

AUSTRALIA / JUDGMENT

Wong v Bailey [2012] NSWLEC 1232

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Land and Environment Court New South Wales

Medium Neutral Citation: Wong v Bailey [2012] NSWLEC 1232 Hearing dates: 16 August 2012
Decision date: 16 August 2012 Jurisdiction: Class 2 Before: Galwey AC Decision: The application is dismissed. Catchwords: TREES (DISPUTES BETWEEN NEIGHBOURS): risk of damage; risk of injury; application dismissed. Legislation Cited: Trees (Disputes Between Neighbours) Act 2006
Cases Cited: Yang v Scerri [2007] NSWLEC 592 Category: Principal judgment Parties: Mr Ivan Wong (Applicant)

Mr Stan Bailey (Respondent) Representation: Mr Ivan Wong (Litigant in person) (Applicant) Mr Stan Bailey (Litigant in person) (Respondent) File Number(s): 20444 of 2012

Judgment

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

1ACTING COMMISSIONER: A mature Narrow-leaved Black Peppermint ("the tree") grows on Mr Bailey's Burwood property, where he resides. The tree is adjacent to his side boundary, part of which is the rear boundary of his neighbour Mr Wong's property. Mr Wong is concerned that the tree may entirely fall onto his property, and that limbs may fall into his property, causing damage or injury. He has applied to the Court under the Trees (Disputes Between Neighbours) Act 2006 ("the Act") seeking orders for removal of the tree. Mr Bailey, the respondent, disputes that the tree is likely to cause damage or injury and says that the tree provides benefits. He wants to retain the tree.

Framework to be considered 2Firstly, according to s 10(2) of the Act, the Court must be satisfied that the tree 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 a person. If one of these tests is met the Court's jurisdiction is engaged. Secondly, under s 12 of the Act there is a range of matters that must be considered. Finally, the Court can make orders as it sees fit, according to s 9 of the Act, to remedy, restrain or prevent damage to the applicant's property, or to prevent injury to a person.

Background

3Mr Bailey has lived at his property since approximately 1993. Mr Wong has lived at his property since 2005. The tree was present before either party purchased their property. In 2006 Mr Bailey and another neighbour, Mr Duffy, discussed the tree and obtained a permit from Burwood Council for pruning up to 50% of its canopy or, alternatively, for the removal of the tree. 4In 2007 Mr Wong delivered a letter to Mr Bailey explaining that a limb had fallen from the tree, that the tree was dangerous and that it might be advisable to remove the tree. 5In May 2009 a second permit was obtained from Council, in the name of Mr Duffy, again for pruning up to 50% of the crown or, alternatively, removal of the tree. In June 2009 the tree was pruned. The invoice for those works shows that Mr Wong and Mr Duffy shared the expense of the works. Dead limbs were removed from the tree but Mr Wong says that Mr Bailey did not allow removal of 50% of the crown. 6In April 2012 Mr Wong filed this application with the Court. In July 2012 Mr Bailey had the tree pruned after receiving arboricultural advice from Mr Mark Hartley, a consulting arborist. The works included the reduction of a limb over Mr Wong's property, removal of deadwood and pruning of a large branch stub. Now, in August 2012, we have the hearing. 7Mr Wong relies on the report of Mr Hayden Coulter, a consulting arborist, dated 27 June 2012. Mr Bailey relies on the report of Mr Hartley, dated 10 July 2012. Mr Hartley appears as a witness at the hearing. The hearing took place on-site. I note that a class of the Wollongbar TAFE campus, led by their teacher Mr Robert Stavrou, attended the hearing and I thank both parties for making this group welcome on their properties.

On-site hearing 8The on-site hearing allowed a view of the tree. Although the tree has been assessed by other arborists I bring my own expertise to the hearing as well. 9The health and structure of the Narrow-leaved Black Peppermint (*Eucalyptus nicholii*) appear to be fairly typical for the species. There is a depression on the south side of the stem. No internal testing has been carried out. Approximately 90% of the crown is over Mr Bailey's property and approximately 10% overhangs Mr Wong's property, which is to the east of Mr Bailey's. The crown is biased to the north, perhaps slightly northwest, with the result that most of the crown's weight is in that direction. 10The tree has not caused damage and is not causing damage at present. Therefore, I must be satisfied that the tree is likely to cause damage to Mr Wong's property in the near future, or is likely to cause injury to a person, before I can make any orders.

Findings 11As both parties have supplied written arboricultural evidence I will discuss those reports. Mr Coulter's report states that the species is known to fail in the clay soils of the area. However, a mere possibility of tree failure, and consequent damage or injury, is not enough to meet the jurisdictional test at s 10(2). I must be satisfied that such failure is likely in the near future, which, as in the principle established in *Yang v Scerri* [2007] NSWLEC 592, I shall regard as the next 12 months. Mr Coulter's report includes two options for recommendations. The first option is to prune the tree and test the stem. He states that there can be no assurance that the tree will not fail if this option is taken. In my mind it is not possible to give any such assurance for any tree, so such a statement does not greatly assist the Court. Mr Coulter's second option is to remove the tree entirely. He states that this is the only way to assure that there is no failure.

Again, I find that this statement would be true for any tree. It is not enough that it is possible for a tree to fail, and that its removal would also remove all risk of failure. I must be satisfied that it is likely to fail within the next 12 months. 12Mr Hartley discusses in his report the level of risk associated with the tree. Based on observations of the tree, and using methods of risk calculation, he concludes that the tree does not pose a higher risk than the average tree. Considering his report in light of my own observations, I accept his finding that the tree is not likely to cause damage or injury within the next 12 months. 13Regarding the Tree Preservation Order permits from Council, Mr Wong says that Mr Bailey has not complied with the description of pruning works to be carried out within those permits. However a permit from Council is only a permit - the works described therein are not orders and the owner of the tree is not obliged to carry out the pruning described in a permit (although it may be the case that the tree owner or the permit recipient cannot prune more than what is specified). Similarly, if the Court does not make orders for interfering with the tree there is nothing to prevent Mr Bailey applying in future for another permit to interfere with the tree and then carrying out any permitted works. 14As I am not satisfied that the tree is likely to cause damage to Mr Wong's property in the near future, or injury to a person, I cannot make any orders for the tree. 15As a consequence of the above, the application should be dismissed in its entirety.

Orders

16The orders are: (1)The application is dismissed.

D Galwey Acting Commissioner of the Court

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