

AUSTRALIA / JUDGMENT

Webb v Milton [2024] NSWLEC 1851

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Land and Environment Court

New South Wales

Medium Neutral Citation: Webb v Milton [2024] NSWLEC 1851

Hearing dates: 5 August 2024

Date of orders: 5 August 2024

Decision date: 05 August 2024

Jurisdiction: Class 2

Before: Douglas AC

Decision: The Court orders that:

- (1) The respondents, at their expense, shall contract Australian Qualification Framework (AQF) level 3 arborists with all appropriate insurances (the arborists) to remove the Jacaranda branch leaning on the fence.
- (2) The arborists or the respondents shall grind or excavate the Bougainvillea stump to entirely clear it from the boundary line.
- (3) The works in Orders 1 and 2 shall be completed within 45 days of the date of these orders.
- (4) The respondents shall employ a fencing contractor with appropriate insurances, to repair the fence so it is vertical and rigid and forms a straight line on the boundary. The fencing works shall be completed within 60 days of the date of these orders.
- (5) All tree work shall comply with the Safe Work Australia, Guide to Managing Risks of Tree Trimming and Removal Work, 2016, and shall be completed during reasonable daytime working hours.
- (6) The applicant shall provide access for completion of works and removal of debris, subject to 72 hours emailed notice from the respondents.

Catchwords: TREES (DISPUTES BETWEEN NEIGHBOURS) – trees damaging common boundary fence -- minor s 12 considerations only – orders made

Legislation Cited: Trees (Disputes Between Neighbours) Act 2006

Pt 2: ss 7, 8, 9, 10, 12

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

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

Category: Principal judgment

Parties: Bruce Charles Webb (Applicant)

Edward Milton (First Respondent)

Gail Milton (Second Respondent)

Representation: B Webb (Self-represented) (Applicant)

E Milton (Self-represented) (First Respondent)

G Milton (Self-represented) (Second Respondent)

File Number(s): 2024/191639

Publication restriction: Nil

Judgment

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

Background

1. COMMISSIONER: Bruce Charles Webb, the applicant, and Edward and Gail Milton, the respondents, share a rear boundary between their neighbouring properties in Blackalls Park, near Lake Macquarie. The common boundary was oriented north, north-west to south, south-east and was delineated by a timber paling fence. The parties' land sloped downhill from the respondents' street frontage at an angle of about 12 degrees and both properties were leased to tenants.
2. At the rear of the respondents' land was a garage or large shed, the back wall of which was parallel to the common boundary and about 800mm distant. A mid-size Jacaranda tree, the subject of the application, was growing about halfway along the narrow space between the shed's back wall and the common boundary. The canopy of the Jacaranda tree arched over both the applicant's back yard and the shed, and one low mid-size branch was contacting the boundary fence.
3. The residual stump of a large Bougainvillea vine was growing across the boundary near the north, north-western end of the shed. The woody canopy of the Bougainvillea had recently been removed by the respondents.

4. Mr Webb contended the Jacaranda was causing damage to the common boundary fence and he had attempted to organise for the respondents to remove the branch and repair the fence.
5. Upon receiving no response to repeated attempts to contact Mr and Mrs Milton, Mr Webb made an application, pursuant to s 7 of Pt 2 of the Trees (Disputes Between Neighbours) Act 2006 (the Act).

The onsite hearing

1. Both parties were self-represented at the final hearing and the Milton's were joined by the tenant of their property, who was a relative. I inspected the trees and both sites from the Milton's land.
2. The applicant proposed the following orders:
 1. Trim or remove the tree.
 2. Straighten the fence to the boundary and repair any damage to the fence.
1. Prior to pruning the Bougainvillea's canopy, the stump of the Bougainvillea was concealed from view from the applicant's land. Therefore, Mr Webb was unaware that the stump of the Bougainvillea was located on and across the boundary and was thus likely to restrict fence repair.
2. Consequently, I granted leave for the Bougainvillea to be added to the application, with agreement of both parties.

Jurisdictional framework

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. Section 8 of the Act details requirements for service of the application and proposed orders, on the respondent, the local council, and other relevant parties.
3. Mr Webb provided appropriate service on the respondents and Mr Milton attended the procedural hearing on 9 July 2024 on behalf of both respondents. Mr Webb also provided evidence of service of the application documents and the orders made by the Registrar at the procedural hearing, on Lake Macquarie Council. The Court provided sufficient notice prior to the onsite hearing, therefore s 8 was satisfied.
4. Under s 9, the Court may 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 the subject of the application concerned. The Court has discretion to make a wide range of orders and is not limited to the orders proposed by the applicant.

5. Under s 10(1) of the Act:

- (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.

Reasonable effort to reach agreement

1. Mr Webb repeatedly sent letters to the respondents but garnered no response. Mr Webb also asked the respondents' tenant to request that Mr Milton contact him. At the onsite hearing, the Milton's acknowledged having received the letters from the applicant but, much to Mr Webb's chagrin, no explanation was forthcoming.
2. The following commentary explains the 'reasonable effort required to reach agreement' under the Act. In *Robson v Leischke* (2008) 72 NSWLR 98; NSWLEC 152, at [191] – [192], Preston CJ notes:

"191 The requirement in s 10(1)(a) of the Trees (Disputes Between Neighbours) Act 2006 that the applicant make a reasonable effort to reach agreement with the tree landowner is consistent with the recommendations of the New South Wales Law Reform Commission that neighbours should endeavour to settle a dispute about trees between themselves before taking court action. The Law Reform Commission had noted in its Report 88, *Neighbour and Neighbour Relations* that: "[t]he remedies proposed in this Report should be regarded as remedies of last resort. Talking to the neighbouring land owner and trying to find a mutually acceptable solution should be the first step when a dispute arises.": para 1.13, p 7.

192 The Trees (Disputes Between Neighbours) Act 2006 does not prescribe any particular means by which an applicant must make a reasonable effort to reach agreement with the tree landowner. The New South Wales Law Reform Commission had recommended in its report a process whereby the affected landowner would write a letter before taking any court action to the tree landowner telling them what problems the tree is causing and asking them to abate the problem and, if the affected landowner has suffered damage, asking the tree landowner to pay the amount needed to compensate for the damage caused: see para 2.45, p 33. Through this mechanism, the affected landowner could negotiate. If the tree landowner did not respond to the notice within the specified time, the affected landowner could then apply to the Local Court for an order.": para 2.46, p 33.

1. As the respondents' ongoing lack of response meant there was little more Mr Webb could do, I am satisfied that the applicant made a reasonable effort to reach agreement with the owners of the land on which the tree is situated. Therefore, the requirements of s 10(1)(a) of the Act have been satisfied. Section 10(1)(b) was also satisfied by the prior engagement of s 8.

2. The key jurisdictional requirements are at s 10(2). This states:
 - (2) The Court must not make an order under this Part unless it is satisfied that the tree concerned:
 1. has caused, is causing, or is likely in the near future to cause, damage to the applicant's property, or
 2. is likely to cause injury to any person.

Did the tree/s cause the damage?

1. I was satisfied that one low branch on the Jacaranda tree had bent the timber boundary fence towards the applicant's land and damaged the fence. The stump and lower trunk of the Bougainvillea had also levered the fence out of alignment. Consequently, I am satisfied that both trees caused fence damage such that s 10(2) of the Act is engaged.
2. If the jurisdictional tests at s 10 of the Act are satisfied, the Court can make orders such as those at s 9 to remedy, restrain or prevent damage to property, or to prevent injury to a person, as a consequence of the tree. In making orders, the Court must consider s 12 of the Act, from which only the following matters were relevant:
 1. While the Jacaranda would likely provide aesthetic amenity to residents of both subject properties when in flower, it was a relatively small tree with restricted exposure due to its location behind the respondents' shed. Being an exotic species, it provided limited ecosystem and biodiversity contributions, and perhaps minor amenity to residents of neighbouring properties.
 2. As all but the lower trunk and stump of the Bougainvillea had been removed prior to the hearing, consideration of its environmental attributes and contributions was not required.

Conclusions

1. From the adduced evidence, I reached the following conclusions:
 1. I was satisfied that both of the respondents' trees had damaged the timber fence, owned in common by the parties, by levering the fence from its alignment on the boundary onto the applicant's land. Therefore, s 10(2) of the Act was engaged.
 2. The boundary fence shall be repaired and re-aligned at the respondents' expense after completion of the tree work. There were no considerations at s 12 of the Act that preclude the following orders being made.
 3. Within the Tree Dispute Claim Details (Form H), Mr Webb sought compensation for the cost of the application filing fee. He claimed the respondents ongoing lack of response to his letters and messages, left him with no option other than Court action to address his property damage.

4. Commissioners do not have power to order such costs. Claims for reimbursement of filing fees require the lodgement of a Notice of Motion with the Court, which is heard before a Registrar or a Judge.

Orders

1. The Court orders that:
 1. The respondents, at their expense, shall contract Australian Qualification Framework (AQF) level 3 arborists with all appropriate insurances (the arborists) to remove the Jacaranda branch leaning on the fence.
 2. The arborists or the respondents shall grind or excavate the Bougainvillea stump to entirely clear it from the boundary line.
 3. The works in Orders 1 and 2 shall be completed within 45 days of the date of these orders.
 4. The respondents shall employ a fencing contractor with appropriate insurances, to repair the fence so it is vertical and rigid and forms a straight line on the boundary. The fencing works shall be completed within 60 days of the date of these orders.
 5. All tree work shall comply with the Safe Work Australia, Guide to Managing Risks of Tree Trimming and Removal Work, 2016, and shall be completed during reasonable daytime working hours.
 6. The applicant shall provide access for completion of works and removal of debris, subject to 72 hours emailed notice from the respondents.

J Douglas

Acting Commissioner of the Court

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Decision last updated: 10 February 2025

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