Land and Environment Court
New South Wales

Medium Neutral Citation:	**Georges River Council v WK Strong Pty Limited; Georges River Council v Awada [2019] NSWLEC 97**
Hearing dates:	03 July 2019
Date of orders:	08 July 2019
Decision date:	08 July 2019
Jurisdiction:	Class 5
Before:	Preston CJ
Decision:	The Court orders:

In proceedings 2018/227315 (concerning Tree 1):
(1) WK Strong Pty Limited (the defendant) is convicted of the offence against s 125(3A) of the *Environmental Planning and Assessment Act 1979* as charged.
(2) The defendant is fined $15,000.

In proceedings 2018/227316 (concerning Tree 2):
(1) WK Strong Pty Limited (the defendant) is convicted of the offence against s 125(3A) of the *Environmental Planning and Assessment Act 1979* as charged.
(2) The defendant is fined $30,000.

In proceedings 2018/227361 (concerning Tree 9):
(1) WK Strong Pty Limited (the defendant) is convicted of the offence against s 125 of the *Environmental Planning and Assessment Act 1979* as charged.
(2) The defendant is fined $45,000.

In proceedings 2018/227363 (concerning Tree 12):
(1) WK Strong Pty Limited (the defendant) is convicted of the offence against s 125 of the *Environmental Planning and Assessment Act 1979* as charged.
(2) The defendant is fined $5,000.

In proceedings 2018/227336:
(1) Mr Khaled Awada is found guilty of the offence against s 125 of the *Environmental Planning and Assessment Act 1979* as charged.
(2) The proceedings are dismissed.

In proceedings 2018/227315, 2018/227316, 2018/227361, 2018/227363 and 2018/227336:

(1) WK Strong Pty Limited and Mr Khaled Awada are to pay to the Registrar of the Court, for payment to the prosecutor, 4/5 and 1/5 respectively of the amount of the costs of the prosecutor as may be determined under s 257G of the *Criminal Procedure Act 1986.*

Catchwords:

OFFENCES AND PENALTIES – sentence – cutting trees without development consent – breaching condition of development consent to retain and protect trees – individual offender and his company – objective seriousness – low environmental harm – foreseeable risk of harm – practical measures to prevent harm – control over causes – offences of low objective seriousness – subjective circumstances of offenders – no prior convictions – prior good character – early guilty pleas – genuine remorse – assistance to authority – totality principle – adjustment of fines for multiple offences – s 10 order dismissing charge against individual offender – costs ordered

Legislation Cited:

Crimes (Sentencing Procedure) Act 1999 ss 10, 21A
Criminal Procedure Act 1986 s 257G
Environmental Planning and Assessment Act 1979 ss 125

Cases Cited:

Burwood Council v Abdul Rahman (No 2) [2017] NSWLEC 177
Cameron v Eurobodalla Shire Council (2006) 146 LGERA 349; [2006] NSWLEC 47
Camilleri's Stock Feeds Pty Ltd v EPA (1993) 32 NSWLR 683
Gittany Constructions Pty Ltd v Sutherland Shire Council (2006) 145 LGERA 189; [2006] NSWLEC 242
Erector Group Pty Ltd v Burwood Council; Liverpool Development Group Pty Ltd v Burwood Council (2018) 232 LGERA 304; [2018] NSWCCA 56
Hornsby Shire Council v Henlong Property Group Pty Ltd (No 2) [2019] NSWLEC 17
Hunters Hill Council v Gary Johnston [2013] NSWLEC 89
Hunters Hill Council v Liu [2018] NSWLEC 108
Parramatta City Council v Cheng [2010] NSWLEC 94
Pearce v The Queen (1998) 194 CLR 610
Plath v Rawson (2009) 170 LGERA 253; [2009] NSWLEC 178
R v De Simoni (1981) 147 CLR 383; [1981] HCA 31
R v Nguyen [2002] NSWCCA 183
R v Paris [2001] NSWCCA 83
Re Attorney General's Application under s 37 Crimes (Sentencing Procedure) Act (No 3 of 2002) (2004) 61 NSWLR 305; [2004] NSWCCA 303
Willoughby City Council v Rahmani [2017] NSWLEC 166

	Wingecarribee Shire Council v O'Shannassy (No 6) [2015] NSWLEC 138
Category:	Principal judgment
Parties:	Georges River Council (Prosecutor) WK Strong Pty Limited (Defendant) Mr Khaled Awada (Defendant)
Representation:	Counsel: Mr Mark Seymour (Prosecutor) Dr James Smith (Defendants) Solicitors: Georges River Council (Prosecutor) Dakdouk & Associates (Defendants)
File Number(s):	2018/227315; 2018/227316; 2018/227361; 2018/227363 and 2018/227336
Publication restriction:	Nil

JUDGMENT

1 A builder, Mr Awada, and his company, WK Strong Pty Ltd, carried out a dual occupancy development at 111 Gungah Bay Road, Oatley ("the land"). In doing so, the company engaged contractors to lop branches of two Blackbutt trees, one on the land (referred to as Tree 2) and the other on the neighbouring land at 113 Gungah Bay Road (referred to as Tree 1), without development consent and thereby committed two offences against s 125(3A)(a) of the *Environmental Planning and Assessment Act 1979* ("EPA Act"). The company excavated a trench to lay stormwater and sewer pipes and stockpiled soil within the tree protection zone of another Blackbutt tree (referred to as Tree 9) in breach of a condition of the development consent and failed to transplant successfully a Magnolia tree (referred to as Tree 12) in breach of the same condition of the development consent, and thereby committed another two offences against s 125 of the EPA Act. Mr Awada had participated in instructing the contractor to prune a branch of the Blackbutt tree, Tree 2, and thereby aided, abetted, counselled or procured the lopping of the tree, which is an offence under s 125(3A)(a) of the EPA Act.

2 Each of the company and Mr Awada have been charged with, and have pleaded guilty to, committing these offences. A sentence hearing has been held, and they are to be sentenced for the offences they have committed.

The facts in brief

3 Georges River Council ("Council") granted, on 13 April 2016, development consent to demolish an existing dwelling house on the land and construct a detached dual occupancy and front fence. The consent was subject to deferred commencement

conditions, which were later satisfied, so that the consent became operative. Two of the operational conditions required protection and retention of trees on the land. Condition 1 required:

> "1. GEN1001 **– Approved Plans –** The development must be implemented in accordance with the approved plans and supporting documentation listed below which have been endorsed by Council's approved stamp, except where marked up on the plans and/or amended by conditions of this consent:"

4 One of the documents "listed below" was an Arboricultural Impact Assessment Report dated 2 February 2016 by Jacksons Nature Works (the arborist report).

5 Condition 21 of the development consent required:

> "CC5002 **– Trees – Tree Protection and Retention** – The following trees shall be retained and protected:
>
> (a) The trees identified as Tree 1, 2, 3, 4, 6 and 9 as identified in the Arboricultural Impact Assessment Report prepared by Jacksons Nature Works (dated 2 February 2016)
>
> (b) Transplanting the tree identified as Tree 12 Arboricultural Impact Assessment Report prepared by Jacksons Nature Works (dated 2 February 2016)
>
> All trees to be retained shall be protected and maintained during demolition, excavation and construction of the site. The tree protection measures must be in [sic] undertaken in accordance *AS4970-2009 Protection of trees on development sites* and the recommendations of the Arboricultural Impact Assessment Report prepared by Jacksons Nature Works (dated 2 February 2016). **The trees to be retained and transplanted are to be shown on the landscape plan prepared by a qualified landscape architect.**
>
> Details of the tree protection measures to be implemented must be provided with the application for a Construction Certificate by a suitably qualified Arborist (AQF Level 4 or above in Arboriculture) and must be retained through all stages of construction."

6 The arborist's report referred to in these conditions assessed various trees on the land, including the three Blackbutt trees (Trees 1, 2 and 9) and the Magnolia tree (Tree 12). The arborist's report recommended retaining and protecting Tree 1 on the neighbouring property; pruning a long lateral branch of Tree 2 (described as a first order branch) growing towards one of the proposed dual occupancy dwellings; avoiding construction in the structural root zone and tree protection zone of Tree 9; and transplanting the Magnolia (Tree 12) from its current position (which was within the proposed driveway) to another location on the land, although no location was specified.

7 The arborist's report recommended the installation of specified tree protection measures around the retained trees, including Tree 9.

8 In undertaking the development, the company, through its foreman, Mr Joseph Chouman, engaged an independent contractor to undertake the tree removal and lopping set out in the arborist's report. Mr Awada provided a copy of the arborist's report to the contractor before work began.

9 Around 9 August 2016, the contractor lopped the first order branch of Tree 2 identified in the arborist's report. In addition, the contractor cut at least four smaller, second and third order branches of Tree 2 that were also growing towards the proposed dual occupancy dwelling. The canopy of Tree 1, growing in the neighbouring property at 113 Gungah Bay Road, mingled in part with the canopy of Tree 2 growing on the land. The

contractor cut the upper sections of two second order branches of Tree 1 that were overhanging the boundary fence between the two properties. Mr Awada said that he did not instruct the contractor to cut the extra branches of Tree 2 or the overhanging branches of Tree 1; the contractor took this action on his own initiative.

10 Around 26 June 2017, excavation work was carried out to excavate a trench and lay stormwater and sewer pipes in the trench. The trench crossed through the tree protection zone of Tree 9. The trench was excavated by hand and excavated soil was stockpiled using a small mechanical excavator.

11 The evidence does not establish who undertook this work. The Tree Management Officer of the Council, Mr Lunniss, who inspected the land on 26 June 2017, spoke to a labourer who was not identified by name. Neither the site foreman, Mr Chouman, nor Mr Awada were present on the site at the time.

12 Mr Awada said that the location of the trench for the stormwater and sewer pipes was in accordance with the construction certificate and was necessary in order to comply with the hydraulic engineer's plan and the relocation of the driveway. The arborist's report had recommended moving the driveway approximately 1.5m to the south to avoid construction impacts within the structural root zone of Tree 9. The amended landscape plan approved with the construction certificate showed a curved and relocated driveway in order to retain and protect Tree 9.

13 The excavation of the trench severed about six roots of Tree 9 that were greater than 100mm in diameter. An arborist, Mr Sam Allouche, subsequently attended the site in August 2017. He undertook remedial work involving clearing soil around the severed roots and cleanly cutting them to sound tissue. The trench was later backfilled with the stockpiled soil. Mr Allouche said that the tree roots that were severed were outside the structural root zone radius. The trenching and stockpiling of soil were, however, within the tree protection zone for Tree 9.

14 On 26 June 2017, Mr Lunniss also observed that the Magnolia (Tree 12) had not been transplanted as required by condition 21 and the arborist's report. Mr Awada said that he had met with the former arborist, Mr Ross Jackson, who had written the arborist's report in June 2016, and Mr Jackson gave practical instructions on how to transplant the Magnolia. This involved undertaking the transplanting process over several weeks and performing it in steps: first, fertilising the tree regularly leading up to the stage of transplanting the tree; second, hand digging a small trench around the tree a short time before removal and replanting; third, when removing the tree, cutting the lower branches to help reduce water loss, and fourth, removing and replanting the tree. Mr Awada said that he carried out these steps. Once removed, the tree was placed in a large planter bag to recover before it was replanted in the ground. Unfortunately, the Magnolia did not survive.

15

Mr Awada said that when the root ball of the tree was removed, he noticed that the main roots were embedded in rocks about 300-350mm beneath the soil surface and they broke or had to be cut when the root ball was removed. Mr Awada also observed that the hard soil, which comprised fractured sandstone, made the removal of the tree difficult.

16 On the death of the tree, the company obtained a replacement advanced Magnolia tree in February 2019 and planted it in the backyard at a location advised by another Council officer.

The objective circumstances of the offences

17 In determining the objective seriousness of the offences, the circumstances of the offences in this case of relevance are: the maximum penalty for the offences; the objective harmfulness of the offenders' actions; the offenders' state of mind in committing the offences; the offenders' reasons for committing the offences; the foreseeability of risk of harm to the environment; the practical measures to avoid harm to the environment; and the offenders' control over the cause of harm to the environment.

Maximum penalties

18 The maximum penalty for each offence against s 125 of the EPA Act committed by the company is $2,000,000 and for the offence committed by Mr Awada is $500,000, being the applicable Tier 2 penalty for a corporation and individual respectively.

Objective harmfulness of the offences

19 The harm caused by each offence is relevant to the objective seriousness of the offence: the more serious the harm, the more serious the offence and generally the higher the penalty: *Camilleri's Stock Feeds Pty Ltd v EPA* (1993) 32 NSWLR 683 at 701. Causing substantial harm is an aggravating factor: s 21A(2)(g) of the *Crimes (Sentencing Procedure) Act 1999* ("Sentencing Act").

20 Actual harm was caused to Tree 1 by lopping the upper sections of two second order branches. The loss of those branches would have reduced photosynthesis and sugar production for the tree. Potentially, the cutting of the branches left the tree wounded and predisposed to plant pathogens, pests and diseases, which could invade the tree through the wounds left by the lopping. The tree would need to use its stored starch reserves to deal with the wounds. However, there was no evidence that the wounds left from the lopping were actually affected by any plant pathogen, pest or disease or that the loss of the leaves of the two branches materially affected the tree's photosynthesis or sugar production. The health of Tree 1 did subsequently decline and in January 2019 the Council granted a permit for its removal.

21

The evidence does not establish, beyond reasonable doubt, that the lopping of the upper sections of the two second order branches of Tree 1 caused the irreversible decline of the tree. Mr Lunniss, the Council's tree management officer, opined that: "It is difficult to solely attribute the death of Blackbutt T1 to it being lopped, but it is highly likely that it was a significant contributing factor." I do not find that this bare statement of opinion establishes, beyond reasonable doubt, that the lopping of the two branches of Tree 1 in fact caused the death of Tree 1.

22 First, as I have found earlier, Mr Lunniss did not find that the lopping of the two branches did in fact lead to any plant pathogen, pest or disease invading the tree through the wound of the cut branches.

23 Secondly, Mr Lunniss did not disclose the extent of any loss of leaves, and hence any reduction in photosynthesis and sugar production of the tree, caused by the lopping of the two branches. Mr Lunniss did not estimate the extent of leaf canopy of the tree as a whole, either before or after the lopping of the branches, or the amount of leaves lost by the lopping of the branches, or the proportion of leaf canopy that was lost by lopping of the branches, or the significance to the tree health of the loss of those leaves in the branches that were lopped or that proportion of leaf canopy. Mr Lunniss' opinion was purely theoretical.

24 Thirdly, Mr Lunniss did not consider at all the impact that the building works that were carried out on the neighbouring property might have had on the irreversible decline of Tree 1. A residential development was carried out on the neighbouring property at 113 Gungah Bay Road. Tree 1 was conditioned to be retained by a condition of the development consent DA 2014/0953 for that development. The carrying out of the development involved the erection of a substantial building on the site upslope of the tree as well as the construction of onsite detention (OSD) tanks at the rear of the site and construction of a storm water easement through the tree's structural root zone. The Council noted in a letter dated 7 March 2019 that "excavation works occurred around the tree [Tree 1] as part of the development and installation of the stormwater easement from 111-113 Gungah Bay Road in 2016."

25 Mr Allouche said that it was unknown whether the tree suffered cumulative impacts from the development on the neighbouring property. He said that, without being aware of the mode of construction, the timing of construction, and the extent of works for the OSD on the neighbouring property, he was unable to form any opinion as to whether the development on the neighbouring property contributed to the tree's decline.

26 Mr Lunniss did not consider the location, nature or extent of the building, OSD tanks and stormwater easement constructed on the neighbouring property or whether these works were a contributing factor to the death of Tree 1. The failure to do so undermines Mr Lunniss' opinion that the lopping of two branches of Tree 1 was "a significant contributing factor" to the death of Tree 1. That opinion was not able to be drawn without considering the impact of the development on the neighbouring property.

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I find, therefore, that the harm caused by the offence concerning Tree 1 was limited to the direct impact of lopping the two branches of Tree 1. This harm is not substantial for the purposes of s 21A(2)(g) of the Sentencing Act.

28 The harm caused to Tree 2 on the land involved lopping the upper sections of at least four, second to third order branches of Tree 2. As with Tree 1, the loss of leaves thereby occasioned would have reduced photosynthesis and sugar production and there was a potential for plant pathogens, pests or diseases to invade the tree through the wounds left by the lopping. However, there was no evidence that Tree 2 has been so affected.

29 Indeed, the agreed fact is that Tree 2 appears healthy and in fair condition. Mr Lunniss repeated this opinion in his evidence. He added that whether the tree's long term viability has been affected will only become apparent over time. Mr Allouche opined that Tree 2 "remains stable and viable, with no long lasting damage to the tree".

30 From an amenity perspective, Mr Lunniss considered that "the lopping of the branches has altered its form and shape creating an asymmetrical canopy". Mr Allouche did not agree, considering that the lopped tree does not show altered form or that the crown is asymmetrical. Both Mr Lunniss and Mr Allouche agreed that Tree 2 has high amenity value, but Mr Allouche considered that, even though Tree 2 has endured some impact, its amenity value has not been lessened.

31 I find that the harm caused by the offence concerning Tree 2 was limited to the direct impact of the lopping on the four branches of Tree 2. This harm is not substantial for the purposes of s 21A(2)(g) of the Sentencing Act.

32 The harm caused to Tree 9 involved severing six of the roots greater than 100mm of Tree 9 whilst excavating the trench for the stormwater and sewer pipes. Mr Lunniss said that it was uncertain whether the severing of the roots could be likely to affect the long term health of Tree 9. However, he said that so far the tree appears to be healthy and viable. The agreed fact is that Tree 9 "appeared healthy and viable". Mr Allouche was also of the opinion that the tree was "stable and viable".

33 Mr Allouche undertook remedial works shortly after the trench was dug and cleanly cut the severed roots back to sound tissue. He noted that, as the cut roots were outside the structural root zone, the tree would remain viable.

34 The soil that was stockpiled in the tree protection zone of Tree 9 was left for only about a day before being moved and backfilled into the trench. No harm was proven to be caused by the stock piling of the soil in the tree protection zone.

35 I find that the harm caused by the offence was limited to the direct impact of severing six roots of greater than 100mm in diameter, but this is not proven to have adversely affected the tree's health. The harm is not substantial for the purposes of s 21A(2)(g) of the Sentencing Act.

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The harm caused to the Magnolia tree (Tree 12) was its death by the transplanting operation being unsuccessful. The Magnolia is a small ornamental tree, of an exotic nature. The Magnolia was located in the position of the proposed driveway and had to be removed. The arborist's report suggested that it might be able to be relocated on the land, but did not suggest any specific location. Conditions 1 and 21 of the development consent, which required implementation of the arborist's report, was similarly silent as to where the Magnolia should be replanted. The reason for transplanting the Magnolia is not explicitly stated, but it appears to be that "it can be easily transplanted as a mature specimen".

37 Neither the arborist's report nor the development consent refer to the Magnolia having any landscape or amenity value or contributing to the streetscape. Insofar as the Magnolia had some value on the site, it has been replaced with a less mature, but still advanced, Magnolia plant. The replacement Magnolia was planted in the rear yard in a location suggested by a Council officer.

38 The loss of the Magnolia during the transplanting operation appeared to be foreseeable. Mr Awada observed that the Magnolia was growing in hard soil with its main roots embedded in the rock substrate. These conditions made transplanting the Magnolia difficult. Mr Allouche said that successful transplantation of the Magnolia was problematic for three reasons:

> "i. The species of this tree, being a mature *Magnolia soulangeana*, based on my personal experience as a consultant arborist over the last 15 years, is generally not an ideal candidate for transplantation, as they are known to be sensitive to changes in their growing environment or root disturbance.
>
> ii. The tree's proximity to the existing dwelling, which would have had some impact on the efficacy of transplantation given the root ball would have been configured to the foundations of the dwelling and would have been asymmetric.
>
> iii. The tree apparently had been partly growing in rock, and the preparation for transplanting this tree would have meant that roots would have inevitably been damaged."

39 Mr Lunniss had never transplanted a Magnolia and had not seen this particular Magnolia before or during the process of endeavouring to transplant it. He merely referred to the arborist's report, noting that the arborist had recommended transplanting the Magnolia, and his previous experience in transplanting other small trees, so thought that it could be achieved.

40 I find that the harm caused by the offence was limited to the loss of one specimen of Magnolia, but this harm was mostly offset by the planting of a replacement Magnolia. There is no evidence that the loss of one Magnolia and its replacement with another Magnolia has had any effect on the landscape or streetscape or the amenity of the area. The harm caused is not substantial for the purposes of s 21A(2)(g) of the Sentencing Act.

State of mind of the offenders

41

The offences against s 125 of the EPA Act are strict liability offences and the state of mind of an offender in committing the offence is not an element of the offence. Nevertheless, subject to consideration of the principles in *R v De Simoni* (1981) 147 CLR 383; [1981] HCA 31, the commission of a strict liability offence intentionally, negligently or recklessly will be objectively more serious than one not so committed.

42 In this case, the evidence does not establish, beyond reasonable doubt, that the company or Mr Awada committed the offences intentionally, negligently or recklessly.

Reasons for committing the offences

43 The prosecutor submitted that the company and Mr Awada carried out the dual occupancy development on the land for commercial gain. That much can be accepted. But this does not establish that the conduct constituting each offence was carried out for commercial gain. The prosecutor has not proven, beyond reasonable doubt, that the company and Mr Awada financially gained or could have financially gained by lopping branches of Trees 1 and 2 that they should not have lopped, digging the trench and severing some roots of Tree 9, or failing to successfully transplant Tree 12 and instead planting a replacement tree.

Foreseeability of risk of harm

44 The company and Mr Awada could reasonably have foreseen that their respective actions in relation to Trees 1, 2, 9 and 12 might cause harm to the trees. The fact that, as events turned out, the actual harm caused to the trees was small did not mean that there was not a foreseeable risk of harm to the trees. In the case of Tree 9, the foreseeability of the risk of harm by digging a trench within the tree protection zone was clearly foreseeable, having regard to the observations and recommendations in the arborist's report about avoiding construction impacts within the structural root zone and tree protection zone of Tree 9.

Practical measures to prevent harm

45 The company and Mr Awada could have and should have ensured compliance with the conditions of development consent, including condition 21. The company and Mr Awada should have ensured that the contractor who was engaged to lop the branch of Tree 2 that was specified in the arborist's report only lopped that branch and no other branches of Tree 2 and did not lop any branches of Tree 1. The company should have ensured that the trench for the stormwater and sewer pipes was dug outside of the tree protection zone of Tree 9. If this required amendment of any plans, including the hydraulic engineer's plans, the company should have attended to this before digging the trench.

46 The transplanting of the Magnolia was more difficult. It may be, as Mr Allouche said, successfully transplanting the Magnolia was always going to be problematic. Nevertheless, the company could have engaged professional landscapers, with

experience in transplanting mature plant specimens, to undertake the transplanting, rather than the company and Mr Awada, who had no experience, trying to do the task themselves.

47 I find that there were practical measures that could have been taken to minimise the risk of harm to the trees.

Control over causes of offences

48 The company and Mr Awada had control over the causes that gave rise to the offences committed by each of them. The company gave the instructions to the contractor to lop Tree 2. Mr Awada gave the contractor the arborist's report describing the work to be done on Tree 2. Both could have exercised supervision and control over the contractor's work to ensure that only the branch on Tree 2 was lopped and no other branches of Tree 2 or Tree 1. The company undertook the activities of excavating the trench near Tree 9 and transplanting Tree 12. They had control over the causes of those offences.

Conclusion on objective circumstances

49 I find that the four offences committed by the company and the one offence committed by Mr Awada are of low objective seriousness.

50 Although all are of low objective seriousness, I would rank the offences committed by the company, in ascending order of seriousness, from the offence concerning Tree 12, to the offence concerning Tree 1, to the offence concerning Tree 2, to the offence concerning Tree 9.

51 The offence concerning Tree 12 was committed by the transplanting of Tree 12 required by condition 21 being unsuccessful, not by the company failing to undertake the transplanting at all. The harm caused was small and has been partly offset by planting a replacement tree.

52 The offence concerning Tree 1 was committed by the contractor of his own volition. The company did not instruct the contractor to touch Tree 1 in the neighbouring property. The instruction to lop a branch was limited to Tree 2. The company had no warning or notice that the contractor would cut overhanging branches of Tree 1. The harm caused to Tree 1 by lopping the overhanging branches is not proven to extend beyond the removal of these branches.

53 The offence concerning Tree 2 is more serious than the offences concerning Trees 12 and 1. The company instructed the contractor to lop the branch specified in the arborist's report and Mr Awada provided that report to the contractor. They should have ensured that the contractor only lopped that branch. Nevertheless, no ongoing harm to Tree 2 is proven to have been caused by the contractor lopping four more branches than the one branch that was required to be cut.

54

The offence concerning Tree 9, relative to the other offences, is more serious. The arborist's report identified Tree 9 as "one of the best trees on site and its retention will maintain the streetscape". To retain the tree, the arborist's report recommended moving the driveway to the south to avoid construction impacts within the structural root zone and tree protection zone of the tree. The company's actions in excavating the trench for the stormwater and sewer pipes within the tree protection zone was clearly contrary to this recommendation in the arborist's report. Fortunately, the severance of some roots of the tree while excavating the trench does not appear to have affected the health of the tree, as it appears to be healthy and viable. Nevertheless, the conduct of digging a trench in the tree preservation zone of the tree posed a foreseeable risk of harm.

55 The offence committed by Mr Awada is also of low objective seriousness. The offence arose from Mr Awada joining with the company to instruct the contractor to lop the branch of Tree 2 specified in the arborist's report, but the contractor going further and lopping four other branches of Tree 2. There is no evidence to distinguish the culpability of Mr Awada for committing the offence concerning Tree 2 from the culpability of the company for committing the offence concerning Tree 2. The degree of objective seriousness of the offences concerning Tree 2 committed by both Mr Awada and the company should therefore be found to be the same.

Subjective circumstances of the offenders

56 Within the limits set by reference to the objective seriousness of the offences, the Court needs to consider the favourable, mitigating factors personal to the offenders.

Lack of prior convictions

57 The company and Mr Awada do not have any prior convictions for any environmental offences: s 21A(3)(e) of the Sentencing Act.

Prior good character

58 Both the company and Mr Awada have otherwise been of good character: s 21A(3)(f) of the Sentencing Act. Character references were tendered speaking to the good character mainly of Mr Awada, but also of his company WK Strong Pty Ltd. Character references for Mr Awada were from: Councillor Carmelo Pesce, the Mayor of Sutherland Shire Council (the neighbouring local government area); Councillor Kent Johns (Emeritus Mayor of Sutherland Shire Council); Mr Hussein Abbas, a senior electrical engineer with CitiScope Engineers who knows Mr Awada personally and professionally; Mr Alexander Mitrevski, a senior surveying technician with OSUM Surveying Pty Ltd who is a friend and fellow student studying to become a registered surveyor; Mr Mounzer Mortada, a registered architect with M Cubed Architects, who were the architects for the dual occupancy development carried out by the company on the land; Ms Mary Talevski, a graduate civil engineer and friend of Mr Awada; Mr Glen Watson, surveyor, who has had his house built by Mr Awada; Mr Matt O'Shea, real

estate sales agent and principal of Ray White Oatley who has had business dealings with Mr Awada; Mr Hassan Awada, the elder brother of Mr Awada; and Ms Sue Awada, the sister of Mr Awada. A couple of these referees also speak about the character of Mr Awada's company. The references speak to Mr Awada's (and to a lesser extent the company's) hard work ethic, commitment to the community, friends and family, reputation for operating ethically and reliably, and adherence to legal requirements. They note Mr Awada's considerable remorse and embarrassment for committing the offences.

59 The Prosecutor submitted that this factor should be given less weight, due to the prevalence of the commission of these types of offences by persons of good character, citing *Re Attorney General's Application under s 37 Crimes (Sentencing Procedure) Act (No 3 of 2002)* (2004) 61 NSWLR 305; [2004] NSWCCA 303 at [118]-[119]. It has been held that prior good character has less significance for environmental offences for this reason: Plath v Rawson (2009) 170 LGERA 253; [2009] NSWLEC 178 at [147]-[148]. Nevertheless, I take into consideration that both the company and Mr Awada are generally held to be of good character.

Pleas of guilty

60 The company and Mr Awada have pleaded guilty at an early time, although not at the first available opportunity. Nevertheless, the prosecutor did not dispute that the company and Mr Awada should be afforded the full discount of 25% for the utilitarian value of their pleas of guilty to the criminal justice system: see s 21A(3)(k) and s 22 of the Sentencing Act.

Remorse

61 Mr Awada, and through him, the company, have expressed genuine remorse for committing the offences. Mr Awada, both individually and for the company, expressed his "sincere apology to the Court, the prosecutor and to the community" for the offences they committed. Mr Awada said that the company "has a long and successful history in providing safe, affordable and quality homes for members of the public and is ashamed that it has been held to account for offences that it did not intend to commit".

62 Mr Awada said on his own behalf:

> "The Court however can be confident that I will not reoffend. These proceedings have had a significant mental, physical and financial toll on me and I would never wish to go through it again.
>
> The experience of being prosecuted has been significant in allowing me to appreciate the ramifications of facing the Court and the impact this has had on my reputation. I'm proud of the work I do and this is why it has made it more difficult."

63 The company and Mr Awada have accepted responsibility for their actions. Mr Awada said that, as the director of the company, he took "full responsibility for the Company not conducting sufficient background checks before engaging the independent

contractors and having sufficient safeguards in place to ensure the work was carried out in accordance with the Arborist's Report."

64 The company and Mr Awada have endeavoured to make reparation for any harm caused by their actions. The Magnolia, Tree 12, which was lost in transplanting, has been replaced with another Magnolia. The company has planted further trees in the front of the site, as advised by a Council officer, to improve the streetscape. Notwithstanding the completion of the dual occupancy development on the site, the company is continuing to pay for the ongoing monitoring of all trees retained on site, including Trees 2 and 9, to ensure their ongoing health.

65 The company and Mr Awada have endeavoured to address the causes of the offences so as to prevent reoffending. The company has since the pruning of Trees 1 and 2 took place:

> "(i) Terminated the employment of the foreman who oversaw the majority of the work to the property for a major breach of Company policy, in particular the pruning of T1, and for failing to take the appropriate steps to monitor the contractor engaged to prune the trees.
>
> (ii) Perform a detailed interview process when hiring or engaging contractors, including performing extensive background checks and searches on the contractor, prior to contracting them to perform services on the Company's sites.
>
> (iii) Ensure that when any sensitive pruning is carried out, the Company has a director or a member of senior management present as well as supervision by a project arborists.
>
> (iv) Educate its staff, including foreman and labourers, in Horticulture and Gardening courses. The Company's staff will be attending horticulture and gardening courses run by the University of Sydney's Centre for Continuing Education."

66 Mr Awada indicated that he wishes to progress from being a builder to becoming a registered land surveyor. Due to back injuries from working in the building industry, Mr Awada has undergone spinal surgery in November 2018 to rectify bulging disk injuries. He is currently in his third year of a Bachelor of Surveying course, aiming to qualify as a registered land surveyor. He then hopes to run a successful surveying practice.

67 I find that both Mr Awada and the company are remorseful and unlikely to reoffend: s 21A(3)(g) and (i) of the Sentencing Act.

Assistance to authority

68 The company and Mr Awada have assisted the prosecutor during its inspections of the land on 9 August 2016 and 27 July 2017. They have assisted with the preparation of an agreed statement of facts, which improves the efficiency of the sentencing hearing.

69 The company and Mr Awada have agreed to pay the prosecutor's costs. They suggest apportioning liability for the costs in the ratio 4:1 between the company and Mr Awada. Although the amount of costs is yet to be agreed or assessed, the prosecutor indicated the amount of costs might be in the order of $55,000.

Appropriate sentences

70

The sentences that are appropriate for the offences committed by the company and by Mr Awada differ. The appropriate sentence for the company is to convict the company for the four offences it committed and impose fines at the appropriate level. The appropriate sentence for Mr Awada is to find him guilty of the offence he has committed, but without proceeding to conviction, direct that the charge for the offence be dismissed under s 10(1)(a) of the Sentencing Act. I will explain why these orders are appropriate.

The appropriate fines for the company

71 I take into account the objective circumstances of the offences committed by the company and the subjective circumstances of the company as the offender, as I have discussed above.

72 I take into account the purposes of sentencing in s 3A of the Sentencing Act. The purposes of punishment, retribution and denunciation are relevant. There is the need for the Court, through the sentences it imposes, to ensure that the company is adequately punished for the offences it has committed, to hold it accountable for its actions, and to denounce the conduct of the company in proportion to the seriousness of the offences.

73 There is a need for the Court to recognise the harm done to the trees by the company's offending conduct. The sentence of the Court needs to reflect this harm and the purpose of restoration and reparation for the harm.

74 The sentence needs to act as a deterrent. The purpose of general deterrence is relevant to ensure that persons do not carry out development, including removing or cutting trees, without first obtaining and complying with a development consent. The purpose of general deterrence is particularly relevant when imposing sentences of cutting down trees: see *Cameron v Eurobodalla Shire Council* (2006) 146 LGERA 349; [2006] NSWLEC 47 at [71]-[80]; *Gittany Constructions Pty Ltd v Sutherland Shire Council* (2006) 145 LGERA 189; [2006] NSWLEC 242 at [103]-[106]; *Erector Group Pty Ltd v Burwood Council; Liverpool Development Group Pty Ltd v Burwood Council* (2018) 232 LGERA 304; [2018] NSWCCA 56 at [126]; *Hornsby Shire Council v Henlong Property Group Pty Ltd (No 2)* [2019] NSWLEC 17 at [74]-[77].

75 In the circumstances of these offences, having regard to the company's lack of prior convictions, its remorse for committing the offences, its prior good character, the actions taken at the time of and following commission of the offences to address the causes giving rise to the offences and to prevent reoccurrence of the offences, and the unlikelihood of it reoffending, there is a lesser need for individual deterrence of the company.

76 In determining the appropriate penalty, the Court should be consistent with a pattern of sentencing for like offences. I have had regard to the sentences imposed by this Court in other cases involving offences of cutting or removing trees to which the parties have

drawn my attention. I have considered the sentences imposed and the objective circumstances of the offences and the offenders involved that led the sentencing court to impose those sentences. The cases include:

(a) *Hunters Hill Council v Gary Johnston* [2013] NSWLEC 89 (total removal of three trees and part removal of a fourth tree required to be retained by conditions of development consent and fined $40,000);

(b) *Wingecarribee Shire Council v O'Shannassy (No 6)* [2015] NSWLEC 138 (unlawful earthworks and removal of six to nine trees without development consent and fined $93,500);

(c) *Burwood Council v Abdul Rahman (No 2)* [2017] NSWLEC 177 (removal of tree in a heritage conservation area and fined $50,000);

(d) *Willoughby City Council v Rahmani* [2017] NSWLEC 166 (removal of three trees that were part of an endangered ecological community and fined $60,000);

(e) *Hunters Hill Council v Liu* [2018] NSWLEC 108 (removal of two trees and fined $48,000) and

(f) *Hornsby Shire Council v Henlong Property Group Pty Ltd (No 2)* (removal of seven trees permitted to be cleared by a development consent but before the consent became operative and fined $28,000).

77 The sentence that I consider to be appropriate to be imposed for each offence committed by the company is not inconsistent with the sentences imposed in these cases that provide a check or yardstick. The amounts of the fines imposed in those cases vary, depending on the particular facts found about the objective and subjective circumstances of the offence and the offender involved and any other component of the sentence (such as the amount of costs ordered). It is not a useful exercise to compare only the amounts of the fine imposed in each of these cases with the amount I consider to be appropriate in the present case. They are different but that is because the circumstances are different. Furthermore, the more appropriate yardstick against which the sentence in this case should be compared is the maximum penalty set by Parliament for an offence committed by a corporation ($2,000,000) rather than the amounts of fines imposed in past cases.

78 Synthesising all of the relevant objective and subjective circumstances of each offence and of the company as the offender, and considering the relevant purposes of sentencing, I consider that the appropriate monetary penalty for the offences is as follows for:

(a) the offence concerning Tree 9, $80,000;

(b) the offence concerning Tree 2, $60,000;

(c) the offence concerning Tree 1, $40,000; and

(d) the offence concerning Tree 12, $20,000.

79 These amounts should be discounted by 25% for the utilitarian value for the pleas of guilty. This makes the amounts:

(a) the offence concerning Tree 9, $60,000;

(b) the offence concerning Tree 2, $45,000;

(c) the offence concerning Tree 1, $30,000; and

(d) the offence concerning Tree 12, $15,000.

80 Because there are multiple offences, the totality principle is applicable. The effect of the totality principle is to require the Court, which passes a series of sentences, each properly calculated in relation to the offence for which it is imposed, to review the aggregate sentence and consider whether the aggregate is just and appropriate and reflects the total criminality before the Court. In relation to fines for multiple offences, an appropriate result may be reached by reducing the amounts of the fine for each offence.

81 Care must be taken, however, to ensure that any adjustment of individual sentences does not cause the aggregate sentence not to reflect the total criminality or the sentence for any individual offence to become disproportionate to the objective gravity of that offence.

82 In this case, I consider that the totality principle does justify making an adjustment to the monetary penalties for two groups of offences.

83 The first group comprises the offences concerning lopping branches of Trees 1 and 2. The conduct involved and the time period in which the conduct occurred were the same. The company instructed the contractor to lop the branch of Tree 2, identified in the arborist's report, that was projecting towards a proposed dwelling. The contractor did so but went further so as to lop other nearby branches of Tree 2 and overhanging branches of Tree 1, both of which projected towards the proposed dwelling. The lopping of the branches of the two trees involved one continuous course of conduct and was carried out in a confined time period. The fact that the branches lopped were from two trees, rather than one tree, caused the company to commit two offences, but this was accidental. As was observed in *Pearce v The Queen* (1998) 194 CLR 610 at [40], "the punishment to be exacted should reflect what an offender has done; it should not be affected by the way in which the boundaries of particular offences are drawn."

84 I consider that an adjustment should be made to reflect the considerable degree of overlap between the two offences committed by the company lopping branches of two nearby trees in the one course of conduct. The aggregate of the amounts that I consider otherwise appropriate to be imposed for these two offences is $75,000. This should be adjusted to be $45,000. This amount should be apportioned between the two offences as $30,000 for the offence concerning Tree 2 and $15,000 for the offence concerning Tree 1.

85 The second group comprises the offences involving breaching condition 21 of the development consent by digging the trench in the tree protection zone of Tree 9 and failing to successfully transplant Tree 12. The particular conduct involved for each offence was different, but the common element was the failure of the company to comply with condition 21 of the development consent and the incorporated tree protection measures in the arborist's report. The conduct for each offence occurred at

around the same time period. The degree of overlap between these two offences of failing to comply with condition 21 of the development consent is less than the degree of overlap between the two offences involving lopping the branches of Trees 1 and 2.

86 The aggregate of the amounts that I consider otherwise appropriate to be imposed for these two offences is $75,000. I consider an appropriate adjustment of the aggregate is to reduce it to $50,000. This should be apportioned as $45,000 for the offence concerning Tree 9 and $5,000 for the offence concerning Tree 12.

The appropriate sentence for Mr Awada

87 Mr Awada submitted that the Court should consider making an order under s 10(1)(a) of the Sentencing Act, which provides that:

> "Without proceeding to conviction, a court that finds a person guilty of an offence may make any one of the following orders:
>
> (a) an order directing that the relevant charge be dismissed,"

88 Mr Awada submitted that this order is appropriate having regard to the particular offence committed by Mr Awada and Mr Awada's particular circumstances.

89 In deciding whether to make an order under s 10(1) the Court is required to have regard to the following factors in s 10(3):

> "(a) the person's character, antecedents, age, health and mental condition,
>
> (b) the trivial nature of the offence,
>
> (c) the extenuating circumstances in which the offence was committed,
>
> (d) any other matter that the court thinks proper to consider."

90 Mr Awada submitted that the factors identified in s 10(3) are intended to be disjunctive and non-exhaustive. Hence, it is not necessary, in order for the Court to make an order under s 10(1), that the Court characterise the nature of the offence as being trivial: *R v Paris* [2001] NSWCCA 83 at [42]. None of the factors in s 10(3) are conclusive as to the exercise of the Court's discretion under s 10(1), but all must be taken into account: *R v Paris* at [43], [48], [49]; *Re Attorney General's Application under s 37 Crimes (Sentencing Procedure) Act (No 3 of 2002)* at [13].

91 Mr Awada submitted that the capacity to dismiss a charge under s 10(1) reflects the willingness of the legislature, and thus the community, to provide first offenders, in certain circumstances, a second chance to maintain a reputation of good character: *R v Nguyen* [2002] NSWCCA 183 at [50].

92 Mr Awada submitted that:

(a) as to the factors in s 10(3)(a), Mr Awada is a person of very good character, as his character references attest; he has no prior convictions for any planning or environmental offence; he pleaded guilty early; he has expressed genuine remorse for the offence he committed; he has taken steps to ensure that he will not reoffend; his work related back injuries and spinal surgery limits his future career as a builder; and he is transitioning from working as a builder to being a land surveyor by studying a Bachelor of Surveying;

(b) as to the factors in s 10(3)(b), (c) and (d), the nature of the offence committed by Mr Awada concerning Tree 2 overlapped to a considerable extent with the offence committed by the company concerning Tree 2. Instructions were given to the contractor to lop only one branch of Tree 2, as permitted by the arborist's report and condition 21 of the development consent. No instruction was given to the contractor to lop any other branches of Tree 2. The contractor acted contrary to the instruction and on his own initiative lopped extra branches of Tree 2. The lopping of the extra branches did not cause substantial harm to Tree 2, indeed Tree 2 continues to be healthy and in fair condition. As a precaution, Mr Awada and the company are paying for the ongoing monitoring of the health of Tree 2.

93 Mr Awada submitted that in the circumstances he should be given a second chance to maintain his reputation of good character.

94 Mr Awada referred to the decision in *Parramatta City Council v Cheng* [2010] NSWLEC 94 where no conviction was recorded for a landowner who employed a contractor to cut down three trees and lop one tree in breach of a tree preservation order in circumstances where the landowner was of good character, pleaded guilty early, had no prior convictions and the environmental harm was minor.

95 I agree that, having regard to the particular circumstances of the offence committed by Mr Awada and the particular circumstance of Mr Awada, he should be given the benefit of s 10(1) to not have a conviction recorded and to have the charge dismissed. The factors pointed to by Mr Awada support exercising the discretion provided by the section. Further, it is relevant that the company, which is the business alter ego of Mr Awada, has been charged and will be convicted and fined for the same offence arising from the same conduct of lopping the extra branches of Tree 2 without development consent. The criminal conduct involved in unlawfully lopping the extra branches of Tree 2 will therefore not go unpunished.

Costs

96 The company and Mr Awada agree that it would be appropriate for the Court to order them to pay the prosecutor's costs of the proceedings. The amount of the costs has not yet been agreed or assessed, but the prosecutor indicated the amount might be in the order of $55,000. The precise amount can be determined through the process provided for in s 257G of the *Criminal Procedure Act 1986.*

97 The company and Mr Awada submitted that they should be liable to pay the amount of costs so determined in the ratio of 4:1 between the company and Mr Awada.

Orders

98 The Court makes the following orders:

In proceedings 2018/227315 (concerning Tree 1):

(1) WK Strong Pty Limited (the defendant) is convicted of the offence against s 125(3A) of the *Environmental Planning and Assessment Act 1979* as charged.

(2) The defendant is fined $15,000.

In proceedings 2018/227316 (concerning Tree 2):

(1) WK Strong Pty Limited (the defendant) is convicted of the offence against s 125(3A) of the *Environmental Planning and Assessment Act 1979* as charged.

(2) The defendant is fined $30,000.

In proceedings 2018/227361 (concerning Tree 9):

(1) WK Strong Pty Limited (the defendant) is convicted of the offence against s 125 of the *Environmental Planning and Assessment Act 1979* as charged.

(2) The defendant is fined $45,000.

In proceedings 2018/227363 (concerning Tree 12):

(1) WK Strong Pty Limited (the defendant) is convicted of the offence against s 125 of the *Environmental Planning and Assessment Act 1979* as charged.

(2) The defendant is fined $5,000.

In proceedings 2018/227336:

(1) Mr Khaled Awada is found guilty of the offence against s 125 of the *Environmental Planning and Assessment Act 1979* as charged.

(2) The proceedings are dismissed.

In proceedings 2018/227315, 2018/227316, 2018/227361, 2018/227363 and 2018/227336:

(1) WK Strong Pty Limited and Mr Khaled Awada are to pay to the Registrar of the Court, for payment to the prosecutor, 4/5 and 1/5 respectively of the amount of the costs of the prosecutor as may be determined under s 257G of the *Criminal Procedure Act 1986.*

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Decision last updated: 08 July 2019