

AUSTRALIA / JUDGMENT

Xu v Johns [2024] NSWLEC 33

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Land and Environment Court

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Source record**Land and Environment Court****New South Wales****Medium Neutral Citation:** Xu v Johns [2024] NSWLEC 33**Hearing dates:** 26 March 2024**Date of orders:** 26 March 2024**Decision date:** 26 March 2024**Jurisdiction:** Class 2**Before:** Preston CJ**Decision:** (1) The name of the respondent is changed from Eileen Claire Seccombe to Eileen Claire Johns.

(2) The proceedings are dismissed.

(3) The applicants are to pay the respondent's costs of the proceedings.

Catchwords: CIVIL PROCEDURE – Summary disposal – dismissal of proceedings – second proceedings litigating same cause of action and issues – abuse of process – effect of judgment in first proceedings – res judicata – issue estoppel – Anshun estoppel**Legislation Cited:** Dividing Fences Act 1991 (NSW)**Local Court Act 2007 (NSW)****Trees (Disputes Between Neighbours) Act 2006 (NSW), Part 2, ss 5, 7, 10(2)****Land and Environment Court Rules 2007 (NSW), r 3.7****Uniform Civil Procedure Rules 2005 (NSW), r 13.4****Cases Cited:** Blair v Curran (1939) 62 CLR 464; [1939] HCA 23**Commonwealth of Australia v Cockatoo Dockyard Pty Ltd [2003] NSWCA 192****Henderson v Henderson (1843) 3 Hare 100; 67 ER 313****Moore v Inglis (1976) 50 ALJR 589****Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 509; [1981] HCA 45****Robson v Leischke (2008) 72 NSWLR 98; (2008) 159 LGERA 280; [2008] NSWLEC 152****Stokes (by a tutor) v McCourt [2013] NSWSC 1014****Xu v Seccombe [2023] NSWLEC 1670****Category:** Procedural rulings**Parties:** Xiu Yan Xu (First Applicant)**Xiabing Xu (Second Applicant)****Eileen Claire Johns (Respondent)**

Representation: Xiu Yan Xu (Self-represented and for Second Applicant)

Counsel: L Sims (Respondent)

Solicitors: Bick & Steele (Respondent)
File Number(s): 2023/460920
Publication restriction: Nil
Decision under appeal Court or tribunal: Land and Environment Court
Jurisdiction: Class 2
Citation: [2023] NSWLEC 1670
Date of Decision: 26 September 2023
Before: Galwey AC
File Number(s): 2023/180739

JUDGMENT**An application for summary dismissal of a tree dispute**

1. Ms Eileen Johns is the neighbour of Ms Xiu Yan Xu and Mr Xiabing Xu. Ms Johns lives at 41 Valerie Avenue, Chatswood West, and Ms Xu and her son, Mr Xu, own 39 Valerie Avenue, Chatswood West. For ease of reference I will refer to the applicants as Ms and Mr Xu, but I do not intend by that reference to suggest that they are married, as Mr Xu is the son of Ms Xu.
2. Two trees grow on Ms Johns's land, near the boundary with Ms and Mr Xu land. The first tree is an exotic Loquat (*Eriobotrya japonica*), referred to by Ms and Mr Xu as Tree 1. The second tree is a native, Sydney Peppermint (*Eucalyptus piperita*), referred to by Ms and Mr Xu as Tree 2. The Loquat was planted but the Sydney Peppermint was self-sown.
3. Ms and Mr Xu want Ms Johns to remove both trees, for a variety of reasons. Ms Johns does not wish to remove the trees.
4. Ms and Mr Xu have brought four sets of proceedings, two in the Land and Environment Court and two in the Local Court, for orders for the removal of the trees, either directly or indirectly, and compensation for loss and damage said to be caused by the trees and their debris. The current proceedings are the second application under Part 2 of the Trees (Disputes Between Neighbours) Act 2006 (NSW) (Trees Act) which Ms and Mr Xu have made for the removal of the trees and payment of compensation.
5. Ms Johns seeks, by notice of motion filed on 13 February 2024, for the current proceedings to be dismissed pursuant to r 13.4 of the Uniform Civil Procedure Rules 2005 (NSW) (UCPR) on the basis primarily that the proceedings are an abuse of the process of the court (r 13.4(1)(c)) or otherwise that the proceedings are frivolous or vexatious (r 13.4(1)(a)).

An application for amendment of the respondent's name

1. The notice of motion also seeks an order that Ms Johns's name, as the respondent, be amended to be Eileen Claire Johns, instead of her former name of Eileen Claire Seccombe.
2. Ms and Mr Xu opposed both of Ms Johns's applications. Ms Xu appeared in person on her own behalf and on behalf of her son.
3. I will deal first with the application to amend the surname of the respondent from Seccombe to Johns. Ms Xu said that at the time she commenced the proceedings, Ms Johns's land was registered in the name of Eileen Claire Seccombe. Ms Xu therefore named the respondent as Ms Seccombe. That was understandable. Nevertheless, Ms Johns's solicitor, Mr Bick, has deposed that, on being alerted to the fact that the register still referred to Ms Johns by her former married surname, rather than the surname she currently uses, he arranged for the property title to be updated. The current title search now identifies Ms Johns as the registered owner.
4. This application to amend the surname of the respondent to Ms Johns rather than Ms Seccombe should be granted.

The tree owner's application for summary dismissal

1. I will now deal with Ms Johns's main application for the dismissal of the proceedings. Ms Johns contends that the current proceedings are an abuse of process or alternatively are frivolous or vexatious. Three grounds are advanced:
 1. the current proceedings are an attempt to re-litigate issues which have already been determined in previous proceedings, where the principle of res judicata and/or issue estoppel applies: *Stokes (by a tutor) v McCourt* [2013] NSWSC 1014;
 2. the current proceedings are an attempt to litigate issues which could and should have been litigated in previous proceedings: *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589; [1981] HCA 45; and
 3. Ms and Mr Xu have brought concurrent proceedings in different courts relating to the same subject matter: *Moore v Inglis* (1976) 50 ALJR 589; *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd* [2003] NSWCA 192.
1. Each of these three grounds are founded on Ms and Mr Xu bringing multiple proceedings relating to the same subject matter. These proceedings need to be explained.

The first tree dispute proceedings

1. The first proceedings were an application in this Court under Part 2 of the Trees Act (the first tree dispute proceedings). This application was filed on 6 June 2023. The application, when first filed, sought orders for: the removal of the Loquat (Tree 1) and Sydney Peppermint (Tree 2); Ms Johns to pay the cost of removal of the trees and compensation for other related costs to the applicants; Ms Johns to pay court fees and other related costs to the applicants; and Ms Johns to pay interest if she delays in paying moneys ordered by the Court.
2. The bases on which Ms and Mr Xu sought removal of the Loquat was that the tree's trunk and canopy lean across the common boundary and invade the air space of their property and the tree blocks the easterly sunlight of a room in their house. The bases on which Ms and Mr Xu sought removal of the Sydney Peppermint was that the tree leans across the common boundary and invades the airspace of their property and has damaged their house's roof and inside ceiling by tossing dead leaves and sticks on the roof and blocking gutters.
3. Subsequently, Ms and Mr Xu amended their application, on 31 July 2023, to seek also the removal of two more trees on Ms Johns's land, a Swamp She-oak (*Casuarina glauca*) and a Snow-in-Summer (*Melaleuca linariifolia*).
4. Ms and Mr Xu's amended application of 31 July 2023 elaborated on the bases for seeking removal of the Loquat and Sydney Peppermint. The bases for seeking removal of the Loquat was that: the tree interferes with the proposed dividing fence that they wished to erect (foreshadowing another court case for the new fence against Ms Johns); the tree leans across the boundary and invades the air space of their property; the tree continuously deposits dirty leaves and branches on their property, requiring constant cleaning; and the tree blocks the easterly sunlight and daylight of a room in their house.
5. The bases for seeking removal of the Sydney Peppermint was that: the tree leans across the boundary and invades the airspace of their property; the tree continuously tosses dead leaves and sticks on their house's roof, gutters and ground; the tree has thereby damaged their house's roof, gutters, downpipes and inside ceiling and has blocked running stormwater; and the tree has "infested termites".
6. A sheet entitled "Compensation and Cost Reimbursement Claim Details" was attached to the amended application. The sheet itemised each claim. The claims fell into three categories.
7. The first category concerned costs and disbursements associated with the litigation, such as filing fees and disbursements, including photocopying, incurred in bringing the proceedings; her travel costs to attend hearings; and her labour costs in preparing for the proceedings. As an unrepresented litigant, Ms Xu is not entitled to many of these costs.

8. The second category concerns costs claimed to have been incurred in repairing areas of Ms and Mr Xu's house said to have been affected by termites, cleaning their house's roof and gutters "inundated" by leaves and debris from the trees, replacing gutters and downpipes damaged by tree debris, and cleaning their land from tree debris.

9. Ms Xu particularised the compensation she claimed for the "other related costs" as follows:

"6. Respondent pay Applicants, by 31st July 2023, total \$17,969.53 money for compensation for damage caused and costs incurred reimbursement (refer to attached sheet and supporting evidence), \$820 monthly cleaning bill after the Court verdict (refer to attached sheets for more details). Any damages and costs incurred after 31 July 2023 will be submitted in due course."

1. The third category concerned costs said to be incurred by reason of Ms Xu being bitten on her legs on two occasions by black ants said to be coming from a pile of rotten leaves in a Brush-turkey's nest on Ms John's land. This included the cost of medicine she purchased from a chemist, the cost of purchasing "waders" to protect her legs from ant bites in the future, and compensation for pain and suffering, including itchiness and sleeplessness, from the ant bites, for ten days on each of the two occasions.

2. Ms and Mr Xu further amended their application on 21 August 2023, seeking many further orders. The orders for removal of the Loquat and Sydney Peppermint, and the bases on which removal was sought, remained the same as in the first amended application.

3. Ms and Mr Xu amended their application a third time, on 28 August 2023. They elaborated on the reasons they had advanced in the first and second amended applications for seeking removal of the Loquat and Sydney Peppermint. They added two new bases for seeking removal of the Sydney Peppermint. The first was that it took away so much north-westerly sun, so that installation of a solar panel on the roof was impossible. The second was that rotten leaves from the tree had been used by a Brush-turkey to build a bird's nest. This is a source of termites, which have climbed up the tree branches and invaded the roof of their house, destroying the inside timber structure.

4. The claim for compensation, previously paragraph 6 and now paragraph 9 in the further amended application, was:

"9. Respondent pay Applicants, up to 28 August 2023, total \$21,622.45 money - [Note 4] below, for damages, for compensation, for injuries caused, and costs reimbursement incurred (refer to attached excel sheets and supporting evidence in [note 2] below), \$820 monthly cleaning bill after the Court verdict (refer to attached sheets for more details). Any damages and costs incurred after 28 August 2023 will be submitted in due course."

1. The attached sheet entitled "Compensation and Cost Reimbursement Claim Details" added claims for compensation for what Ms Xu said was a "BIO SECURITY CRIME" committed by Ms Johns. This was described by Ms Xu as Ms Johns having "trespassed to and dumped her grass clippings/cut offs to Applicants' land". This led to Ms Xu increasing the claimed compensation for damages and costs by around \$2,800.
2. Ms Xu added another claim for relief associated with this so-called biosecurity crime, including seeking an order that Ms Johns "never ever trespasses boundary dividing line, into Applicants' land, never ever commits to biosecurity crimes that dumping any unknown plants, seeds, soil to Applicants' land" (claimed order 7).
3. Ms Xu also sought injunctive orders, first, that Ms Johns remove from her land, a "minimum 500 meters away", all materials Ms Xu claims to be "nuisance, harmful, termite/pests infesting materials piled at Respondent's boundary area" (claimed order 5) and, secondly, that Ms Johns "never stores any dead woody tree material relating to any food sources of infesting pests/termite at boundary area" (claimed order 6).
4. The hearing of the first tree dispute proceedings occurred on site on 26 September 2023. Acting Commissioner Galwey, a qualified arborist, presided.
5. At the hearing, Ms Xu tendered a document entitled "Applicant's statement for root mapping investigation results", dated 11 September 2023. This statement recorded that Ms Xu had instructed an arborist, Arbor Express, to carry out root mapping to investigate if significant tree roots from Tree 2, the Sydney Peppermint, are located within the boundary dividing area of 39 Valerie Avenue, adjacent to the neighbouring property at 41 Valerie Avenue. Ms Xu's statement purported to summarise the findings of root mapping by Arbor Express. The investigation included digging trenches to expose tree roots. Ten roots from Tree 2 were identified and the diameters of those roots stated, ranging from 15 millimetres to 70 millimetres. A number of "very fine feeder roots" were identified, but given the quantum, the arborist did not number them. The statement included two photographs showing roots in a trench near the house foundations. The comments under these photographs may have been written by Ms Xu rather than the arborist.
6. After inspecting the trees and the claimed damage to Ms and Mr Xu's house and land, and after hearing the parties' evidence and submissions, the Commissioner gave judgment orally. His reasons for decision were later transcribed and published: Xu v Seccombe [2023] NSWLEC 1670.
7. The Commissioner dismissed Ms and Mr Xu's application for the four trees to be removed, as well as their claims for compensation for loss and damage said to be caused by the trees. The Commissioner found that Ms and Mr Xu had not established, for each of the four trees, that the tree has caused, or is likely in the near future to cause, damage to their property or injury to a person (for the Loquat, [7]; for the Sydney Peppermint, [13], [14]; for the Swamp She-oak, [15]; and for the Snow-in-Summer, [16]). In these circumstances, the Commissioner was precluded from making an order under Part 2 of the Trees Act (see s 10(2) of the Trees

Act).

8. In addition, the Commissioner rejected Ms and Mr Xu's claims regarding:
 1. the trees' invasion of the air space above their land, as this did not constitute damage to property (at [7], [8], [9] and [15]);
 2. the dropping of leaves, twigs and other debris from the trees on their house's roof and gutters, and their land, as such debris is not damage to property under the Trees Act, but in any event has not caused and is not likely to cause damage to their property (at [11], [14]);
 3. the debris used by a Brush-turkey to construct its nest on Ms Johns's land, which might be the source of termites or ants that come to Ms and Mr Xu's property, and cause damage to their property, as any damage caused by such insects did not enliven the Court's jurisdiction (at [12]); and
 4. that roots from the trees have damaged or are likely in the near future to damage Ms and Mr Xu's house, although some woody roots were found near the dwelling (at [13]).

The first Local Court claim

1. On 27 September 2023, one day after the Commissioner dismissed the first tree dispute proceedings, Ms and Mr Xu filed a statement of claim in the Local Court (the first Local Court claim). The relief claimed included that Ms Johns:

"1. Remove harmful material stored at boundary area: woody logs, woody rubbish, bird nest built by rotten leaves, pay costs of removal - more details in separate pages

2. Rectify BIO SECURITY CRIME by Respondent of trespassed to and dumped grass clippings/ cut offs to Applicants' land ...
3. Never store woody or wood-related material at boundary area
4. Never trespass into Plaintiff land, never commit BIO SECURITY CRIME to Plaintiff and Plaintiff land
5. PAY COMPENSATION @ amounts below - more details on separate pages".

1. The amount of the claim was \$4,570.98 together with filing fees of \$333 and service fees of \$11.05, totalling \$4,915.03.

2. The case pleaded by Ms and Mr Xu was:

"1. As a result of the defendant's actions in above Claim 1, the plaintiff suffered personal injury, bitten/poisoned by the black ants infested from Respondent's bird nest - more details in separate pages.

2. As a result of the defendant's actions in above Claim 2, the plaintiff suffered mental [sic mental] stress and harassment, many sleepless nights - more details in separate pages."

1. The "separate pages" referred to were in a "Supporting Document". These elaborated on the claims for removal of "dead tree logs, dead tree remnants, dead tree branches, dead tree rotten leaves, dead tree debris, harmful, termite/pests infesting materials heaped piled at Respondent/Applicants' boundary area"; compensation for Ms Xu being bitten by ants alleged to have come from this debris material; compensation for the alleged biosecurity crime of dumping grass clippings and other debris on Ms and Mr Xu's land; and compensation for Ms Xu's labour and time in preparing the claim.
2. On 30 November 2023, Ms Johns filed a defence in the proceedings and the matter was listed for a pre-trial review on 15 December 2023. On 15 December 2023, following a discussion between the Registrar and Ms Xu, Ms and Mr Xu's statement of claim was dismissed.

The current tree dispute proceedings

1. On 20 December 2023, five days after the first Local Court claim was dismissed, Ms and Mr Xu filed in this Court a second application under Part 2 of the Trees Act. This is the current application. In this application, Ms and Mr Xu again seek orders for the removal of the Loquat (order 1) and Sydney Peppermint (order 2) and that Ms Johns pay Ms and Mr Xu the amounts of \$2,200 and \$5,500 for the costs of Ms and Mr Xu removing the Loquat and Sydney Peppermint respectively (claimed in orders 1 and 2). Ms and Mr Xu also seek an order that Ms Johns pay compensation for the damage caused by the trees and other costs incurred by Ms and Mr Xu (order 3). This claim is:

"3. The Respondent pays \$41,800 [Note 1] damages caused by the trees stated in the EXPERT WITNESS REPORT with Scott Schedule, plus total \$7,700 work order stated above, plus all the Court's fees \$267, Expert Report fee \$1100, Expert Court appearances/summons fee \$500, postage \$xxx (to be added) and other related future costs relating to this Court case."

1. The "Tree Dispute Claim Details" included a report by Mr David Augustine Raul dated 5 December 2023. Mr Raul describes his occupation as "Authorised Inspector & Technician" and as being a "Registered Master Inspector". The report includes a "Building (Structural) Defects Inspection" at Ms and Mr Xu's house. The stated purpose of the inspection was "to provide advice to the Client regarding the condition of the Building & Site at the time of inspection" (p 11). The report estimated the cost to rectify identified defects, including:
 1. \$8,800 to remove the Loquat and Sydney Peppermint; remove dead tree logs, branches and debris from the boundary line; sealing cracks and gaps in brick work of Ms and Mr Xu's house;
 2. \$11,800 to (again) remove the Loquat and Sydney Peppermint; (again) remove dead tree logs, branches and debris from the boundary line; seal all cracks and gaps in the concrete work, including the concrete floor; and stabilise the front left column;

3. \$22,000 to (again) remove the Loquat and Sydney Peppermint; (again) remove dead tree logs, branches and debris from the boundary line; seal all cracks and gaps in the interior skirting boards, cornices/moulding, including exterior trim; clean all exterior tiles and gutters professionally and reconnect front left downspout to the eaves gutters; and arrange for a mould remediation contractor to perform deep cleaning of the interior and exterior surfaces, including subfloor areas.
1. The Scott Schedule itemised these claims for compensation as:
 - (1) Removal of Loquat \$2,200
 - (2) Removal of Sydney Peppermint \$5,500
 - (3) "Brickwork" \$8,800
 - (4) "Rectification of Column & Concrete work" \$11,000
 - (5) "Rectification of Interior wall, skirts, cornices & Exterior Fixing, Fixtures, Gutters & Mould remediation" \$22,000
1. Although the Scott Schedule stated the total claimed to be \$41,800, the sum of the itemised claims is in fact \$49,500.
2. Mr Raul asserted that the cause of these identified defects was the trees' roots. He included photographs of some woody roots on the surface of the soil near the house, at a direction towards the exterior wall of the house. He calculated a hypothetical reach of roots of a tree with the height of the Loquat, and again for the Sydney Peppermint, and concluded that the roots could hypothetically reach the foundation, floor and exterior wall of the house. On these bases, Mr Raul said that removal of both trees was "strongly recommended ... to protect structural integrity of elements" of Ms and Mr Xu's house (p 23).
3. On the return of the application on 23 January 2024, Ms Johns foreshadowed the filing of a motion to dismiss the proceedings as an abuse of process, or as being frivolous or vexatious. The Registrar directed Ms Johns to file a notice of motion by 13 February 2024 and listed the matter for directions on 20 February 2024. On 20 February 2024, the notice of motion, which had been filed, was listed for hearing today, 26 March 2024.

The second Local Court claim

1. Perhaps prompted by this foreshadowed motion for dismissal of the second tree dispute proceedings, Ms Xu filed another application in the Local Court, this one under s 45 of the Local Court Act 2007 (the second Local Court claim). Ms Xu seeks orders for the erection of a fence at the "boundary dividing line"; Ms Johns to pay 50% of the cost of the fence (\$6,430 quoted) and the cost of survey pegging (\$266.03); Ms Johns "removes all the harmful nuisance material piled at boundary area - namely: huge dead dry tree remnants, dead dry tree branches, dead dry tree rotten leaves, dead dry tree debris piled at boundary area"; and Ms Johns pay court fees and other related costs.

2. The supporting information repeated claims Ms Xu has made in the other proceedings that Ms Johns should remove all tree debris and "harmful, termite/pests infesting materials" from Ms Johns's land to a "minimum 500 meters away". Ms Xu claimed that such debris and materials are the source of the termites that "severely damage" her house and the black ants that bite Ms Xu.
3. As I have noted, Ms Johns contends that the current proceedings are an abuse of process, or frivolous or vexatious, for three reasons:
 1. they are an attempt to re-litigate issues which have already been determined in the first tree dispute proceedings, where the principle of res judicata and/or issue estoppel applies;
 2. they are an attempt to litigate issues that could or should have been litigated in the first tree dispute proceedings; and
 3. Ms and Mr Xu have brought concurrent proceedings in this Court and the Local Court relating to the same subject matter.
1. I will deal with each ground.

Attempt to relitigate issues already decided

1. Ms Johns submitted that the current proceedings are an attempt to re-litigate issues that have already been decided in the first tree dispute proceedings. The relief claimed in both proceedings in relation to the Loquat and Sydney Peppermint is the same, namely, removal of both trees and payment of compensation for loss and damage said to have been caused by the trees. The grounds for seeking the removal of the trees are the same, being that the trees' roots, and the trees' branches, leaves and debris, have caused damage to Ms and Mr Xu's house. The loss and damage for which compensation was claimed, and the ways in which compensation was calculated, did differ, but the basal claim that the loss and damage was caused by the trees remained the same.
2. Ms Johns submits that Ms and Mr Xu's claim that the trees, including the trees' roots, have caused damage to Ms and Mr Xu's house and grounds was determined finally and completely by the Commissioner in the first tree dispute proceedings. The current proceedings seek to re-litigate that claim.
3. Ms Johns submits that, in particular, the Commissioner addressed, but rejected, Ms and Mr Xu's claim that roots from the trees damaged their house. The Commissioner recorded that "[s]ome woody roots were found near her dwelling, but this is unsurprising given the proximity of Tree 2 [Sydney Peppermint]". The Commissioner noted that Ms Xu provided "her own summary" of the findings of someone she had engaged to carry out "root mapping", but did not provide an expert report of that person. Ms Xu also provided photographs of roots. The Commissioner found, on the evidence before him, that:

"Neither the photos provided by the applicants, nor the summary of root mapping, nor my own observations, show that the tree has damaged the applicants' dwelling or that it is likely to do so in the near future." (at [13]).

1. Ms Johns submits that this is the same claim that Ms and Mr Xu make in the current proceedings for each tree: "This tree roots reached, penetrated to the Applicants' wall and foundation, damaged the Applicants' property wall, foundation, other structural elements."
2. This claim of damage to Ms and Mr Xu's house, caused by the roots of the trees, was finally and completely determined by the Commissioner. This determination by the Commissioner gave rise to two types of estoppel: a cause of action estoppel in accordance with the principles of res judicata and an issue estoppel, a form of res judicata estoppel, because the issue has been decided: *Stokes (by a tutor) v McCourt* at [95].
3. As to res judicata, Ms and Mr Xu's cause of action under s 7 of the Trees Act, that the two trees on Ms Johns's land caused damage to Ms and Mr Xu's property, passed into judgment upon the Commissioner determining the proceedings, and had no later existence as a cause of action. Accordingly, Ms Johns submits, no proceedings can later be brought upon that cause of action. The current proceedings, which seek to re-litigate the cause of action of the trees causing damage to Ms and Mr Xu's property, merged in the judgment in the first tree dispute proceedings, and should be dismissed on the principle of res judicata.
4. Insofar as the claim or cause of action in the current proceedings can be seen to be different to that litigated in the first tree dispute proceedings, the issue of fact of whether the roots of the trees caused any damage to Ms and Mr Xu's property was determined by the Commissioner, which determination gives rise to an issue estoppel. The Commissioner's determination of that issue of fact disposed of the issue once for all, so that it cannot afterwards be raised between the same parties in some other claim or cause of action: *Blair v Curran* (1939) 62 CLR 464 at 531-532; [1939] HCA 23. Accordingly, Ms Johns submits, Ms and Mr Xu cannot raise in the current proceedings, the issue of whether the roots of the trees caused damage to their house, as that is a matter necessarily decided by the prior judgment in the first tree dispute proceedings.

Attempt to litigate issues that could or should have been litigated in previous proceedings

1. The second basis on which Ms Johns contends the current proceedings are an abuse of process is that the current proceedings seek to re-litigate issues that could or should have been litigated in previous proceedings. This is an Anshun estoppel, the extended principle of issue estoppel expressed in *Henderson v Henderson* (1843) 3 Hare 100 at 115; 67 ER 313 at 319, and accepted in *Port of Melbourne Authority v Anshun Pty Ltd* at 598-604, 605, 610-615.
2. Ms Johns notes that in the first tree dispute proceedings, the claim that tree roots had caused damage to the foundations of Ms and Mr Xu's house was only expressly made in the application in respect of Tree 2, the Sydney Peppermint, and not Tree 1, the Loquat. In the

current proceedings, that claim continues to be made in respect of the Sydney Peppermint but also, now, in respect of Tree 1, the Loquat. Ms Johns submits, however, that the claim could and should have been made in the first tree dispute proceedings in respect of the Loquat. Given the close proximity of the Loquat and Sydney Peppermint, the root mapping evidence that Ms Xu adduced in the first tree dispute proceedings would have revealed roots not only from the Sydney Peppermint, but also from the Loquat, which allegedly had caused damage to the house.

3. On one view, the Commissioner's consideration of this evidence (in [13] of the judgment) represented a determination that the roots of the Loquat did not cause damage to the house. On another view, however, if the Commissioner did not determine that issue of whether the roots of the Loquat caused damage to the house, then the issue was one that could and should have been litigated in the first tree dispute proceedings. The Loquat was one of the trees that Ms and Mr Xu claimed should be removed because it had caused damage to their property. Ms and Mr Xu obtained the root mapping evidence in order to establish that the roots of the Sydney Peppermint had caused damage to their property. Any claim that the roots of the Loquat had also caused damage to their property could and should have been litigated in those proceedings.
4. Ms Johns notes that Ms and Mr Xu had ample opportunity to have litigated this claim. Ms and Mr Xu amended their application three times. A scheduled hearing of the proceedings was vacated in order to facilitate a third amendment of the claim, so that all issues could be tried at the one time. Ms and Mr Xu had the opportunity to litigate the claim that the Loquat's roots had caused damage to their property.

Frivolous and/or vexatious proceedings

1. The third ground on which Ms Johns contends the current proceedings should be dismissed is that they are frivolous or vexatious. Ms and Mr Xu have commenced four proceedings relating to the same or related subject matter. All four proceedings relate to trees and their vegetative debris near the common side boundary of the two properties. Ms and Mr Xu object to the trees and the vegetative debris on Ms Johns's property and have commenced proceedings, on various bases, seeking the removal of the trees and vegetative debris and compensation for loss and damage allegedly suffered by Ms and Mr Xu.
2. Ms Johns submits that many of the claims made in these proceedings lack any reasonable foundation. In the first tree dispute proceedings, claims for relief that were not within the scope of relief available under the Trees Act included:
 1. orders for removal of branches because they cross the boundary into the air space above Ms and Mr Xu's property;
 2. orders for removal of logs, leaves and vegetative debris on Ms Johns's land;

3. order for payment of compensation for loss or damage not claimable under the Trees Act, such as for Ms Xu's pain and suffering from being bitten by black ants said to have come from a Brush-turkey's nest on Ms Johns's land;
 4. order for payment of compensation for damage to Ms and Mr Xu's house, allegedly caused by termites said to have come from the logs, leaves and vegetative debris on Ms Johns's land; and
 5. orders for compensation for committing "biosecurity crimes" and restraining Ms Johns from trespassing and committing biosecurity crimes in the future.
1. In the first Local Court claim, Ms Johns submits that there was no reasonable cause of action disclosed for the relief sought, being:
 1. an order to remove woody logs and branches and other vegetative debris, and the Brush-turkey's nest built from such debris, on Ms Johns's land; and
 2. an order to rectify the alleged biosecurity crime of trespass and dumping of grass clippings on Ms and Mr Xu's property.
 1. In the second Local Court claim, Ms Johns submits that there is no reasonable cause of action disclosed for the relief sought, other than in relation to the erection of a fence under the Dividing Fences Act 1991 (NSW), including the order for the removal of branches, leaves and other vegetative debris from Ms Johns's land because such material causes a fire hazard and is infested with termites and pests.
 2. Ms Johns submits she has been put to inconvenience and considerable expense in defending these proceedings, which include claims that lack any reasonable basis. The ways in which Ms and Mr Xu have conducted the proceedings have caused unreasonable annoyance and detriment to Ms Johns.
 3. Ms Johns submits that these three proceedings, and the manner in which they have been conducted, are frivolous or vexatious. In this context, the current proceedings in this Court are also frivolous or vexatious. This provides a further reason for the summary dismissal of the current proceedings.

The affected land owners' response

1. Ms Xu rejects Ms Johns' submission that the current proceedings are an abuse of process. Ms Xu submits that she has produced "new, fresh evidence" that the roots of the two trees, the Loquat and the Sydney Peppermint, on Ms Johns's land have "severely damaged the Applicants' property structural elements". That evidence is the expert report of Mr Raul. This evidence was not before the Commissioner in the first tree dispute proceedings.
2. Ms Xu's argument proceeded in these steps:

1. the Commissioner recorded in his reasons at [13] that Ms Xu did not provide an expert report, only her summary of the findings of the root mapping;
 2. the reason Ms Xu said she did not provide an expert report was that the arborist who did the root mapping informed her that "it was out of its expertise to provide expert witness report for Applicants' property structural damages caused by the Respondent's trees' roots" (Ms Xu's submissions dated 26 March 2024 at [6]);
 3. the roots uncovered by the arborist in undertaking the root mapping were covered by soil before the hearing;
 4. the Commissioner was therefore only able to observe the tree roots on the surface of the soil and not the tree roots underneath the soil at 20-30 centimetres' depth;
 5. after the Commissioner had said in his judgment that Ms Xu had not provided an expert report establishing that the trees' roots had caused property damage, Ms Xu engaged a building consultant, Mr Raul, to provide an expert report establishing that "the Applicants' property structural damages [was] caused by the Respondent's trees' roots" (Ms Xu's submissions dated 26 March 2024 at [7]); and
 6. Ms and Mr Xu believe that, if the expert witness report of Mr Raul had been provided to the Commissioner, his decision regarding "these 2 damaging trees, would be completely different" (Ms Xu's submissions dated 26 March 2024 at [8]).
1. Ms Xu also submits that Ms Johns has failed to provide her own expert report investigating and verifying Ms and Mr Xu's claim of property damage caused by the roots of the trees on Ms Johns's land. Instead, Ms Johns, in the evidence in support of the motion for summary dismissal of the current proceedings, has only reproduced documentary evidence from the first tree dispute proceedings.
 2. Ms Xu submits that in these circumstances, Ms Johns's motion for summary dismissal is itself an abuse of process and should be dismissed.

The current proceedings should be dismissed

1. The current proceedings should be dismissed on the grounds of res judicata, issue estoppel and Anshun estoppel. It is unnecessary to decide whether they should also be dismissed because they are frivolous or vexatious.
2. The first ground for summary dismissal is cause of action estoppel. Ms and Mr Xu litigated in the first tree dispute proceedings the statutory cause of action under s 7 of the Trees Act that two trees on Ms Johns's land, the Loquat and Sydney Peppermint, had caused and were likely to continue to cause damage to Ms and Mr Xu's property, including their house. I describe the action under s 7 of the Trees Act as a statutory cause of action, as it replaced the common law cause of action in nuisance. Section 5 of the Trees Act provides, in part, that: "No action may be brought in nuisance as a result of damage caused by a tree to which Part 2

applies...". For a summary of the history of the Trees Act, and the prior cause of action in nuisance, see *Robson v Leischke* (2008) 159 LGERA 280; [2008] NSWLEC 152.

3. Nevertheless, although an action in nuisance has been replaced by a statutory action under the Trees Act, the cause of action remains essentially the same. This is important in this case. Ms and Mr Xu's cause of action arises from damage to their property allegedly caused by the trees on Ms Johns's land. Ms and Mr Xu litigated that cause of action in the first tree dispute proceedings. They adduced such evidence and advanced such submissions as they considered would be sufficient in order to establish their case. This included adducing evidence of the trees' branches, twigs and leaves, and other vegetative debris, that had fallen onto Ms and Mr Xu's house and grounds; the trees' roots that had grown into Ms and Mr Xu's land; and the damage allegedly caused to the house and grounds by that vegetative material and those tree roots. In short, Ms and Mr Xu had run their case on that cause of action.
4. The effect of the Commissioner's determination of Ms and Mr Xu's application in the first tree dispute proceedings was that the cause of action "passed into judgment, so that it is merged and has no longer an independent existence": *Blair v Curran* at 532. This is the meaning of *res judicata*: the "thing", the cause of action, has been decided. That cause of action cannot afterwards be raised between the same parties.
5. Yet, that is precisely what Ms and Mr Xu seek to do in the current proceedings. They seek to re-litigate the same cause of action under s 7 of the Trees Act that the same two trees on Ms Johns's land, the Loquat and Sydney Peppermint, have caused damage to Ms and Mr Xu's property. The fact that they seek to establish that the two trees have caused different damage to their property or to adduce further evidence to prove the cause of action, is immaterial. That cause of action for damage to their property caused by the trees on Ms Johns's land has been decided, and precludes Ms and Mr Xu later bringing proceedings upon that cause of action.
6. The second ground for summary dismissal is issue estoppel. This is a form of *res judicata* estoppel because the issue has been decided. It applies where the issue is sought to be raised for the purposes of some other claim or cause of action, not the cause of action that has been determined in the prior proceedings. Although I consider that the statutory action under s 7 of the Trees Act sought to be litigated in the current proceedings is the same cause of action as that litigated and determined by the Commissioner in the first tree dispute proceedings, so as to be precluded by the principle of *res judicata*, if the current action can be seen to be different to the previous action, an issue estoppel arises in respect of the issues necessarily decided by the prior judgment: *Blair v Curran* at 531-532.

7. Central to Ms and Mr Xu's current action is that the roots of the trees on Ms Johns's land, the Loquat and Sydney Peppermint, caused damage to their house. That issue is one of fact: had the trees' roots caused damage to the house? That issue was also central to Ms and Mr Xu's action in the first tree dispute proceedings. Ms and Mr Xu expressly raised this as a basis for the removal of Tree 2, the Sydney Peppermint. The Applicants' Statement for Root Mapping Investigation Results, dated 11 September 2023, reiterated their claim that:

"4. The Respondent's Tree 2 roots invaded Applicants' land space, reached to the Applicants' property foundation structure, threatening [sic threatening] to the Applicants' house structural stability."

1. The statement summarised the findings of the root mapping by the arborist engaged by Mr Xu of the tree roots of Tree 2, the Sydney Peppermint. The statement also, however, claimed that the roots of Tree 1, the Loquat, had "invaded Applicants' land space", are "sitting above the easement", and "are threatening the public facility safety and maintenance accessibility". Although the root mapping undertaken by Arbor Express did not identify significant sized roots from Tree 1, having regard to its proximity to Tree 2, the "number of very fine feeder roots" identified by the arborist during root mapping, may well have been from Tree 1 as well as from Tree 2.
2. The issue of whether the trees' roots caused damage to Ms and Mr Xu's property was necessarily decided by the Commissioner, as it was central to Ms and Mr Xu's claim that the trees should be removed because they have caused damage to their property.
3. The Commissioner's determination of the issue of fact of whether the trees' roots caused damage to Ms and Mr Xu's property disposed once for all of the issue, so that it cannot afterwards be raised by the same parties. Ms and Mr Xu are therefore estopped from raising the issue again in the current proceedings. As this issue is now the central issue in the current proceedings, the estoppel operates to justify the dismissal of the proceedings.
4. The third ground for summary dismissal is Anshun estoppel, named after the High Court case, Port of Melbourne Authority v Anshun Pty Ltd, in which this form of estoppel was explained. This form of estoppel is an extension of issue estoppel and applies not to issues that have been decided in earlier litigation, but rather to issues that could and should have been raised in that earlier litigation. This form of estoppel applies in this case in respect of the issue of whether roots of Tree 1, the Loquat, caused damage to Ms and Mr Xu's house.
5. I have found that this issue may in fact have been decided by the Commissioner in the first tree dispute proceedings. But if it was not, then it was an issue that Ms and Mr Xu could and should have raised in the first tree dispute proceedings. Ms and Mr Xu did claim that roots of Tree 1, the Loquat, had "invaded Applicants' land space". They engaged an arborist to investigate if roots of Tree 2, the Sydney Peppermint, had invaded their property. The trunks of Tree 1 and Tree 2 are very close to one another, so that the roots of each tree would overlap considerably. The arborist could have investigated the roots not only of Tree 2, but also of Tree 1, in the same root mapping exercise. In these circumstances, Ms and Mr Xu

could and should have raised as an issue that roots from Tree 1 have caused damage to their property.

6. The reason why Ms and Mr Xu did not raise that issue, and make that claim that the roots of Tree 1 caused damage to their property, are not material. Ms Xu says that the reason was that the arborist undertaking the root mapping said that he did not have the expertise to establish that the trees' roots caused property damage to their house. But if that be the case, it was incumbent on Ms and Mr Xu to obtain evidence from someone who did have that expertise. They did this a couple of months after the Commissioner gave judgment dismissing their application, engaging the building consultant, Mr Raul. However, they could have engaged Mr Raul after they were informed by the arborist that he lacked expertise and before the hearing of the first tree dispute proceedings.
7. Ms and Mr Xu made a forensic decision as to how best to run their case, which was not to adduce evidence establishing that the roots of Tree 1 caused damage to their property. Having made that forensic decision, they are estopped from raising the issue in a subsequent action, being the current proceedings.
8. The estoppel in respect of the issue of the damage caused by the roots of Tree 1 is central to the claim made in the current proceedings. The effect of the estoppel justifies the dismissal of the current proceedings.
9. These conclusions that the proceedings should be dismissed, on the grounds of three forms of estoppel, makes it unnecessary to decide Ms Johns' contention that the current proceeding should be dismissed for being frivolous or vexatious. Ms and Mr Xu have brought multiple proceedings, two in this Court and two in the Local Court, seeking the same or similar relief, for the same or similar reasons, for the removal of the trees and their vegetative debris on Ms Johns's land. Whether these proceedings, taken together, establish that the current proceedings are frivolous or vexatious need not be decided.

Costs

1. Ms Johns seeks an order that Ms and Mr Xu pay her costs of the current proceedings, including of this notice of motion. These proceedings are in Class 2 of the Court's jurisdiction. Under r 3.7(2) of the Land and Environment Court Rules 2007, the Court is not to make an order for costs in proceedings in Class 2 unless the Court considers that the making of an order as to the whole or any part of the costs is fair and reasonable in the circumstances. Rule 3.7(3) gives some circumstances where the Court might consider the making of a costs order to be fair and reasonable, including:

"(c) that a party has acted unreasonably in circumstances leading up to the commencement of proceedings,

(d) that a party has acted unreasonably in the conduct of the proceedings,

...

- (f) that a party has commenced or continued a claim in the proceedings, or maintained a defence to the proceedings, where:
 - (i) the claim or defence (as appropriate) did not have reasonable prospects of success, or
 - (ii) to commence or continue the claim, or to maintain the defence, was otherwise unreasonable."
- 1. These circumstances are engaged in these proceedings. I have found that Ms and Mr Xu were estopped, by reason of cause of action estoppel, issue estoppel and Anshun estoppel, from re-litigating the action under s 7 of the Trees Act that the trees on Ms Johns' land caused damage to Ms and Mr Xu's property and the issue that the roots of those trees caused damage to their property. This made it unreasonable for Ms and Mr Xu to commence and continue the action under s 7 of the Trees Act, including raising that issue of fact. The making of a cost order against Ms and Mr Xu is therefore reasonable in the circumstances.
- 2. The Court makes the following orders:
 - 1. The name of the respondent is changed from Eileen Claire Seccombe to Eileen Claire Johns.
 - 2. The proceedings are dismissed.
 - 3. The applicants are to pay the respondent's costs of the proceedings.

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Decision last updated: 05 April 2024

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Prepared on 26 October 2026 · Esheria