant also claimed that damage was being caused by roots from the trees growing under the concrete slab of her dwelling.
4. Mr Burrows resisted removal of the trees and claimed that he kept them regularly maintained. He noted having applied to Wyong Shire Council in 2008 when the applicant's house construction was planned, seeking removal of three trees, but that Wyong Shire Council permitted removal of one tree only. The properties now fall under Central Coast Council (Council), which was established in 2016 upon the amalgamation of Gosford City Council and Wyong Shire Council.

The on-site hearing

1. The hearing commenced on the morning of 7 August 2023 with an inspection of the trees from both properties, and of the applicant's roof, which was viewed from ground level. Ms Schellnack was self-represented while Mr Burrows represented himself and his wife. Mr Burrows was accompanied by Mr Vassallo. Though Mr Vassallo was not a party to the application and had not satisfied the Court's requirements to act as Agent for the

respondents, given his relatively long-term tenancy of the respondents' property, and the absence of objection by the applicant, I considered it reasonable for Mr Vassallo to contribute to the proceedings including photographs, videos, and written submissions. A letter from the respondents' property agent, dated 14 July 2023, noted that LJ Hooker, Wyong, had managed the property for the Burrows since 2000.

2. During oral submissions, Ms Schellnack withdrew her claim for compensation for past damage, but instead prioritised mitigation of future damage and injury.
3. While 12 trees were shown on the site diagram in the application, there were 11 trees present on site. Tree 11 was growing towards Council property at the back of the site and was set back from the common boundary such that it was irrelevant to the application. Therefore, 10 trees were considered, with the numbering sequence of the trees commencing near the front of the respondents' rear yard and terminating near the respondents' back fence, consistent with the application. Tree details are listed in the table below:

Tree number Tree species

- | | |
|----|---|
| 1 | Eucalyptus pilularis (Black Butt) |
| 2 | Lophostemon confertus (Brush Box) |
| 3 | Eucalyptus sp - dead |
| 4 | Grevillea robusta (Silky Oak) |
| 5 | Eucalyptus botryoides (Southern Mahogany) |
| 6 | Grevillea robusta |
| 7 | Grevillea robusta |
| 8 | Eucalyptus botryoides |
| 9 | Grevillea robusta |
| 10 | Eucalyptus botryoides |

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 (or trees) to which this Act applies, that is situated on adjoining land. Ms Schellnack met these requirements.
2. The applicant provided evidence in satisfaction of the requirements under s 8(1) of the Trees Act: to give at least 21 days' notice of the lodging of the application and the terms of any order sought, to the respondents under s 8(1)(a), and to Council under s 8(1)(b) of the Trees Act.

3. Section 9(1) of the Trees Act provides the Court powers to make such orders as it thinks fit to remedy, restrain, or prevent damage to property, or to prevent injury to any person, as a consequence of the tree/s the subject of the application.
4. The applicant had satisfied s 10(1)(a) of the Trees Act: to make a reasonable effort to reach agreement with the owner of the land on which the trees are situated. The respondents provided copies of letters from Ms Schellnack from May and July 2022, which both reiterated a request for tree removal. The letter of July 2022 included a description of damage incurred to the applicant's dwelling, the lack of sunlight preventing solar panel installation, and the constant leaf drop requiring daily maintenance and preventing lawn growth. The parties also engaged in mediation through a Community Justice Centre.
5. The next major test that is posed, by s 10(2) of the Trees Act, states:
 - (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.

Findings

1. The trees varied in height, with the tallest reaching about 16 metres (m). Trees 1, 2, and 3 were growing close together, adjacent to the applicant's side neighbour's common boundary with the respondents, rather than the applicant's land, with a space of about 6m between Trees 3 and 4. The applicant submitted letters to the Court from her side neighbour, Ms Lyn Macpherson, dated 4 April 2023, and another, dated 24 January 2023, which Ms Macpherson had sent to Mr Burrows but received no reply. The letters outlined Ms Macpherson's fear of entering her small rear courtyard due to "close misses" from falling branches and noted having witnessed "a huge branch crashed through my neighbour Joan's roof only metres from me".
2. While s 10(2)(a) of the Trees Act relates to damage only on the applicant's land, s 10(2)(b) covers a tree's likelihood "to cause injury to any person". As Tree 3 was a tall, large dead Eucalyptus tree growing close to Ms Macpherson's property which appeared to be deteriorating structurally, I was satisfied that Tree 3 presented a genuine risk of injury to Ms Macpherson and, though to a lesser extent, to the applicant, to Mr Vassallo, and to the respondents. Consequently, s 10(2)(b) of the Trees Act is engaged.
3. Conversely, neither Tree 1 nor Tree 2 were likely to cause injury to any person nor to have caused damage to the applicant's property, or to cause damage to the applicant's property in the near future. Tree 1 was distinctly leaning over the respondents' land while Tree 2 was a stable, structurally sound, small Brushbox tree. Though both the applicant and Ms Macpherson expressed fears about any or all of the trees uprooting and falling on their

houses, there were no indicative signs that any of the trees were unstable in the soil, notwithstanding that the hidden root system of dead Tree 3 would also have been deteriorating structurally and the tree's anchorage in the ground was thus likely becoming less predictable.

4. Trees 4 – 10 inclusive were planted both close together and close to the common boundary and part of their canopies overhung the applicant's land. However, because the applicant's dwelling was not parallel to the common boundary, her dwelling was closer to the boundary at the rear of her yard than at the front, and this coincided with the branches from Trees 8 and 10, which, of all the branches, extended furthest over the boundary.
5. Trees 4 – 10 contained dead and/or overextended live branches that were likely to shed from the trees, and distinct wounds on various trunks, and broken branch stubs, indicated that some relatively large branches had probably fallen into the applicant's land in the recent past. Considering that such branches may also deflect unpredictably when falling through tree canopies or be blown towards the applicant's dwelling by prevailing winds, I was thus satisfied that the trees had caused the applicant's roof tile damage and that further near future damage was likely. Based on the decision in *Yang v Scerri* [2007] NSWLEC 592, near future damage is considered to be a period of about 12 months. Consequently, s 10(2)(a) of the Trees Act is engaged.
6. I was not satisfied, however, that roots from the trees had caused or were causing damage to the concrete slab of the applicant's dwelling. One root had previously been severed by the applicant while other roots growing near the concrete slab were sufficiently small that they could also be severed and cleared without negatively impacting the trees.
7. Mr Burrows and Mr Vassallo submitted that the applicant's damage claims were contrived and lacked credibility, that tree removal was sought to provide maximum sunlight to proposed solar panels rather than to mitigate future dwelling roof damage and that either the applicant's son, or a tradesman replacing broken tiles on the applicant's dwelling roof in August 2022, had intentionally broken tiles on the roof to manipulate evidence in support of the applicant's tree removal 'agenda'.
8. Mr Vassallo contended that branches were not overhanging the applicant's roof, but drone video evidence taken from above the trees, submitted by Mr Burrows, displayed branches significantly overhanging the applicant's roof, particularly from Eucalyptus Trees 8 and 10. Mr Burrows also submitted photographs and ground-based videos which displayed the tradesman replacing broken tiles on the applicant's dwelling roof in August 2022, and a dead Eucalyptus branch about 75mm in diameter on the roof adjacent to broken tiles.

9. Mr Burrows questioned the veracity of the tradesman's roof repair invoice submitted by the applicant because it lacked an Australian Business Number, business name detail, and correct invoice date. Mr Burrows also challenged photographs supplied by the applicant because they were not date and time stamped and claimed that the same photographs had been submitted by the applicant to substantiate two separate instances of damage.
10. Though Ms Schellnack's written evidence was unsophisticated and partially inconsistent, this is not unusual with applications under the Trees Act by self-represented litigants, and I was satisfied by the applicant's oral explanations. It is usual, as in this case, for determinations of the Court under the Trees Act to rely heavily on evidence adduced onsite.
11. Had the applicant maintained her claim for compensation for past damage, her submitted evidence may have been deemed insufficiently substantive, but much of the extensive video and photographic evidence submitted by both Mr Burrows and Mr Vassallo supported the applicant's ongoing tile damage claims, rather than refuting it.
12. I was not persuaded by Mr Burrow's submissions purporting to display that he had maintained the trees regularly and appropriately. A copy of a 2008 determination by Wyong Shire Council granting approval for one tree removal but refusing two others was of little value as it related to three *Eucalyptus scoparia* trees, rather than any of the species in the row of trees considered on site. An invoice from Woodpeckers from 10 November 2010, noting "Tree work carried out at above property", lacked specificity of works undertaken while an invoice from Total Tree Service Pty Ltd, dated 11 December 2013, which did specify "trim branches overhanging houses", was the most recent submitted evidence of tree maintenance.
13. Mr Burrows' evidence included a copy of a brief undated statement on a blank sheet of paper, which he attributed to an inspection by Total Tree Services on 21 May 2022. This inspection report, which did not satisfy requirements for expert evidence submitted to the Court, claimed that "The trees to the side of the property are in good sound condition" and "branches overhanging the neighbours' property were trimmed approximately four years ago" by the tree owner. Mr Burrows provided no invoices or other evidence, however, to substantiate tree maintenance works undertaken subsequent to 11 December 2013.
14. It is common in urban areas for tree branches or roots to grow beyond property boundaries and encroach over neighbouring land and no remedy is available under the Trees Act where no damage or risk of injury accompanies such encroachment. Where damage or risk of injury is foreseeable, however, as in this case where relatively large dead and live branches overhang a neighbour's dwelling, the tree owners owe a duty of care to mitigate such likelihood of damage or injury. Such mitigation usually requires tree inspections by a suitably qualified and experienced arborist at intervals appropriate to the tree species and circumstances, and after major storm events.

15. With s 10(2) of the Trees Act satisfied, I have jurisdiction under s 9 to make a wide range of orders with respect to the trees. To determine, what, if any, orders should be made, the Court must consider relevant matters in s 12 of the Act, as follows:

Discretionary matters – s 12

1. The trees are growing in a row in the rear yard of the respondent's property, close to the common boundary with the applicant, and with her side neighbour (s 12(a)).
2. In the absence of s 6(3) of the Trees Act, removal or major pruning of the trees would require approval under the Environmental Planning and Assessment Act 1979, as administered by Council. Mr Burrows made an application for removal of three trees on his property in 2008 but the Council determination showed these three trees were of a distinctly different species to the trees included in the application (s 12(b)).
3. Subsection 12 (b2) considers the impact any pruning would have on the trees. A significant reduction of the likelihood of future roof damage from Trees 4 – 10 inclusive may be achieved through programmed tree pruning, with little negative impact on the trees. Pruning is not a viable option for Tree 3, the dead Eucalyptus, and orders shall be made for its removal.
4. The trees provide protection from the sun and from wind and enhance the natural landscape of the area and the scenic value of the land on which they are situated. Though they are located in the respondents' rear yard, the trees are sufficiently tall, broad, and conspicuous to nearby residents that they cumulatively contribute to public amenity. All the trees are likely to provide food and habitat for native fauna, particularly the Eucalypt's, as their endemic natural distribution extends into this region. The trees also contribute to privacy and are likely to stabilise soil in which they are growing, improve soil structure, and enhance infiltration of water (ss 12(b3),(d),(e),(f),(g)).
5. Subsection 12(h)(i) considers anything, other than the trees, 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.
6. With respect to "any act or omission by the applicant", a major theme in the applicant's written and oral evidence was constant leaf drop onto her dwelling roof and yard, the daily maintenance burden that arose from such debris in the yard and the associated inability to maintain lawn growth.
7. Annoyance from debris dropping or blowing from trees onto neighbouring land is an element common to many applications under Pt 2 of the Trees Act. In *Robson v Leischke* (2008) 72 NSWLR 98; [2008] NSWLEC 152, at [171], Preston CJ addresses this issue:

"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. Related claims of excessive maintenance that also commonly arise in applications under Pt 2 of the Trees Act are 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. 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. Though the "age and nature of the structure" is also considered under s 12(h)(i), as a certain amount of wear and tear is expected to arise with any structure over time, I am not satisfied that deterioration of structural integrity of the applicant's roof tiles is a significant factor influencing tile breakage. The size of branches likely to have fallen onto the roof, as displayed in photographs, videos, and reinforced by the size and location of trunk and branch stub wounds, in combination with the considerable height from which many of the branches are likely to have fallen, suggests that tile breakage was likely whether the applicant's tiles were new or aged. Further, the construction of the applicant's dwelling in 2010 suggests that the tiles would be within an age range where they may be expected to remain fit for their purpose.
2. Although the applicant emphasised the lack of sunlight to her yard and dwelling caused by the trees, Pt 2 of the Trees Act provides no remedy for insufficient solar access, regardless of potential benefits of solar panels to an individual.

Conclusions

1. The removal of all the trees, as proposed by the applicant, would cause a significant impact on the site, on the natural landscape and scenic value of the land on which they are situated, on the trees' intrinsic value to public amenity, on local biodiversity, and on above and below ground ecological interrelationships which the trees foster. Further, many serious storms have occurred in this area over recent decades but wounds on the trees were not indicative of resultant major trunk or branch damage or even widespread minor damage.
2. I am satisfied that the applicant has suffered ongoing roof damage from branches falling from the trees but, paradoxically, this row of trees would provide a barrier that is likely to slow and modify prevailing winds and protect adjacent dwellings from major damage that may otherwise result from extreme storm events. With this consideration and in an endeavour to retain the abovementioned myriad significant benefits that the trees provide, in contemplation of orders, the option of tree removal shall be the last resort, notwithstanding the necessity to mitigate likely future damage and risk to people.
3. Both Mr Burrows and Mr Vassallo appeared to have blinkered themselves to readily apparent site conditions, and the contention that the applicant conspired to break her own roof tiles was unpersuasive, at best. Regardless that Ms Schellnack unambiguously sought removal of the trees to gain full benefit from proposed solar panels, it was obvious and foreseeable at the onsite hearing that some or all of Trees 4 – 10 contained branches overhanging the applicant's yard and roof of sufficient size and height to readily break tiles upon falling, which became inevitable in the absence of sufficiently regular tree maintenance. The respondents submitted no invoices or other evidence substantiating tree maintenance works undertaken subsequent to 11 December 2013, almost 10 years ago.
4. Similarly, Mr Vassallo's submission that live branches were not extending over the applicant's roof was simple denial, considering the site reality and the respondents' own drone derived video evidence which displayed large branches from Eucalyptus Trees 8 and 10 extending far over the applicant's roof.
5. I assigned negligible weight to the respondents' inspection report from Total Tree Services of 21 May 2022. While I concur that, other than Tree 3, the trees were generally in "sound condition", the inspection report did not address the obvious priority issue regarding damage from dropping branches and was thus of negligible value. Even if "branches overhanging the neighbours' property were trimmed approximately four years ago", as claimed in this "report" this has clearly not been sufficient to prevent the applicant's roof damage resulting from the trees, as displayed in both parties' photographs and videos.
6. Consequently, orders shall be made for pruning of specified live branches from Trees 4 – 10 inclusive, as follows:

Tree number Common name and description Pruning specifications

Approximate branch collar size Approximate height of branch above ground level (m)

(mm)

125 7

4 Silky Oak 100 8

3 branches 70 9

- at branch junction

Mahogany 100 12

5 - 2 trunks 150 12

2 branches Both branches are on trunk closest to applicant's land – retain vertical leader

Silky Oak 60 7

6 - 2 trunks 60 x 2 branches 7.5

5 branches 100 7.5

60 8.5

Silky Oak Various Prune about 5 low epicormic branches

7 About 7 branches in total 50 3.2

10 4

8 Mahogany 150 10

1 branch Large long branch

Various Prune about 4 low epicormic branches

9 Silky Oak 160 2.8

About 7 branches in total 80 5

50 6.25

Mahogany 60 7

10 - 2 trunks 120 7.75

2 branches Both branches are on trunk closest to applicant's land

1. An annual risk assessment by a qualified arborist shall also be ordered along with annual pruning based on risk assessment inspection results. It is unlikely that the quantity of live foliage required to be pruned annually would exceed 10% of total tree foliage so Council permission is unlikely to be needed under current Council requirements.

2. Given the obvious foreseeability of property damage when a row of 10 relatively large trees is growing very close to and over neighbouring properties, and is inadequately maintained, the Burrows breached the duty of care they owe to their neighbours. The orders of the Court should minimise the likelihood of future damage to the applicant's property arising from average weather conditions, but in light of the respondents' duty of care, it would also be prudent for a qualified arborist to assess the respondents' trees after extreme storm events.
3. Though the applicant will still have leaves and other minor tree debris dropping and blowing into her yard, I am satisfied that the pruning regime ordered will result in a reduced and reasonable maintenance burden in accordance with the Tree Dispute Principle established at [20] of Barker.

Orders

1. The Orders of the Court are:
 1. The respondents, at their expense, shall employ Australian Qualification Framework (AQF) level 3 arborists with all appropriate insurances (the arborists) to remove dead Eucalyptus Tree 3 to near ground level within 60 days of the date of these orders. All branches and trunk sections shall be lowered or thrown onto the respondents' land.
 2. The respondents, at their expense, shall employ the arborists to prune all dead branches with a diameter greater than 15 millimetres (mm) at the branch collar from Trees 4 – 10 inclusive that are growing over the applicant's land, within 60 days of the date of these orders. All branches shall be lowered or thrown onto the respondents' land.
 3. The respondents, at their expense, shall employ the arborists to prune live branches growing over the applicant's land from Trees 4 – 10 inclusive, as specified above in [43], within 60 days of the date of these orders. All branches shall be lowered or thrown onto the respondents' land.
 4. In November of 2024 and in November of every subsequent year, the respondents, at their expense, shall employ AQF level 3 arborists with all appropriate insurances to conduct a tree risk assessment on Trees 4 - 10 inclusive, and to prune all dead branches with a diameter greater than 15mm at the branch collar from Trees 4 – 10 inclusive that are growing over the applicant's land. The arborists shall also prune any and all live branches overhanging the applicant's land that were deemed in the aforementioned tree risk assessment to be likely to fall onto the applicant's land over the subsequent year.
 5. All pruning works shall comply with Australian Standard (AS) 4373-2007: Pruning of amenity trees, and all tree works shall comply with the Safe Work Australia, Guide to Managing Risks of Tree Trimming and Removal Work, 2016.

6. Should it be required, the applicant shall allow the arborists access to her property for the undertaking of any of the ordered tree works or to clear up afterwards, upon receipt of at least 72 hours' notice from the respondents, provided to the applicant via email.
7. All works shall be completed during reasonable daytime working hours.

J Douglas

Acting Commissioner of the Court

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Decision last updated: 28 November 2023

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