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Land and Environment Court of New South Wales

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**Reuben v Lace [2010] NSWLEC 1024 (27
January 2010)**

New South Wales Land and Environment Court

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**Reuben v Lace [2010] NSWLEC 1024 (27
January 2010)**

Last Updated: 27 May 2010

NEW SOUTH WALES LAND AND ENVIRONMENT COURT

CITATION: Reuben v Lace [\[2010\] NSWLEC 1024](#)

PARTIES: APPLICANTT Reuben

RESPONDENTSR & R Lace

FILE NUMBER(S): 20732 of 2009

CATCHWORDS: TREES (NEIGHBOURS)

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

CASES CITED: Aon Risk Services Australia Limited v Australian National University [\[2009\] HCA 27](#) Yang v Scerri [\[2007\] NSWLEC 592](#) Black v Johnson (No 2) [\[2007\] NSWLEC 513](#)

CORAM: Moore SCFakes C

DATES OF HEARING: 27 January 2010

EX TEMPORE DATE: 27 January 2010

LEGAL REPRESENTATIVES

APPLICANT In person

RESPONDENTS Ms L Lace, agent

JUDGMENT:

THE LAND AND

ENVIRONMENT COURT

OF NEW SOUTH WALES

MOORE SC

FAKES C

27 January 2010

20732 of 2009 Reuben v Lace

JUDGMENT

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

1. **SENIOR COMMISSIONER:** In October 2009, Ms Reuben lodged an application with the Court concerning a number of trees located on the adjacent property owned by Mr and Mrs Lace. There are a number of procedural matters that arise that require to be dealt with prior to turning our attention to the merits of the matter.
2. The first of these is that the property is jointly owned by Mr and Mrs Lace and Mrs Lace has been, at all relevant times, a patient in a mental health institution and unable to take any informed part of the court process. When the matter was initially drawn to my attention, at the call-over hearing, Mr Lace was represented by his daughter and it was suggested, at that time, that the question of Mrs Lace's participation would be dealt with at the time of the on-site hearing in light of her then circumstances and whether or not any guardian had been appointed to represent her separate interests in the proceedings.
3. Since that time, no formal guardianship has been entered into and, as a consequence, we are satisfied that, to the extent that Mrs Lace has an interest in the proceedings, that interest is coincidental with that of Mr Lace and is adequately represented by their daughter who has

authority to speak on Mr Lace's behalf. We have therefore proceeded to hear and determine the matter today on the basis that it is appropriate, as the application papers have been served on Mr Lace, that orders of the Court that might be made can bind him and his wife (given the coincidence of their interests in the proceedings).

4. The second matter, with which we need to deal, is the fact that it is quite clear from the application that was made by Ms Reuben, that the basis of the application was made of a risk of injury to persons. The directions that were made on 16 November clearly reflect that, as for any matters relating to compensation for property and the like, Standard Directions 6 and 7 would have been made but were not required to be made.
5. The change in circumstances that has occurred since that time is that a branch detached itself from the large eucalypt which is one of the trees, that is subject to the application – being the tree closest to the front of Mr and Mrs Lace's property. The branch fell on 10 January 2010 and on the following day Ms Reuben sent an email to the Court drawing our attention to the matter. This email states:

Yesterday i.e. on 10/01/10 and around 12.30 in the afternoon, a large trunk from the tree concerned snapped and fell on our fence and has damaged the fence and the gate and nearly missed falling on the roof of our house. Attached are images of the incident. Please advise us, as to what action the court or/ and ourselves are to take to resolve this issue. We notice that there are a few other branches which are in similar condition i.e. ready to give up or fail. We request immediate action on this matter to safeguard property and life.

1. As the basis of that communication is clearly one reinforcing the basis of the application being a risk of injury or future risk to property, no claim is made in that correspondence for any compensation or remedial order with respect to damage to the fence. Although we are informed that the Lace's insurer will address the question of the damaged fence, that is not a matter of concern to us.
2. The matter that we need to address is the fact that Ms Reuben has sought today, during her closing submissions, to amend her application to encompass orders for rectification of the fence. This is not a matter that has been drawn to the Court's attention at any time.

It is not a matter that has been put in any proper correspondence to the Court and served on the owners of the tree. There is no basis, consistent with the decision of the High Court in *Aon Risk Services Australia Limited v Australian National University* [2009] HCA27, at what amounts to the death of the proceedings, upon which we should grant leave to amend the application, given that there has been adequate opportunity for Ms Reuben to do so on proper notice.

3. Leave was granted to reconvene the directions hearing on two days notice, a standard direction made in these types of proceedings. That leave was not availed of and there has been no opportunity given to the Court, and hence to the respondents, to deal with that issue. We decline to permit any amendment to the application in that regard.
4. Similarly, during the course of proceedings, Ms Reuben asked us if we wished to inspect the interior of her property, that being the subject of proceedings under the Trees Act that she had commenced against Mr and Mrs Lace some considerable period of time ago and which were discontinued by consent.
5. Similarly, although there is a “damage to property” form submitted with the application, no orders have been sought from the Court in that regard. Whether or not there has been any material damage to or changes to her property since the early proceedings were discontinued, there has been no opportunity for the respondents to deal with questions of compensation, engineering and the like (all of which were matters that arose in the earlier discontinued proceedings. We therefore declined to pay any regard to the internal damage to her house.
6. We have confined ourselves to those matters that were contained in the application, namely three trees located on the Laces’ property in the vicinity of the fence between the Laces’ property and the Reubens’ property.
7. We turn the first to the question of the rearmost tree – being a Casuarina located some 2 m from the fence line. Some branches of this tree have been pruned, at some time in the past, to a vertical extension of the fence line between the properties.
8. There has been no material change to that tree since we inspected the premises on the occasion of the discontinued proceedings. There is no evidence that that tree has caused, in the immediate past since that earlier application was discontinued, any damage to the Reubens’

property. There is, on our examination of the tree, no reasonable likelihood of any significant element of that tree failing in any fashion that is likely to cause damage to the Reubens' property or is a likely risk of injury to anybody located on either property. We therefore decline to make any order with respect of the Casuarina furthest from the street.

9. The second Casuarina, which is the middle tree, has two leaders, one of which leans in the direction of the Reubens' property. This leader has been pruned at a point approximating the vertical extension of the fence line between the properties. It was, on our recollection, pruned to that point at the time of the earlier proceedings. There are epicormic shoots arising from the cut end of the leader. On Ms Reuben's own evidence, there has been no significant material falling on her property from that tree, no injury to any person and no damage to her property since the last occasion on which we inspected the tree.
10. We have closely examined the tree at a point where the two leaders diverge and we can see no reason to consider that there is a risk of failure and thus of injury arising from that. Nor is there any likelihood of damage to the Reubens' property arising from that tree within the next 12 months or so, that being a rule of thumb adopted by the Court in *Yang v Scerri* [\[2007\] NSWLEC 592](#) and which we consider to be appropriate to apply in these proceedings. We therefore decline to make any order with respect to the second of the Casuarinas.
11. We now turn our attention to the eucalypt that is closest to the street. It has, in the past, had two co-dominant leaders. The one closest to the Laces' house splits into three stems at a point approximately 4 to 4.5 m above the ground. The trunk closest to the Reubens' property has been removed at a height of approximately 4 to 5 m above the ground at some time in the past. The large limb that failed, and was drawn to the Court's attention on 11 January, fell from the stem closest to the street.
12. We have carefully examined the tree and note that there are a series of cavities and hollows contained in it. We have had regard to the fact that, on our earlier inspection, there was no discernible likelihood that the limb that has failed would fail. From this inspection, we have also considered the fact that the tree appears, in

the number of hollows in it, to provide a degree of desirable habitat for birds in the neighbourhood. However, we have concluded that it is likely that the tree poses, as it is presently formed, a risk of injury to persons.

13. Those persons are not merely persons resident in the Reubens' property but in fact, persons who are resident in the Laces' property. We have concluded that the element of the tree trunk that is closest to the street requires removal because it is one that we consider is possible to fail and constitutes a risk of injury to persons. We consider that it should be removed at a point where the three existing trunks diverge.
14. We are unable to determine the extent to which decay, evident from the external parts of the tree, extends beyond the point of removal of that leader. Similarly, we consider the removal of that leader will place significant additional stresses on the remaining elements of the tree. Although we have considered whether it would be possible to order the retention of the remaining element of the tree, we are not satisfied that it would be prudent to do so as we consider that there would still remain a real risk of failure and hence risk of injury to persons particularly those resident in the Laces' property.
15. As a consequence we have concluded that all three trunks of the tree should be removed at a point approximate to the point where those trunks diverge as shown on the marked photograph appended to this judgement. This will retain some potential habitat but minimise the risk of injury to persons.
16. We now turn to the question of who should pay for that removal and how long should be allowed for that removal to be effected.
17. We have concluded that Mr and Mrs Lace should be responsible for undertaking the removal and that it would be reasonable to allow a period of 90 days from today's date for that removal to be effected. We have concluded, as earlier indicated, that it would not be necessary to undertake the significantly expensive exercise of removing the totality of the stump of the tree and of the lower portions of it. Hence the removal at the designated points, we are satisfied, will remove the likelihood of risk of injury to persons.
18. As to the cost of removal, it is raised on behalf of Mr and Mrs Lace the fact that the tree was there prior to the erection of the Reubens' residence . We have considered the design and location of the

Reuben residence on their allotment to question whether there is any unreasonable design or locational issues (consistent with the discussion in the tree planning principle published in *Black v Johnson (No 2)* [\[2007\] NSWLEC 513](#)) that would cause us to depart from the ordinary position of requiring the owner of the tree to bear the cost of its removal. We are not satisfied that there is any basis founded on anything to do with the design or location of the Reubens' residence for us to depart from the usual cost basis. Therefore we have concluded that Mr and Mrs Lace should bear the cost of the removal of the tree within 90 days from the date of this hearing.

19. The Orders of the Court are:

1. The application to remove the Eucalypt is upheld; 2. The application to remove the Casuarinas is dismissed;

1. The respondents are to engage and pay for an AQF level 3 arborist with the appropriate current insurances, to remove the eucalypt to the points indicated on the photograph appended to these orders; and
2. These works (1) and (3) are to be carried out by 29 April 2010.

Tim Moore Judy Fakes

Senior Commissioner Commissioner of the Court

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