

AUSTRALIA / JUDGMENT

Yan v Khanaly [2023] NSWLEC 1006

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Land and Environment Court

New South Wales

Medium Neutral Citation: Yan v Khanaly [2023] NSWLEC 1006

Hearing dates: 7 October 2022

Date of orders: 10 January 2023

Decision date: 10 January 2023

Jurisdiction: Class 2

Before: Douglas AC

Decision: The Court orders that:

(1) The application is refused.

Catchwords: TREES (DISPUTES BETWEEN NEIGHBOURS) – apprehension of damage to roofs and sewer - leaves, fruit and small sticks falling onto roofs and yard – tree was there first

Legislation Cited: Trees (Disputes Between Neighbours) Act 2006, ss 7, 8, 10, 12

Cases Cited: Ball v Bahramali & Anor [2010] NSWLEC 1334

Barker v Kyriakides [2007] NSWLEC 292

McPherson v Lake [2017] NSWLEC 1081

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

Stevens v Russell [2016] NSWLEC 1233

Yang v Scerri [2007] NSWLEC 592

Texts Cited: Standards Australia, AS4373-2007: Pruning of Amenity Trees

Land and Environment Court of NSW: Annotated Trees(Disputes Between Neighbours Act), 2013

Category: Principal judgment

Parties: Jing Wen Yan (Applicant)

Siamak Khanaly (First Respondent)

Neda Karimi (Second Respondent)

Representation: J Yan (Self-represented) (First Applicant)

S Khanaly (Self-represented) (First Respondent)

N Karimi (Self-represented) (Second Respondent)

File Number(s): 2022/198630

Publication restriction: Nil

Judgment

1. COMMISSIONER: This is an application, pursuant to s 7 of Pt 2 of the Trees (Disputes Between Neighbours) Act 2006 (the Act) by Jing Wen Yan, relating to a large *Corymbia citriodora* (Lemon Scented Gum) (Tree 1) and a *Cinnamomum camphora* (Camphor laurel) (Tree 2) located within an adjacent neighbouring property.

Background

1. Mr Yan, (the applicant), and Mr Khanaly and Ms Karimi, (the respondents), share a north – south boundary at the rear of their respective properties in Castle Hill. Mr Yan has lived at his property since 1994, while the respondents have occupied their property since 2020.
2. The applicant has raised concerns about the respondents' trees growing near the common rear boundary, with branches encroaching over his property. Mr Yan claims that these branches are likely to break, or that the trees could uproot in storms and cause damage to his house and other property.
3. The applicant also submitted that roots from the trees had blocked his sewer pipes in the past, most recently in 2018. He claimed no compensation for the plumbing works required to clear this blockage, or install a new inspection pipe, but he submitted "avoidance of future sewer pipe damage" as a basis to justify the trees' removal.
4. Mr Yan proposed that the Court make the following orders:
 1. The respondent is solely liable for any future damages to our (families') house's roof, roofed deck and shed caused by their trees.
 2. The respondent will remedy any damages caused to our property by their trees. The respondent must hold a Tree Insurance policy cover at all times, of at least \$100,000, and increasing yearly according to inflation. The insurance policy terms must be precisely defined and agreed upon by both applicant and respondent.
 3. The respondent will prune the trees at least once a year, to remove branches overhanging our house or potentially causing damage.

4. The respondent will pay 80% of the plumbing cost for future blocked sewer pipelines. The applicant pays 20% of the cost.

The onsite hearing

1. Both parties attended the hearing and were self-represented. Mr Yan had advised that he had recently had COVID-19 and thus conservative social distancing protocols were practiced by all participants. Nonetheless, aided by the flexibility available at an outdoor onsite hearing, all relevant evidence was adduced.
2. Both trees were located in the south-east corner of the respondents' rear yard. As is not uncommon, the tree dimensions estimated by the applicant were much greater than reality. Tree 1 was about 20 metres (m) tall with a canopy spread of about 14 m and trunk Diameter at Breast Height (DBH) of about 800 millimetres (mm). It is well clear of the boundary.
3. Mr Yan advised that it was one of four Gum trees planted in about 1975, soon after the respondents' property was developed, and he provided photographs of their stumps along the common boundary. Three had been removed in about 2000, but Council permission was refused for the removal of Tree 1.
4. Tree 2 was about 10 m tall with a 10 m canopy spread and trunk DBH of about 600 mm, growing vigorously close to Tree 1. It appears to be younger than Tree 1 and was most likely self-sown, as this species has for decades been unavailable for purchase through the nursery industry. The tapering base of Tree 2 is very close to the common boundary fence.
5. Mr Yan noted that The Hills Shire Council provided an exemption from the requirement for a Development Application (DA) for tree removal when trees are within 5 m of a DA approved dwelling or structure (increased from 3 m in November 2019). Mr Yan opined that the 8 m and 6 m distance of the respective trees from his house and deck should thus be considered in determining his application.
6. The respondents note that the trees contribute to privacy and provide a range of environmental services, and they resist intervention with the trees.

Jurisdictional requirements

1. With respect to s 7 of the Trees Act, an owner of land may apply to the Court for an order to remedy, restrain or prevent damage to property on the land, or to prevent injury to any person, as a consequence of a tree to which this Act applies that is situated on adjoining land.
2. The Court is obliged to initially consider matters pursuant to s 8 of the Act as follows:

8 Notice of application for order to be given to owners of affected land

- (1) An applicant for an order under this Part must give at least 21 days' notice of the lodging of the application and the terms of any order sought to:

- (a) the owner of the land on which the trees are situated, and
 - (b) any relevant authority that would, in accordance with section 13, be entitled to appear in proceedings in relation to the trees, and
 - (c) any other person the applicant has reason to believe will be affected by the order.
- (2) The Court may direct that notice of an application be given to a person or that notice be given in a specified manner or within a specified period.
- (3) The Court may waive the requirement to give notice or vary the period of notice under this section if it thinks it appropriate to do so in the

circumstances.

1. On 3 July 2022, the applicant provided the respondents with his notice of intention to apply to the Court seeking orders for tree removal. His application was stamped by the Court on 7 July 2022 and thus appears not to have met the requirements of s 8 of the Act. In *Ball v Bahramali & Anor* [2010] NSWLEC 1334 (Ball), at [38], Fakes C addressed a similar situation;

"With respect to Mr Gerathy's contentions concerning the notice given by the applicant and compliance with s 14C(1) the application was filed with the Court on 19 August. The date specified and stamped in the application by the Court regarding when the application had to be served on the respondents and other parties was 27 August. The matter was listed for a preliminary hearing on 21 September 2010. This information is recorded in the application; this was copied and made available to the applicant. Thus there was at least 21 days notice specified by the Court for the serving of documents and the preliminary hearing and therefore compliance with s 14C(1)."

1. In this case, Ms Yan's application was lodged with the Court on 7 July 2022. The date specified and stamped in the application by the Court regarding when the application had to be served on the respondents and other parties was 7 July 2022, and the respondents and Council were served around this date. The matter was listed for a preliminary hearing on 16 August 2022, as displayed on page 2 of the stamped application. This information is recorded in the application; this was copied and made available to the applicant and respondents.
2. As occurred in *Ball*, in this case there was at least 21 days' notice specified by the Court for the serving of documents and the preliminary hearing and therefore compliance with s 8(1) of the Act. I note commentary referencing *Ball* on page 29 of the *Land and Environment Court Annotated Trees (Disputes Between Neighbours) Act 2006*, which says; "It is clear that the 21-day period relates to notice of an application having been made not of an intention to lodge an application"
3. Section 10(1)(a) of the Act requires that the applicant has made a reasonable effort to reach agreement with the owners of the land on which the trees are situated. Mr Yan provided evidence of verbal and written requests for intervention with the trees since the respondents' occupation in 2020. While the respondents allege that Mr Yan was focused on

removal or pruning of a Liquidambar located further north along the boundary, rather than Tree 1, I am satisfied that Mr Yan's requests for intervention likely related to both the Liquidambar and Tree 1, and that he has met the requirements of s 10(1)(a) of the Act.

4. The next major test that is posed, by s 10(2) of the Trees Act, is that the Court must be satisfied that the tree concerned:
 - (a) has caused, is causing or is likely, in the near future, to cause damage to the applicant's property, or
 - (b) is likely to cause injury to any person.

Damage to house and property from trees uprooting or shedding branches

1. Mr Yan claims that the trees, especially Tree 1, regularly drops both dead and live branches, some of which are a few metres long and up to about 50mm in diameter. Mr Yan replaced his decking boards and roof about a year before the hearing but claimed that falling branches had damaged his previous deck roof and made dents, albeit minor, in the previous decking boards. No evidence of deck damage was evident.
2. Ms Karimi disputed Mr Yan's submission and claimed that no live branches had fallen from Tree 1 since her occupation in 2020. My tree inspection also revealed no obvious live broken branches or torn branch collars on Tree 1.
3. Mr Yan opined, based on news stories, that Tree 1, in particular, "could uproot and fall on the house or drop a big branch", noting that such damage was possible in Sydney "at any time". He thus deemed it is 'common sense' to insure against possible damage by pruning or removing the tree.
4. Notwithstanding that any tree may fail or shed branches, particularly in violent storms, it is not reasonable to intervene with every tree based purely on this possibility. Each tree must be assessed on its merits and in site context. Drawing on the arboricultural expertise which I bring to the Court, Tree 1 appears structurally stabile and well anchored in the ground. When stability is compromised, there are normally signs around the tree base such as soil heaving and lifting, evidence of fungal decay, or cracks in the soil, which an arborist may recognise and interpret.
5. From my inspection around the tree base and the surrounding soil, I observed no indicators leading to stability concerns. Similarly, the tree's branch scaffold looks sound and branch attachments appear to be strong and stable. There are no obvious signs on the trunk or on the branch scaffold of past shedding of large or medium sized branches.
6. *Corymbia citriodora* have a potential lifespan of around 100 years in Sydney, they are normally well anchored in the soil, and are not particularly prone to fungal decay of their wood. Tree roots generally grow laterally away from the trunk base, in response to the environmental forces exerted upon them, in a loosely radial pattern. They often spread well

beyond the tree's canopy, and are usually found fairly close to the surface, as they need to access oxygen for respiration. Stability in the soil is a product of the cumulative shear resistance of this broad spreading web of roots.

7. Tree 1 appears to be healthy and growing vigorously. When healthy trees grow on a lean, or branches grow laterally away from the trunk, trees produce extra growth (reaction wood) as and where needed in both roots and branches, in order to optimise strength. Throughout their life, trees compensate for the various demands of their environment, particularly winds and gravity, provided they are sufficiently healthy and vigorous to do so, and where they are not compromised by senescence, or species considerations regarding wood strength.
8. Tree 1 is in 'the prime of its life', about 50 years old, and a useful life expectancy of 80-100 years is not uncommon in Sydney when the tree's growing environment appears to have been relatively undisturbed, as in this case.
9. Tree 2 also appears to be structurally sound and well anchored in the soil. It has dense foliage which does not extend to the dwelling and has been pruned in the lower canopy to provide clearance for the applicant and his south side neighbour. This tree is unlikely to uproot, nor damage the applicant's house or other property as a result of dropping branches.
10. Though the parties provided conflicting submissions about live branches of up to 50mm diameter shedding from the Tree 1, no evidence of past or present damage has been submitted.
11. The jurisdiction of the Act is limited. Damage that has occurred in the past or is currently occurring must be substantiated by evidence. Where an applicant claims that damage is likely in the near future, based on the determination of Yang v Scerri [2007] NSWLEC 592, the near future is considered to be a period of about 12 months. For the Court to make such a finding, again there must be a solid evidential basis. The mere possibility of damage occurring, unsupported by evidence, does not engage s 10(1)(a) of the Act.
12. In the absence of solid evidence from the applicant, based on my site inspection and other evidence adduced, I am not satisfied that damage to Mr Yan's property has occurred as a consequence of Tree 1 and Tree 2, nor that it is likely in the near future. This element of Mr Yan's claim is set aside.
13. Tree 2 is not currently impacting the common fence, but this is likely in the medium term, with associated damage. Intervention by the respondents will likely be required in future as this species can potentially grow very large and may impact multiple property boundaries. This does not come under the jurisdiction of the Act, however, as these issues are unlikely to arise in the near future.

Risk of Injury

1. Though Mr Yan did not seek orders in his application on the basis of risk of injury, he alluded to this in his oral submissions. Notwithstanding that the basis for this concern was the same as underpinned damage to property, it is relevant to address this issue.
2. Using the guidance decision published in *McPherson v Lake* [2017] NSWLEC 1081 with respect to injury, the Court considers the risk posed by a tree 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.
3. Consistent with my analysis of damage to property, there are no obvious characteristics of Tree 1 that cause concern with respect to risk of injury, and Mr Yan provided no formal risk assessment to support his claim. There is no apparent sign of structural weakness in the trunk, or at branch junctions, nor issues with structural stability. There is no reported history of repeated failures of overhanging branches or signs of past torn out branches, nor near misses.
4. When one assesses tree risk, the occupancy rate of the area below the tree must be considered. On stormy or windy days, when branches are more likely to break from trees, pedestrian occupancy outside buildings is usually limited.
5. Foliage from Tree 1, emanating mainly from one large branch, overhangs the roof line by a few metres. Tree risk assessment also considers protection one may gain from a structure. In this situation, should the light foliage and relatively small branches overhang the dwelling break and fall onto the roof, injury to persons in the dwelling below is unlikely.
6. Overall, I find the risk of injury as a result of either tree to be low, which is an acceptable risk. There is an absence of evidence from Mr Yan to support an alternative finding. This claim is also set aside.

Encroachment and proximity of trees

1. Mr Yan objected to the trees' branches encroaching over the common boundary, but under the Act, there is no remedy for overhanging branches unless they also cause damage or are likely to cause injury.
2. At [169] of *Robson v Leischke* (2008) 72 NSWLR 98; [2008] NSWLEC 152 (Robson), Preston CJ provides the following commentary:

"169 At common law, although damage is necessary to complete the cause of action in nuisance, the type of damage required varies depending on the kind of nuisance involved. For nuisances of the first kind, causing encroachment as by roots and branches of trees, actual damage to the land (including property attached to or inherent in the ground) must be proved: see paragraph 56 above. For nuisances of the second kind, causing physical damage, actual physical damage to land (including property attached to or inherent in the ground) is also required: see paragraph 67

above. For nuisances of the third kind, causing unreasonable interference with the use and enjoyment of the neighbour's land, however, no actual financial loss or injury to health need be involved. The damage consists of the annoyance and discomfort caused to the occupier of the neighbouring land, such interference being of a material character: Clerk & Lindsell on Torts, 19th ed, Sweet & Maxwell, London, 2006, [20-27], p 1178."

1. Mr Yan placed considerable emphasis on the proximity of the trees to his dwelling, relative to the five-metre distance from DA approved structures, below which, Council permission is not required for tree removal.
2. It appears, however, that Mr Yan has misinterpreted this aspect of Council's tree management policy as a requirement, or direction. This exemption from the requirement to gain Council permission does not imply any recommendation or policy guideline from Council to remove or consider removal of trees in this five-metre proximity. The respondents opined that this exemption only related to tree owners' DA approved dwellings, not those of neighbours.
3. There is also no remedy under the Act for leaves and other materials that may fall from overhanging branches, if they do not also cause damage.
4. In this respect, at [171] of Robson, his Honour notes:

"171 However, annoyance or discomfort to the occupier of the adjoining land occasioned by nuisances of the third kind is not "damage to property on the land" within s 7 of the Trees (Disputes Between Neighbours) Act 2006. Hence, leaves, fruits, seeds, twigs, bark or flowers of trees blown onto a neighbour's land might cause annoyance or discomfort to a neighbour, but unless they also cause damage to property on the neighbour's land they will not be actionable under s 7."

1. The Court has published a Tree Dispute Principle at [20] in Barker v Kryiakides [2007] NSWLEC 292 (Barker) which states at [20] that:

"...For people who live in urban environments, it is appropriate to expect that some degree of house exterior and grounds maintenance will be required in order to appreciate and retain the aesthetic and environmental benefits of having trees in such an urban environment. In particular, it is reasonable to expect people living in such an environment might need to clean the gutters and the surrounds of their houses on a regular basis.

The dropping of leaves, fruit, seeds or small elements of deadwood by urban trees ordinarily will not provide the basis for ordering the removal of or intervention with an urban tree."

1. Based on my inspection on site, this case is not extra-ordinary, and the Tree Dispute Principle in Barker applies here. The required maintenance to clear leaves, seeds, flowers and small sticks from around the applicant's house, roofs, and gutters is reasonable.

Damage to sewer pipes

1. Mr Yan advised that his sewer pipes had been blocked by tree roots in 2014 and again in 2018, and that plumbers had installed a new PVC access pipe after clearing the 2018 blockage. Mr Yan also conceded that he had ringbarked and killed a relatively large tree in his yard growing in close proximity to the sewer at about this time, but nonetheless, he was of the opinion, apparently without evidence, that it was the roots of either Tree 1 or Tree 2 that had caused the pipe blockage.
2. Mr Yan did not seek compensation for the cost of these repairs of 2014 and 2018, but had he done so, the prior property owner would have had to be joined in his application. The respondents did not own their property until 2020 and are thus not liable under the Act for damage that occurred before this.
3. Since 2018, no further blockages or plumbing problems have occurred, but Mr Yan "felt" that "future problems are coming" and he wanted a compensation protocol established for when they arise.
4. The plumbing was rectified about four years ago, with no evidence of problems since. Given this scenario, in the absence of evidence greater than a 'feeling' from the applicant, I am not persuaded that sewer pipe damage is likely in the near future as a consequence of Tree 1 and Tree 2.

Damage to concrete

1. Mr Yan also claimed that the roots from Trees 1 and/or 2 had caused uplift of a section of a concrete path about 5 m from the trees, but he provided no evidence to display a causal link between the damage and the trees' roots. In oral submissions, Mr Yan acknowledged having no proof supporting this belief, nor knowing which tree was the cause.
2. In *Stevens v Russell* [2016] NSWLEC 1233 at [41], 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."
1. The applicant undertook no such excavation that may have shown that the concrete uplift was occurring as a consequence of the roots of Tree's 1 and 2, thus this claim was not substantiated and is also refused.

Findings

1. Mr Yan has applied for orders to remedy and prevent damage to his house, deck, sewer, and concrete path as a consequence of Trees 1 and 2. The onus is on the applicant to prove his case and satisfy the requirements of the Act. There are no elements of Mr Yan's application where he has provided sufficient appropriate evidence to satisfy the jurisdictional test in s 10(2) of the Act.
2. If, however, evidence on site or supplied by Mr Yan had supported any of his claims regarding damage as a result of the respondents' trees, and s 10(2) of the Act was engaged and orders contemplated, the Court must consider relevant discretionary matters in s 12 of the Act.

Discretionary matters – s 12

1. In making an order, the Court considers relevant matters in s 12 of the Act as follows:

* Tree 1 is located in the respondents' property about 1 metre from the common side boundary while Tree 2 is closely adjacent to the boundary (s 12(a)).

* With respect to removal or pruning, Tree 1 is protected by Council's Tree Management Policy. Tree 2 would be similarly protected if it was deemed to have a height greater than 10 m (s 12(b)).

* Past pruning of the Tree 1 has been minimal and this is appropriate in terms of optimum tree health. Any removal of leaf cover by pruning, or any other means, reduces a tree's capacity to optimise photosynthesis. This reduces the tree's potential carbohydrate supply, which is necessary for a range of essential functions. Pruning should therefore not occur as part of 'normal' maintenance but should be undertaken only when necessary to achieve a required purpose (s 12(b2)).

* No pruning is required in this case, though the parties may wish to have some deadwood removed back to branch collars, subject to compliance with AS4373-2007: Pruning of amenity trees, and permission of the tree owners. Pruning of dead branches would not require permission from Council. When orders are made by the Court for the pruning of dead branches, the normal specification only includes branches with a diameter at the branch collar in excess of 20 mm. Visible dead branches overhanging the applicant's roof did not exceed this 20mm diameter threshold (s 12(b2)).

* The trees contribute significantly to privacy, protection from the sun, to landscaping, and to the amenity and scenic value of the respondents' land (subss 12(b3) and 12(e)).

* Because of its flowering and fruiting characteristics, Tree 1 could be expected to provide food and shelter for local fauna, and thus would contribute to local biodiversity (s 12(d)).

* The trees are likely to be providing benefit to soil stability, and to reducing localised water accumulation (s 12(g)).

* Section 12(i) considers anything, other than the tree, that has contributed, or is contributing, to any damage or likelihood of damage, including any act or omission by the applicant and the impact of any trees owned by the applicant. The fact that 'Tree 1 was there first', long before the applicant's occupation, is considered in this respect. In such a scenario, and particularly where there is no reliable evidence of past or present damage caused by the trees, it is disproportionate and unreasonable to expect that the tree be removed or severely pruned.

Conclusion

1. I have examined the trees and the site and have reached the following conclusions:
1. While the Act provides a relatively simple dispute resolution scheme which allows parties access to justice without legal representation, the onus is on the applicant to submit evidence which satisfies the requirements of the Act in order to prove his case, on the balance of probabilities.
2. Mr Yan spoke of damage to the roof and boards of the superseded deck as a result of falling branches, but he provided no photographs or other evidence to substantiate this claim. No current damage was evident and there were no structural or anchorage concerns identified in either tree that may support a finding that branch breakage and consequent roof damage was likely in the near future.
3. Claims arising as a result of twigs, leaves, bark, flowers or fruit falling or blowing from the trees onto roofs or gutters, and the associated maintenance burden, are set aside through the application of the Tree Dispute Principle in Barker.
4. Insufficient valid, reliable, objective evidence was provided to the Court to satisfy the applicant's claims of damage to sewer pipes or concrete paving. There was no evidence of any sewer pipe incursion since the inspection pipe was replaced in 2018, and no excavation had been undertaken near the concrete path to display a causal link between the raised concrete and any tree roots, and certainly not those of Tree 1 and Tree 2, specifically.
5. Though Mr Yan seeks that the respondents provide insurance to cover any possibility of future damage to his property, the Act does not have scope for such an order. At [225] of Robson, his Honour states; "...However, 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" (or may cause in future).

Orders

1. The Court orders that:
1. The application is refused.

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J Douglas

Acting Commissioner of the Court

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Decision last updated: 10 January 2023

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