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Eaglesham & Anor v Prumm [2010] NSWLEC 1016 (21 January 2010)

New South Wales Land and Environment Court

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Eaglesham & Anor v Prumm [2010] NSWLEC 1016 (21 January 2010)

Last Updated: 22 January 2010

NEW SOUTH WALES LAND AND ENVIRONMENT COURT

CITATION: Eaglesham & Anor v Prumm [\[2010\] NSWLEC 1016](#)

PARTIES: APPLICANTs Stuart Eaglesham Julie Godfrey

RESPONDENT Dean Prumm

FILE NUMBER(S): 20390 of 2009

CATCHWORDS: TREES (NEIGHBOURS) :- Damage to property Injury to persons

LEGISLATION CITED: [Trees \(Disputes Between Neighbours\) Act 2006](#)

CASES CITED: Barker v Kyriakides [\[2007\] NSWLEC 292](#) Yang v Scerri [\[2007\] NSWLEC 592](#)

CORAM: Fakes C

DATES OF HEARING: 21/01/2010

JUDGMENT DATE: 21 January 2010

EX TEMPORE DATE: 21 January 2010

LEGAL REPRESENTATIVES

APPLICANT Stuart Eaglesham (litigant in person) Julie Godfrey (litigant in person)

RESPONDENT Did not attend

JUDGMENT:

THE LAND AND

ENVIRONMENT COURT

OF NEW SOUTH WALES

Fakes C

21 January 2010

20390 of 2009 Stuart Eaglesham & Julie Godfrey v Dean Prumm

JUDGMENT

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

1. **COMMISSIONER:** This is an application pursuant to [s7](#) of the *Trees (Disputes Between Neighbours) Act 2006* made by Mr Stuart Eaglesham and Ms Julie Godfrey of 41 The Quarterdeck Tweed Heads against the owner of a tree growing at 43 The Quarterdeck. Mr Dean Prumm is the owner of that property which is currently tenanted. The respondent did not appear at the on-site hearing. The tenant was aware of the hearing but elected not to attend.
2. The applicants are seeking the removal of the tree as they contend that it has caused, and could continue to cause, damage to their property and is a risk of injury to people. The damage said to have been caused is a blocked sewer system as well as damage to parked cars by falling dead wood.
3. The tree was inspected from both properties. It is a mature Ironbark, probably *Eucalyptus siderophloia* (Coast/ Grey Ironbark), a common species in the area. It is approximately 16 m tall and in average health. It consists of 3 main leaders, the most northern of which has been cut to about 2-2.5m above ground and from which large epicormic shoots arise and overhang the applicants' property. The other two trunks each bifurcate at 4-5m and have included bark at those points indicated by reaction wood. These attachments appear

stable. There are several dead hanging branches caught in the canopy and there is approximately 5% dead wood, most of which is located in the uppermost part of the canopy. The condition of the tree is consistent with its age and the changes in its environment,

4. The tree is approximately 1 m from the dividing fence between the applicants' and respondent's properties and part of the canopy overhangs that of the applicants'. The land on which the applicants' house and the tree are located slopes quite steeply to the north and the tree is in an elevated position above the applicants' driveway/ parking area. The applicants voiced their concern about the strong southerly winds that blow debris from the tree onto their property. The tree is immediately to the north of the parking area.
5. The applicants had a plumber unblock a sewer in February 2008. Roots were removed from the sewer and the plumber surmised that they were probably from the Ironbark. This blockage was the first that had occurred since the applicants moved into their house some 4-5 years ago. No blockage has occurred since.
6. The Ironbark is approximately 6-7m distance from the sewer pipe and some 2-3m above across a series of terraces. There are other trees and shrubs in the vicinity. Therefore it cannot be found, on the balance of probability, that the blockage was caused by the tree subject to this application.
7. There is uncontested evidence that falling branches have damage parked vehicles. Due to the steepness of the land and its shape, the parking area could not be relocated to another part of the applicants' property.
8. Under [s10\(2\)](#) of the Act, the Court must not make an order unless it is 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 a risk of injury to persons. In *Yang v Scerri* [\[2007\] NSWLEC 592](#), a rule of thumb, which I consider is also appropriate here, puts *the near future* as being a period of 12 months from the date of the determination. Only if one or more of these tests is satisfied, can the Court move to consider the discretionary questions of whether the damage or risk is sufficiently serious to warrant the intervention of the Court, and if so what should be ordered and who should pay.
9. The Court must consider a number of matters under [s12](#) of the Act. The relevant clauses in this case are;

- (a) The tree is wholly located on the respondent's property.
- (d) The tree is a remnant of the original forest and is part of a remnant community therefore it will make a contribution to biodiversity and to the local ecosystem.
- (e) The tree contributes to the scenic value of the land on which it is growing and to the locality.
- (f) The tree has value to public amenity as it can be seen from the road and is part of the remnant canopy that gives the immediate area its character.

1. The applicants also raised the matter of leaf and fruit drop from the tree. In *Barker v Kyriakides* [\[2007\] NSWLEC 292](#) and subsequent tree dispute principle, the dropping of leaves, flowers, fruit, seeds or small elements of deadwood by urban trees will not ordinarily provide the basis for ordering the removal of or intervention with an urban tree. This applies in this case. It is expected that some level of external housekeeping and maintenance is normal for people who live in leafy urban environments and who benefit from the environmental and aesthetic services that trees provide.
2. However, after considering the written and oral evidence and inspecting the tree, I am satisfied that falling dead wood from the tree has caused damage to parked cars and could continue to do so. I am also concerned about the stability of the epicormic shoots arising from the cut stem and the risk they pose to the applicants' property. However, there is no evidence to support the removal of the entire tree. Therefore as one or more of the tests under [s 10\(2\)](#) are met, the jurisdiction is enlivened and the Court can make an order.
3. The orders of the Court are:
 1. The application to remove the tree is refused.
 2. The respondent is to organise and pay for an arborist with a minimum AQF level 3 qualification in arboriculture and the appropriate current insurances, to remove all dead wood ≥ 30 mm in diameter. All hanging branches are to be removed and the most northerly, previously cut stem, is to be cut to the union of the stem from which it arises.
3. This work is to be carried out in accordance with AS4373:2007

Pruning of Amenity Trees and with the WorkCover Code of Practice for the Amenity Tree Industry.

4. This work is to be undertaken within 40 days of the date of these orders.
5. The applicants are to provide all reasonable access for the work to be carried out in a safe and efficient manner.
6. The applicants and the tenant are to be given at least 3 working days notice of the works.
7. Every two years, within 14 days either side of the initial dead-wooding, the respondent is to repeat orders 2, 3, 5 and 6 with the exception in order 2 that any epicormic shoots arising from the northerly section are to be removed.

J Fakes Commissioner of the Court