

Owners corporation wins a tricky case to get a tree removed

Recently, Bannermans Lawyers has successfully represented an owners corporation to obtain orders from the Land and Environment Court (**LEC**) to remove a tree on the land adjacent to the owners corporation's land which has been causing damage to the owners corporation's garage wall, *The Owners – Strata Plan No 58036 v The Estate of William Hutchinson* [2025] NSWLEC 1625.

The salient feature of this case is that the land which the tree is located is a sliver of land still under Old Title System. According to the NSW Land Registry Services' records, the land still belongs to the estate of a person who was deceased 180 years ago.

Under the *Trees (Disputes Between Neighbours) Act 2006* (**Tree Act**), a lot owner may apply to the LEC for orders to remove a tree on the neighbour's land if the tree has caused damage to that owner's land. But such an application is subject to certain conditions.

Section 4 of the Tree Act provides that the Tree Act only applies to land of certain zonings designated as "residential", "rural-residential", "village", "township", "industrial" or "business" under an environmental planning instrument (within the meaning of the Environmental Planning and Assessment Act 1979) or, having regard to the purpose of the zone, having the substantial character of a zone so designated".

Section 8 of the Tree Act provides that an application to LEC must give notice of the lodging of the application and the terms of any order at least 21 days before a hearing to the owner of the land, any relevant authority and any other person who will be affected by the order. It also provides that the Court may waive the requirement to give notice or vary the period of notice if it thinks it appropriate to do so in the circumstances.

Section 10 further provides that the Court will not be in the position to make an order unless it is satisfied that the applicant has made a reasonable effort to reach agreement with the owner of the land on which the tree is situated. In making the determination, the Court will also need to take into account the factors under section 12 of the Tree Act.

In the above case, it is unknown to any person or authority of the current owner of that strip of land. The owners corporation has carried out an inspection in the State Library of NSW for the estate documents of the documentary owner. The will of the documentary owner or estate map all failed to show how that strip of land was inherited. In addition, the zoning of the land is "Mixed Use". From its appearance the zoning is not within the designated zonings under Section 4.

In such circumstances, it is impossible to provide notice to the owner of that land nor to make any effort to reach an agreement. The only viable option is to rely on section 8 of the Tree Act to request

LEC to exercise the discretion to waive the notice requirement and have the matter proceed ex parte. Therefore, a notice of motion was filed to have the matter listed before a judge.

In *The Owners – Strata Plan No. 58036 v The Estate of William Hutchinson [2025] NSWLEC 76*, after considering the effort that the owners corporation has put to locate the owner of that strip of land, the failure to show the owner from the relevant documents and authorities, and the urgency of the matter given the owners corporation may not be able to renew its insurance policy because of the damaged garage wall, Beasley J decided to exercise the discretion to waive the notice requirement under section 8 of the Tree Act and to have the matter proceed on an ex parte basis. In addition, the Court also expressed the view that the zoning of “Mixed Use” has substantial character of “Business” as captured by section 4 of the Tree Act.

Then the matter was heard on site before a commissioner. The Commissioner decided that the zoning of “Mixed Use” has substantial character of “Business” on the grounds that essentially two zonings share similar objectives. The Commissioner was also satisfied that the tree was causing damage to the wall which made the wall unstable and at risk of collapsing, and no alternative could be achieved to prevent the damage; and thus made the orders to remove the tree.

The takeaway of the case is that in the circumstances where after all reasonable efforts have been taken to locate the neighbour and failed, it is possible to request the court to waive the requirement of notice under section 8 of the Tree Act; and the zoning of “Mixed Use” will have substantial character of “Business”.

If you need any advice or representation concerning a tree dispute matter, feel free to reach out to enquiries@bannermans.com.au or on 02 9929 0226.

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