

AUSTRALIA / JUDGMENT

Wang v Van Niekerk [2018] NSWLEC 1316

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Land and Environment Court

New South Wales

Medium Neutral Citation: Wang v Van Niekerk [2018] NSWLEC 1316

Hearing dates: 31 May 2018

Date of orders: 12 June 2018

Decision date: 12 June 2018

Jurisdiction: Class 2

Before: Douglas AC

Decision: The orders of the Court are:

- 1) The claim with respect to the building damage is dismissed.
- 2) Mrs Van Niekerk is to pay Mr Wang for the full cost of reinstatement of a gently mounded surface over the roots of the 3 m² rectangle located by measuring a one metre distance from the edge of the major woody root in a south, east and westerly direction. No roots are to be severed or damaged by these works. Mr Wang is to get 3 quotes for these works including removal of about 2.5m² of the raised concrete pieces, and provide a paid invoice based on the least expensive quote to LJ Hooker within 28 days of the works being completed. Mrs Van Niekerk is to pay the sum of the invoice to Mr Wang within 28 days of receipt of invoice.
- 3) If such receipt account is not presented to Mrs Van Niekerk within 12 months of the date of this hearing this order lapses.
- 4) Mrs Van Niekerk is liable to pay \$974.50 to Mr Wang within 28 days of the hearing, this being reimbursement of 50% of the Plumbing costs, the invoices of which are included in Mr Wang's application
- 5) The claim with respect to the tree removal is dismissed.

Catchwords: TREES [DISPUTES BETWEEN NEIGHBOURS]: Damage to property; compensation for damage.

Legislation Cited: Civil Procedure Act 2005

Environmental Planning and Assessment Act 1979

Heritage Act 1977

Land and Environment Court Act 1979

Trees (Disputes Between Neighbours) Act 2006

Cases Cited: Barker v Kyriakides [2007] NSWLEC 292

Colling v Wilson [2009] NSWLEC 1061

Robson v Leischke [2008] NSWLEC 152

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

Stevens v Russell [2016] NSWLEC 1233

Woo v Chan [2010] NSWLEC 1317

Yang v Scerri [2007] NSWLEC 592

Category: Principal judgment

Parties: Andrew Wang (Applicant)

Anne Christine Van Niekerk (Respondent)

Representation: Counsel:

Dr J Smith (Respondent)

Solicitors:

Litigant in person (Applicant)

Carrol and O'Dea Lawyers (Respondent)

File Number(s): 2018/80084

Publication restriction: No

Judgment

1. ACTING COMMISSIONER: This is an application, pursuant to s 7 Part 2 of the Trees (Disputes between Neighbours) Act 2006 (the Act) by Mr Yi Pu Wang of Newtown. It concerns a Tallowood (*Eucalyptus microcorys*) (the tree) located very close to the common side boundary in the rear yard of the neighbouring property which is owned by Mrs Anne Christine Van Niekerk.

Background

1. The applicant's son, Mr Andrew Wang, purchased this property at auction, without a building inspection, in late 2012. It is a two storey terrace attached to the respondent's property, with a frontage facing approximately west. The shared boundary therefore runs approximately west to east. The property is currently tenanted. Both Mr Andrew Wang and the applicant, Mr Yi Pu Wang were present at the hearing.
2. The respondent, Mrs Van Niekerk, is an elderly woman who lives in New Zealand. She was available at the hearing by Skype, if necessary. She was represented at the hearing by Dr Smith of Counsel, Mr Daniel O'Brien (Solicitor) from Carrol and O'Dea Lawyers and Mr Paul O'Donnell of CSI Building Consultants, whose report was filed with the Court by 22 May 2018, as required.
3. In 2014, Mr and Mrs Van Niekerk returned to New Zealand to gain family assistance with respect to a chronic medical condition ailing Mr Van Niekerk. Mrs Van Niekerk recently inherited the property from her late husband, who had owned it since 1992. The property has been tenanted and managed by LJ Hooker, Newtown since 2006.
4. After rear access was initially organised with the tenants, the hearing commenced at the front of the applicant's property. Dr Smith drew my attention to minor cracking in the front masonry of Mr Wang's property and, based on extensive lifting and peeling of paint, that there appeared to have been little attention to maintenance for many years.
5. Based on the arboricultural expertise that I bring to the Court, the tree's estimated age is between 30 and 45 years, thus it would likely have been planted prior to Mr Van Niekerk's 1992 purchase. It would have been marginally smaller than its current size when Mr Wang purchased the neighbouring property in 2012.
6. The tree is approximately 17 metres tall with a broad canopy spread of about 14 x 14 metres, extending over the rear yards of both subject properties and beyond. These two properties are each less than 5 metres wide. The Tallowood appears to have a sound branch structure and a dense canopy cover. It is in good condition and shows strong vigorous growth. Branches overhanging Mr Wang's property have been pruned sympathetically in the past, but not for some years. Ms Van Niekerk in her statement (Exhibit B pp7. 29) refers to the tree being expertly pruned "on at least 3 or 4 occasions" since 2012 and to an email about proposed pruning sent by Mr Lake from LJ Hooker on 9 April 2014 (Annexure K). At Point 29 of his response, Mr Wang states that the tree has only been pruned once, in 2014, since Andrew Wang's purchase in 2012 and that "The current situation of the tree will suggest that." I would support Mr Wang's view.
7. The Tallowood's trunk is about 750 mm in diameter near ground level and approximately 550mm at breast height (1.4m above ground level). The base of the tree is close to the steel Colorbond style fence. A large primary woody root extends in a southerly direction, under the fence into Mr Wang's back yard. It is visible above ground for about 400mm in length

and initially is about 250mm in width, though it tapers and narrows away from the tree base. Where it initially protrudes under the fence, it is about 175mm above ground level, and the base of the panel of the fence has been shortened and raised to prevent fence damage, and allow room for the thickening root.

8. Other than a small White Cedar tree (about 4 m tall x about 70mm trunk diameter), and a small Phoenix palm near the Tallowood, no other trees of any significance are growing nearby. Both the White Cedar and the small Phoenix palm may have germinated opportunistically from seed in bird droppings.
9. Mr Wang advised that the tree drops leaves continuously, with the greatest concentration in autumn. He noted that the rear gutters generally fill with leaves within two weeks, and that he cannot keep up with the work required to keep them clear. He indicated that he cleaned out the gutters about every 6 months.

The applicant's case

1. Mr Wang is seeking compensation for the cost of proposed repair of a cracked rear bathroom wall, and for repair of part of a concrete patio in the backyard damaged by root expansion and uplift. He seeks reimbursement of his 2017 payment for repairing sewerage pipes damaged by roots, and for the associated jet blasting to also clear sewer pipes. He is also seeking reimbursement of the cost of a building inspection and his Land and Environment Court application lodgement fee. His application form included copies of receipts for these costs and for the repair of sewerage pipe damage. Additionally, he is seeking orders to remove the tree.
2. Mr Wang contends that the clearly visible major woody root, plus the submerged extension of this root probably along with other submerged roots, have caused acute concrete uplift around the major woody root. He drew my attention to the trip hazards thus formed by the edges of some broken concrete pieces close to the raised major root, which were displaced up to 60mm above neighbouring pieces. Within his application is a signed statement from the current tenants, detailing their concern about the trip hazard caused by the "uneven surface of the back yard."
3. This tenant's statement also refers to their fears relating to a major near vertical crack in the back wall of the house, in that "the wall might be unstable and fall on us." This rear wall is in the bathroom. Mr Wang stated verbally and in his application that "the bathroom walls are cracking continuously leading to a gap that is becoming increasingly larger (Q4.3)." He also noted in his application at Q9.3 that "one particular crack has been repaired less than a year ago but has reappeared and the gap in the crack is getting wider." This apparently refers to the same crack, which currently starts around floor level near the centre of the approximately 3.5 metre long wall, and broadens progressively as it rises towards the ceiling.

4. Mr Wang also contends that this crack has been caused directly by the submerged extension of the visible major woody root, possibly along with other submerged roots that extend out from the base of the tree. He stated that he could lift the concrete and expose the roots and show this, though prior to this hearing, no such excavation had been undertaken. The base of the tree is about 4.0 metres from the location of the wall crack, and the point where the major woody root submerges and is no longer visible is about 3.5 metres away.
5. Mr Wang's application also included a Property Inspection Report from Mr Paul Cavallo of Independent Building Inspections dated 6 March 2018. Mr Cavallo wrote on page 4 that "trees planted close to a house can cause issue" because "They draw out the soil moisture, change the soil structure and the house feels the effects of this added pressure." He contended that this results in the collapse of "layer upon layer of flat platelets" that make up soil particles, and that resulting "soil slumping becomes quite significant and results in severe structural damage to anything built on that soil." The report does not meet the Court's requirements of an Expert Witness, but was submitted by Mr Wang as supporting evidence. Mr Cavallo does not note his qualifications or experience in his report, but includes the name and crest of the Master Builders Association on its front cover, alluding to membership.
6. With respect to sewer pipe damage, Mr Wang included photographic evidence of the sewer pipe repairs showing many fine roots in the immediate vicinity, and copies of two invoices, which provided a description and cost of the completed repairs.
7. In question 6 of his application, Mr Wang contended that Mrs and or Mr Van Niekerk "did not take any steps to prevent or rectify any alleged damage caused by the tree" in the last 5 years. In his response to Mrs Van Niekerk's Statement (Exhibit A pp2.11) contesting this, Mr Wang supported his view with the fact that he had to organise the 2014 tree removal application (Exhibit 1 pp1.15) rather than the respondent, and with an email he received from Mr Kazzi of LJ Hooker on 24 November 2017 that the Niekerks "have no intention of removing the tree" (Exhibit 1 pp1.24). He also cited the fact that Mrs Van Niekerk had not submitted another tree removal application after he emailed her on 22 November 2017 with the plumbers invoice and advise to her that "you need to put application in" (Exhibit 1 pp1.25), and also that "Landlord or representative didn't attend any mediation which means they did not want to resolve the issue" (Exhibit 1 pp1.26).

The respondent's case

1. Mr Wang's proposed orders are resisted by Mrs Van Niekerk. Mr O'Brien lodged Orders with the Court on 24th May 2018 which proposed that the tree be removed with the costs shared equally between the parties, that the applicant's claim be otherwise dismissed, and for the applicant to pay the respondent's costs of the proceedings. At the hearing, Dr Smith also offered Mr Wang compensation of 50% of the \$1700 cost of the 2017 sewer pipe repairs.

2. Mrs Van Niekerk contends that Mr Yi Pu Wang is not the owner of the property and that the registered owner is Andrew Yi Qing Wang.
3. In her Statement (Exhibit B pp2.11), Mrs Van Niekerk disputes Mr Wang's response to question 6 (she mistakenly referred to question 5) of the application that she and or Mr Van Niekerk "did not take any steps to prevent or rectify any alleged damage caused by the tree." She claims on pp3.15 that she exercised this responsibility by consenting to the lodgement of a tree removal application by Mr Wang with City of Sydney Council (Council) on 15 April 2014. She also provided an email dated 15 April 2014 to LJ Hooker which authorised reimbursement to Mr Wang for the \$48 lodgement fee. The tree removal application was refused.
4. On pp3.16, of her Statement, Mrs Van Niekerk referred to the email copy of the Notice of Determination letter from Council, (Annexure D pp12) addressed to Mr Wang and to LJ Hooker Newtown dated 30 April 2014 containing the letter of refusal of removal, but granting permission for specific pruning.
5. Paragraph 5 of this letter on page 13 stated "You can engage a qualified Arborist (who is an AQF Level 5 Arborist) or a qualified Structural Engineer to determine if the tree is a potential hazard or is causing structural damage to your property." Paragraph 6 noted "If you are dissatisfied with this decision, Section 97 of the Environmental Planning and Assessment Act 1979 (EP&A Act) gives you the right to appeal to the Land and Environment Court within six (6) months after the date on which you receive this notice. Paragraph 7 stated that Section 82A of the EP&A Act "provides that the applicant may request the Council to review this determination" within 6 months from receipt of the refusal notice. On page 4.17a and b of her Statement, Mrs Van Niekerk's noted that Mr Wang had undertaken none of the options outlined in paragraphs 5-7.
6. Mrs Van Niekerk contends that an email to Mr Wang from Mr Kazzi of LJ Hooker on 24 November 2017 that the Niekerks "have no intention of removing the tree" was not based on advice she had conveyed to LJ Hooker. She contends that it did not reflect her consistent willingness to consent to tree removal, but that removal was subject to Council permission, and to Mr Wang lodging the new application with her consent, rather than her lodging it. In support of this option being available to Mr Wang, Mrs Van Niekerk provided a download from Council's website dated 27 February 2018 (Annexure G pp25). On page 6.26 of her Statement, Mrs Van Niekerk suggested that her reason for instructing LJ Hooker that mediation was unnecessary most likely related to the refusal of Council to grant permission to remove the tree in 2014.
7. Mr Paul O'Donnell of CSI Building Consultants holds a Bachelor of Building (Hons) and his report notes 33 years relevant industry experience. His report satisfies the requirements of an Expert Witness and he agrees to be bound by the Expert Witness Code of Conduct in Schedule 7 of the Uniform Civil Procedures Rules.

Jurisdictional requirements

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 initial issue, therefore, is the ownership of the land. It has been established that while Mr Yi Pu Wang is the applicant in this case, his son, Mr Andrew Wang is the registered owner of the property. To assist the parties proceeding, Dr Smith has noted that the Court has power under s 64 of the Civil Procedure Act 2005 to amend the application to the owner, Mr Andrew Wang, and Mr Andrew Wang exercised this option.
3. The Court is obliged to consider a number of matters pursuant to s 10 of the Act.
4. As required by s 10(1), I am satisfied that there has been an attempt by the applicant to reach agreement with the owner of the land on which the tree is situated, notwithstanding that Mr Wang's has felt frustrated in his efforts to resolve the issue. This has largely resulted from the respondent's absence and remoteness due to her husband's illness, combined with miscommunication with and by the management agent.
5. The next major test that is posed, by s 10(2) of the 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.
6. In a guidance decision published in *Yang v Scerri* [2007] NSWLEC 592, as a rule of thumb, the 'near future' is deemed to be a period of 12 months from the date of the determination. In regards to injury, the Court considers the risk posed by a tree in the near future based on the characteristics of the tree/s, any history of previous failures and the circumstances of the site apparent at the time of the hearing.

Cracked rear bathroom wall

1. Mr Wang showed the Court a major mainly vertical crack running up the middle of the rear wall of the bathroom as described in paragraph 12. Light penetrated through the crack. Mr Wang contends that the crack was caused by uplift by a tree root below the wall. He noted that this view is supported by Mr Cavallo's building inspection report.
2. Mr O'Donnell, for the respondent, disputed this interpretation and contended that the cracking is caused by subsidence, which in turn is caused primarily by excessive water accumulation nearby, due to inadequate guttering and stormwater management. Other cracks were noted in the bathroom, the largest in the corner most distant from the tree, plus a thin crack in the floor tiles.
3. Outside from the bathroom, Mr O'Donnell drew the Court's attention to the absent and inadequate guttering across the entire roof, and downpipes not connected to stormwater pipes. This would result in both a waterfall off the roof next to the bathroom and a main

downpipe dispersing directly outside the bathroom. At 3.1.2 (pp10) of his report, Mr O'Donnell wrote that "this water is causing erosion" which "in turn causes foundation subsidence". Mr Wang conceded that the stormwater management was in disrepair and inadequate, but focused on the difficulty of clearing leaves blocking the downpipes which he contended prevented water dispersal further from the building.

4. Mr O'Donnell also drew attention to the extensive and wide spread cracking throughout the rear of the building, which is displayed in photographs in both his and Mr Cavallo's reports. At 3.1.8 (pp11), Mr O'Donnell notes that "the cracking in the 100 year old brickwork is considerable" with "deteriorated mortar joints." "The walls are single brick. This is considered an inadequate wall system to be used for habitable areas and would not be approved by council due to its susceptibility to movement." "In every case the cracking is leaning towards the disconnected down pipes that are causing differential settlement." Based on the nature of the cracks, the erosion of the mortar and age of paintwork, I concluded that much of this cracking has existed for many years prior to the 2012 purchase.
5. Notwithstanding that neither Mr O'Donnell nor Mr Cavallo excavated anywhere on site nor provided any soil test results, both noted the presence of reactive clays. At the hearing, Mr O'Donnell suggested that the clays found in this area were, at least, moderately reactive. He explained their nature and relevance in terms of swelling and shrinking, and that they would exacerbate the impact of inadequately constructed walls subject to concentrated excessive stormwater impact. I am familiar with the clays in this area and accept the relevance of Mr O'Donnell's conclusions. Mr Cavallo's assertion as to the likelihood of water absorption by tree roots exacerbating the shrinkage of reactive clays is also plausible and relevant.
6. Crucially, while one or a combination of these various factors is likely contributing to the wall cracking, and the tree roots may be an important factor, Mr Wang failed to provide evidence to support this.
7. While in *Robson v Leischke* [2008] NSWLEC 152 Preston, CJ at [179] notes that the tree need not be the sole cause of damage to property on an applicant's land in order to engage the Court's jurisdiction, in *Stevens v Russell* [2016] NSWLEC 1233 ("*Stevens*") at [40], Fakes C 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." Though the surface consists only of thin cracked concrete, Mr Wang did not excavate and or expose the roots.
8. In *Stevens* at [41], in relation to a wall, Fakes C states, "While it is possible that roots may have contributed to the lean, it is not a proven fact and the opinions are unsubstantiated. No consideration was given to the age and construction, including the type and depth of footings, of the wall or to the fact that it is a free-standing unit not keyed into any other wall perpendicular to it."

9. While the precise structural elements are not identical in Stevens and this matter, the reasoning applies in both cases. Many possible influences could have caused the wall cracking. Mr Wang has conceded that the stormwater management is inadequate and Mr O'Donnel has shown this could be a cause of erosion, thus subsidence and thus cracking. Much of the extensive building cracking clearly predates Mr Wang's purchase. The onus is on Mr Wang to prove the nexus or causal link between the tree and the wall damage for it to be deemed 'a' cause. The closest visible tree root is about 3.5 metres away. Therefore, excavation was required to expose the root or roots and show if and how it or they are causing the wall damage. This was not done.
10. With respect to the shrinkage of reactive clays, in Stevens at [37], Fakes C states "trees can extract water from soils, however, in the absence of any evidence to prove otherwise, the likelihood of the tree being 'the' cause, or even 'a' cause of the internal cracking remains a hypothetical possibility."
11. Mr Wang chose not to employ a Level 5 Arborist or Structural Engineer, referred to in paragraph 5 of the 2014 Council tree removal refusal letter. This choice was again highlighted in Question 8 of the Tree Dispute Application which reads "Do you have statements from other people concerning the damage, including by an arborist or engineer"?
12. On page 3 of his report, Mr Cavallo notes that he "did not dig." On page 4 he states that "Due to the age of the property, the structure will not be able to counteract pressures exerted on it with future tree growth therefore damage can be expected to get considerably worse" and that "in most cases when trees get too large and are too close to residential structures the only remedy is to remove the Tree as soon as possible." These can be viewed only as general statements, not specific useful evidence.
13. Again, he showed no nexus or clear causation between the building damage and the tree roots, only visible about 3.5 metres away. Reference is made to *Woo v Chan* [2010] NSWLEC 1317 at paragraph [10] to support this imperative. In *Smith & Hannaford v Zhang & Zhou* [2011] NSWLEC 29 [62], Craig J notes "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".
14. With respect to injury, the Act relates to the tree, not to the wall. There are no obvious features of the tree, nor any history or obvious visual indication of previous branch failures that would lead me to be satisfied that risk of injury, directly related to the tree, was likely.
15. In the absence of compelling evidence, I am not satisfied that the tree has caused, is causing, or is likely in the near future to cause the applicant's wall damage, nor is it likely to cause injury. As none of the tests under s 10(2) are satisfied, the Court has no jurisdiction to make an order. This element of the application, including the unspecified claim of between \$20,000 to \$30,000 to repair the wall, is thus dismissed.

16. Even if I am wrong on the contribution of the tree to the damage, by the discretion afforded by s 9 of the Act, no orders would be made for compensation. There are many other likely contributory factors such as the inadequate stormwater management, lack of maintenance and wear and tear. Evidence of the historic nature of the cracks provided by the erosion of the mortar and age of paintwork, results in a conclusion that at least most of this cracking has existed for many years prior to the 2012 purchase, before Mr Wang owned the property, and outside the 6 year limit imposed by the Limitation Act 1969 - refer *Stevens v Russell* [2016] NSW LEC 1233 at [40].

Cracked and lifted paving

1. Mr Wang's entire rear yard is covered in a layer of non-reinforced concrete that appears to be about 40mm thick. It appears to be decades old, though there are signs of relatively recent patching of the surface in various locations. The concrete is cracked to a greater or lesser degree throughout the yard, but generally remains fit for purpose as a safe surface. Photographs provided by Dr Smith, from digital property advertisements from the 2012 sale, indicate that the severity and extent of cracking was little different to the current situation.
2. Immediately around the raised primary woody tree root, however, the cracking is combined with uplift leading to an uneven surface, with trip hazards formed by some raised concrete plates. Some protrude above their neighbouring pieces by up to 60mm. I dispute Mr O'Donnell's suggestion that the tree is 100 years old, and thus almost stable in terms of further growth and thickening of roots, trunk and branches. Based on extensive familiarity with this species, I contend that the Tallowood is 30 to 45 years old, and while certainly mature, has the potential and likelihood of further growth.
3. I am satisfied by Mr Wang's argument that the paving uplift and associated trip hazards in the immediate proximity of the thickening root is likely to have at least partly developed, and certainly worsened, over the 6 years that he has owned the property, and that the tree is a cause of this damage. s 10 (2) of the Act is therefore engaged. Mrs Van Niekerk is to compensate Mr Wang for the cost of reinstating a safe surface around the protruding root. This can be achieved by surface reinstatement of the 3 m² area which is identified by measuring a one metre distance from the outer edges of the root in east, west and southerly directions, and resurfacing the rectangular area exposed. In replacing the lifted concrete, there is no need to cover the woody root and no tree roots are to be removed or damaged in the process. This will result in a gently mounded surface over the 3m² rectangle around the root that is safe for pedestrian traffic. This treatment, normally using bitumen, is common for paving reinstatement over roots on council footpaths.

4. Mr O'Donnell noted a Council requirement for at least 15% of the back yard surface to be unpaved to provide for infiltration and retention of stormwater on site. By alternatively converting the immediate area around the root to a garden bed or mulched area after eliminating the cracked concrete trip hazard, Council compliance would be achieved at low cost. Again, no tree roots are to be removed or damaged if this option is selected.

Reimbursement of cost of sewer pipe repair

1. Invoices have been provided by Mr Wang for unblocking a sewer pipe by Wilco Home Services on 21/11/2017 for \$249, and for repair of a collapsed boundary shaft plus clearing of tree roots by Splash Plumbing on 24/11/2017 for \$1700. Mr Wang seeks reimbursement of these costs in full while Mrs Van Niekerk has offered to pay 50% of the \$1700 cost. The Tallowood is the only large tree in the area, and photographs of the plumbing works appear to show minor woody and fine fibrous tree roots in the vicinity of the pipes. As the 24/11/2017 work by Splash Plumbing "Found tree roots in line jet blasted out once completed", I am again satisfied that the penetration of the tree roots into the pipe are a cause of the damage, and thus the jurisdiction of the Court is enlivened to deal with this issue
2. In support of Mrs Van Niekerk offer, Dr Smith provided the precedent in *Colling v Wilson* [2009] NSWLEC 1061 that deals with the issues around damage to clay pipes. Mr Wang's pipes would be at least 30 year old, and in this location and context, likely much older. It is rare after so many years for this type of infrastructure to remain fully sealed and functional. The pipes, the rubber seals, and the surrounding mortar at their junctions deteriorate with age. This deterioration and associated seepage is exacerbated by swelling and shrinking of reactive clays over time. Cracks develop and tree roots may enter through these cracks, likely causing further damage. The boundary shaft collapse may have had no obvious causal relationship to tree roots, but be largely a result of age and wear and tear. The roots in the photograph provided are only in the pipe's proximity. No photographs show roots in the pipes. PVC pipes have now replaced terracotta pipes for many decades. With correctly welded joins, they do not permit entry of tree roots. Given all these considerations, apportionment of costs is reasonable in this situation. Using the guidance of *Colling*, at [27], I consider a reimbursement of 50% of the sum of the two invoices to be appropriate.

Reimbursement of cost of building inspection and Court application lodgement fee

1. Commissioners of the Court are not given delegation by the Chief Judge, pursuant to s 36 of the Land and Environment Court Act 1979, to deal with applications for costs, or for the provision of reports and the like falling within the definition of costs. If Mr Wang wishes to make a separate application to the Court based on the outcome of these proceedings for any costs order, it must be made by Notice of Motion, heard and determined by a Judge of the Court.

Removal of tree

1. On 9 July 2013, within a year of purchasing the property, Mr Andrew Wang wrote to LJ Hooker Newtown expressing concern about the tree and requesting its removal. He noted that the tree was 3-4 metres from his house, damage to the fence, potential sewer pipe damage, some larger branches falling from it especially on windy days, and the danger this posed to his family and future children. He also referred to heavy leaf drop onto his roof causing rust, also into his gutters, as well as possible building damage and paving damage.
2. In respect to this possible and or future damage or injury, in *Robson v Leischke* [2008] NSWLEC 152 [225], Preston CJ states "the mere fact that a tree is situated on a person's land is insufficient reason by itself to justify making that person an insurer of other persons for any harm the tree may have caused to them or their property." At paragraph 56, he states that mere encroachment is not damage, in paragraph 169 that damage must be proved and in para 171 annoyance or discomfort to an applicant by such things as leaves and flowers blown onto their property from their neighbour's land is not "damage to property on land" within s7 of this Act unless they also cause damage to property on the neighbour's land.
3. The Court is not satisfied that compelling evidence has been provided to show that the tree has caused, is causing, or is likely in the near future to cause damage to Mr Wang's building, nor that the tree is likely to cause injury to any person. These aspects of the application have been dismissed.
4. Both the paving trip hazard, and the plumbing damage issues have been resolved, and thus the Court is not satisfied that the tree is likely in the near future to cause damage to Mr Wang's property. Therefore, as none of the tests under s 10(2) are satisfied with respect to the removal of this tree, the Court has no jurisdiction to make an order for any intervention with this tree and the application for removal is dismissed.

Discretionary matters – s 12

1. In making an order, the Court must consider relevant matters in s 12 of the Act. The relevant clauses are:

* The tree is located close to the boundary. Although the tree is mature it will continue to grow, though more slowly as it ages. Therefore some continuation of root expansion could be expected (s 12(a));

* In considering s 12(b), the tree is protected by Council's Tree Management controls under its Development Control Plan. In appendix 3, Mr O'Donnell notes that the parties' properties are within a Heritage Conservation Area – General (Sydney LEP 2012 Heritage Map – Sheet HER_010). Though removal would not require approval under the Heritage Act 1977, this Heritage status was not indicated in Mr Wang's application.

* With respect to s 12(b2), pruning of the tree has been relatively minimal, and in compliance with well specified recommendations from Council, completed to a high standard. This has led to the maintenance of the tree's sound and aesthetically pleasing branch structure and subsequent pruning specifications should continue this. Heavy pruning of overhanging branches should be avoided.

* The tree contributes significantly to protection from the sun, and to the amenity of the respondents' property, and to the immediate locality. It is a large prominent tree and is clearly visible from neighbouring houses and from the adjacent railway lines. As such, it has significant intrinsic value to public amenity (s 12(b3)(e)(f)).

* It could be reasonably expected that this species because of its flowering and fruiting characteristics would provide food and or shelter for local fauna and thus would contribute to local biodiversity (s 12(d)).

* Given the inadequate roof and downpipe drainage infrastructure identified at the rear of the applicant's property, the tree may, contrary to the applicant's assertion, be paradoxically providing benefit by reducing localised water accumulation in the soil around the rear of his dwelling (s 12(g)).

* Normal wear and tear is expected to arise with any structure over time. Consideration must be given to the age and nature of the structure when determining the extent to which a tree may or may not have caused the alleged damage. This must be a significant consideration in this case, where the building is about 100 years old and is dilapidated, and where no significant maintenance has apparently been undertaken for many years, probably decades (s 12(i)).

* The issue of claimed damage to roof infrastructure from falling leaves is dealt with in *Barker v Kyriakides* [2007] NSWLEC 292 and subsequent tree dispute principle, that 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. This principle applies here. It is expected that some level of external housekeeping and maintenance is normal for people who live in leafy urban environments and who benefit from the environmental and aesthetic services that trees provide. Leaf accumulation could be mitigated by more regular maintenance in terms of gutter cleaning and or gutter guard. (s 12(i)).

* With respect to apprehension of risk of injury, no tree risk assessment was provided to support this claim, and the level of risk is considered low and acceptable (s 12(i)).

Orders

1. The orders of the Court are:

1. The claim with respect to the building damage is dismissed.

2. Mrs Van Niekerk is to pay Mr Wang for the full cost of reinstatement of a gently mounded surface over the roots of the 3 m² rectangle located by measuring a one metre distance from the edge of the major woody root in a south, east and westerly direction. No roots are to be severed or damaged by these works. Mr Wang is to get 3 quotes for these works including removal of about 2.5m² of the raised concrete pieces, and provide a paid invoice based on the least expensive quote to LJ Hooker within 28 days of the works being completed. Mrs Van Niekerk is to pay the sum of the invoice to Mr Wang within 28 days of receipt of invoice.
3. If such receipt account is not presented to Mrs Van Niekerk within 12 months of the date of this hearing this order lapses.
4. Mrs Van Niekerk is liable to pay \$974.50 to Mr Wang within 28 days of the hearing, this being reimbursement of 50% of the Plumbing costs, the invoices of which are included in Mr Wang's application
5. The claim with respect to the tree removal is dismissed.

Acting Commissioner Douglas

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Decision last updated: 25 June 2018

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