

Lacey v City of Burnside [2009] SASC 136

By Nicole Harris, Senior Associate, Wallmans Lawyers

This case involved an appeal against a decision of the Respondent Council to refuse an application for the removal of a significant tree on the basis that it constituted an unacceptable risk to safety. The ERD Court upheld the decision of the Council, and this decision was then appealed to a single judge of the Supreme Court.

The appellant had applied for the removal of a large Wallangarra White Gum tree which was situated in his yard. The appellant sought the removal of the tree on grounds that it constituted an unacceptable risk of safety, in that it had 10 sudden limb failures in the past six years. As a result of these limb failures, the appellant had quarantined all areas of his yard which were underneath any branches of this tree.

The relevant provisions of the Council's Development Plan stated that significant trees should not be removed unless:

- the tree represents an unacceptable risk to public or private safety; or
- the tree is threatening to cause substantial damage to a substantial building or structure of value; and
- all other reasonable remedial treatments and measures have been determined to be ineffective.

Conflicting evidence as to possible remedial measures was presented before the ERD Court. Evidence called by the appellant suggested that any pruning regime would affect the visual amenity of the tree, and would also reduce its life-span. The Council however produced evidence to suggest that pruning would be beneficial to the tree, and reduce the risk of further limb failure, but that it would not extend the life of the tree beyond 10 years. The ERD Court accepted that a pruning regime could be undertaken to reduce the risk of limb failure.

The ERD Court found that the tree did in fact pose an unacceptable risk to private safety. This finding was not challenged in the Supreme Court. The finding that was challenged was that the requirement to prove that all other remedial treatments and measures were ineffective had not been adequately satisfied in the circumstances, despite the fact that in the absence of this requirement, the rate and nature of limb failure had reached the point where removal of the tree may be justified.

The appellant argued firstly that the ERD Court had erroneously imposed an onus upon him to establish that the development consent should be granted, and subsequently found against him when he failed to discharge it. The Supreme Court however agreed with this approach on the basis that a provisions of the Development Plan require special reasons to be present before a significant tree may be removed, the onus is therefore upon an applicant to demonstrate that such reasons exist in his or her case.

The appellant also argued that the pruning regime, because it would affect the amenity of the tree, and that it would not extend the life of the tree beyond 10 years, was not a reasonable remedial measure or treatment within the meaning of the Development Plan. The Supreme Court was not persuaded by this argument, and found that the concept of "reasonableness" related to the cost or practicality of such treatments or measures. The possibility of a short life expectancy for the tree was not relevant. The Court found that as the appellant had failed to prove that the costs of the remedial measures were prohibitive, or that they were impossible to carry out, and thus the appeal was dismissed, and the decision of the ERD Court and the Council upheld.