

CITATION: *Davis v Spadaccini [2008] NTMC 015*

PARTIES: STUART DAVIS
v
MICHAEL SPADACCINI

TITLE OF COURT: COURT OF SUMMARY JURISDICTION

JURISDICTION: Criminal

FILE NO(s): 20632450

DELIVERED ON: 7 March 2008

DELIVERED AT: Darwin

HEARING DATE(s): 23 October 2007 & 4 February 2008

JUDGMENT OF: Ms Sue Oliver SM

CATCHWORDS:

Criminal Law – s 251 Criminal Code - Unlawfully damage property – trees – authorisation or excuse – honest claim of right – abatement of nuisance

REPRESENTATION:

Counsel:

Plaintiff: Mr Smith
Defendant: Mr Berkley

Solicitors:

Plaintiff: ODP
Defendant: Woodcock Solicitors

Judgment category classification: A
Judgment ID number: [2008] NTMC 015
Number of paragraphs: 25

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20632450

[2008] NTMC 015

BETWEEN:

STUART DAVIS

Plaintiff

AND:

MICHAEL SPADACCINI

Defendant

REASONS FOR DECISION

(Delivered 7 March 2008)

Ms Sue Oliver SM:

1. The defendant, Michael Spadaccini, was charged with a single count of unlawfully damaging property, namely two Mimusops Elengi trees, the property of the Darwin City Council. The circumstance of aggravation alleged was that the loss caused by such damage was greater than \$5,000, namely \$43,200. Mr Spadaccini pleaded not guilty to this charge on 23 October 2007 and consented to a summary trial of the matter. If convicted of this aggravated offence, he faces a maximum penalty of seven years imprisonment, pursuant to s 251(2)(c) of the *Criminal Code*, although the maximum sentence which can be imposed by this Court on a summary trial is five years imprisonment – see s 122 of the *Sentencing Act*.
2. The prosecution case may be summarised that on 7 November 2006 two men under the direction of Mr Spadaccini and Mr Spadaccini cut back the branches of the two Mimusops Elengi trees (“the trees”), thereby causing damage to them in the value which is alleged.
3. The prosecution called evidence from two persons, Mr Penning and Mr Madden who were said to have actually witnessed the defendant and two others removing branches from the trees. Each worked in the building,

the RCG Centre, in front of which the trees were situated.

4. Mr Penning said that on 7 November 2006 on arriving at work, he saw the defendant and a little old man in a sailor's hat and another of the defendant's maintenance men trimming trees. Later in the morning he saw the off-cuts of the trees in the red truck belonging to the defendant. The following day he said Darwin City Council workers attended and asked him if he had seen who had cut the trees down. On that occasion he said the trees were stumps, which he described as being shorter than him.
5. Mr Madden's evidence was likewise, that on 7 November 2006, early in the morning, he saw the trees being cut. He described two people, an older gentleman in a sailor hat and the defendant at one of the trees, with the older man up the ladder. The tree in question appears to be the one closest to Parliament House, rather than the one situated immediately outside the entry way to the building. Mr Madden said that the tree immediately outside the entry way was at this time sawn off completely to ground level. He was adamant about this in cross-examination.
6. Officers of the Darwin City Council also gave evidence for the prosecution. Ms Gaynor King, a horticulturist, gave evidence that on Wednesday, 1 November 2006 she drove through the City inspecting trees and all were okay. The following day when she drove through she noticed that the crowns were cut off the trees in front of the RCG Centre. She described the first two sets of lateral branches as still being there. She said that on Monday she came back and the trees were stumps, sticking out of the cages. The cages, which were described by various witnesses, are shown in photographs that have been tendered and appear to be decorative barriers around the trees. She said that she later removed one of the trees by cutting it off at the base. She did not say when she did this. She identified a photo later marked as P1 as showing the remainder of what was left on the Monday. Ms King was unable to say when the

trees had last been pruned by the Darwin City Council. As will become apparent, her evidence is consistent with what the defendant says are the days on which he cut the trees. It may be noted that it is not consistent with the two previous witnesses who both attested to seeing the trees being cut on Monday, 7 November 2006, the date on which the offence is alleged to have occurred.

7. Mr Christopher Bailey is a Parks Technical Officer. He took the photos which were marked as P1 and P2 on 8 November 2006. The photos are themselves date stamped with that date. Based on looking at Council computer records, he believed that the last time that the trees had been pruned by Darwin City Council was in 2004. He also identified a letter [D1] from Randazzo C&G Developments Pty Ltd, signed by the defendant as General Manager of that Company, to Mr Allan McGill of Darwin City Council. This is a letter which the defendant subsequently explained in his evidence arose out of a meeting with Mr McGill in 2004 about the problem that the trees were causing for the RCG Centre and after which he said Mr McGill invited him to write requesting the removal of the trees. The defendant said that in fact he had not wanted the trees removed, but wrote the letter in that way at Mr McGill's invitation.
8. Mr David Perry, Manager of Parks & Reserves with the Darwin City Council said that he was advised of the damage on 2 November 2006 and he requested a review and received a report back on 8 November 2006. His evidence as to dates supports that of Ms King and of the defendant.
9. Mr Michael Castelli is another Technical Officer with Parks. Mr Castelli's evidence went to the value of the trees. He used a draft Australian Standard which applies both objective and subjective assessment of features of a tree that are used to create a formula to produce a value. Using this Standard, he assessed the trees as being each valued at \$21,600. In cross-examination he said he didn't think that a

replacement tree of the same size was available. He described the trees as being damaged because they could no longer form a canopy to shade pedestrians. His observation as to the purpose of those trees appear somewhat at odds with what is apparent from the various photos that have been tendered, which is that the awning on the building reaches out almost to a position level with the decorative barrier around the trees, leaving little scope for a shade canopy along the pedestrian walkway.

10. Mr Michael Hastings and Mr Giovanni Pieri were both employees of the Randazo Company at the time of the alleged offence. Both gave evidence of trimming the trees in question. Mr Hastings said this was at the end of a week, either a Thursday or a Friday, that he was called to the RCG Centre to trim trees. Johnny (Giovanni) was there and the defendant. They worked till smoko and the trees were still there, describing them as being nice and green and bushy and approximately ten feet tall at that time. The following week he saw the stumps, the photos in P1 and P2 showing what he saw at that time. He said he had pruned these trees previously and cleared out the box gutters of the building because foliage dropped in them. Mr Pieri, who is aged 78 and has spent many years gardening, appears to meet the description of being the older man in the white sailor hat. He gave evidence that he trimmed the trees on 7 November 2006 because they were touching the ceiling of the building. He said “trim all trees to look nice, not to vandalism”. He said that they still had plenty of branches when he and Mr Hastings were finished.
11. There is very clearly a considerable discrepancy in the evidence of the witnesses for the prosecution as to the dates on which they observed various actions in respect to the trees. Mr Madden’s evidence that on 7 November 2006 he saw the tree directly outside the entry way cut right to the ground cannot be correct because the photo tendered as P2 clearly shows that on 8 November 2006, in accordance with the evidence of Mr Bailey who took that photograph, both trees are at a height just above the

decorative barrier surround.

12. The defendant, Mr Spadaccini, gave evidence that he pruned the trees. He says he clearly remembers the day being 2 November 2006 because that day has special religious significance to him and he had attended St Mary's Cathedral earlier that morning. He said that he, Mr Hastings and Mr Pieri trimmed both trees, although after his initial involvement he gave some directions and left them to get on with it. When he looked at the trees after they had finished, he was concerned that the trees were now lopsided because of pruning over time on the building side to deal with the problems that they were causing to the building. He was concerned that the trees were so unbalanced that they might fall to the roadside. He said on the Sunday he decided that he would take them right back so that they could grow back and be encouraged into a good shape. On the Sunday he cut the trees back to the level which has been indicated in the photographs.
13. The defendant's evidence as to when the cutting of trees occurred is consistent with that of Ms King, Mr Perry and Mr Hastings. The evidence of Mr Madden and Mr Penning that they saw the trees being cut on 7 November 2006, that is a Monday, must be doubted. I do not suggest that these witnesses were being untruthful in their evidence, but I suspect that by the time statements were given, confusion had arisen as to what had been seen and on which date.
14. The defendant said he had been pruning these trees since 2004 following the meeting with Mr Allan McGill of Darwin City Council and an arrangement for an Officer of the Council to meet him at the building to discuss possibilities in relation to the trees. That Officer did not attend on either of the occasions when he was to meet with the defendant. The defendant described the problems which he experienced with the trees. His evidence was consistent with that of Mr Hastings and Mr Pieri. The

problem described was that the branches of the trees extended into the awning area of the building, which as I have said, can be clearly seen from P2 to be in close proximity to the position of the trees. According to the defendant, the trees grew out and under and around the awning and caused foliage to fill up the box gutters which then blocked, causing water to back-up into the awning, resulting in the lights, which also can be clearly seen in P2, shorting out. This had the affect of also taking out the security lighting in the car park because they were on the same circuit. From 2004 the defendant took to pruning the trees himself and said that he found this necessary every six weeks to two months. In November 2006 he was going to be away over the forthcoming wet season and so he decided to do a heavy prune of the trees so that problems would not arise during his absence. Following the initial pruning by Mr Hastings and Mr Pieri, he took the trees right back on the Sunday so that they would regrow to an attractive shape.

15. The defendant is not a horticulturist but he described many properties around town which he similarly had attended to prune trees over the years. Some of these belonged to the Randazzo Company and some were Darwin City Council trees. He says he has never had any complaint from the Darwin City Council with respect to these activities. He said he believed that he had a right to prune the trees. He described this right as being associated with the problems they were causing for building maintenance and did not think that any member of the general public would also have such a right.
16. The defence also called evidence from Mr Darryl South who is a very experienced horticulturist with an advanced diploma in horticulture. Mr South has been in the Nursery industry for 46 years. Mr South's evidence was that the species of trees in question could be obtained in a 300 litre container and would cost approximately \$500. He said that the plant cost associated with the tree of that size would be approximately the cost of

the plant itself, perhaps with a small amount of additional costs depending on the surround. This puts his valuation of the trees in the vicinity of \$1,000 - \$1,500. Mr South was shown the photos marked P1 and P2 and he observed that the trees had not been pruned correctly, that they had been over-pruned. He said it was probably done by a complete novice who didn't know what they were doing.

17. Section 251 of the *Criminal Code* is in the following terms:

Any person who unlawfully damages any property is guilty of an offence and is liable to imprisonment for 2 years.

As previously observed, if the offence is accompanied by circumstances of aggravation, for example as is alleged in this case, that the loss caused or intended to be caused by such damage is greater than \$5,000, then the offence is a crime punishable by imprisonment for up to seven years.

18. There are clearly three elements of the offence. There must be conduct that “damages”, that damage must be to “property” and the conduct must be unlawful. There is no dispute that trees can constitute property for the purposes of this offence. Although s 251(1) makes no explicit reference to any mental element for the offence, the requirement that the damage be unlawful imports the definition of that term in s 1 of the Code and it is therefore a requirement that the damage be proved to have been done without authorisation, justification or excuse. The requirement that the damage be proved to have been done without excuse attracts the provisions of s 31 of the Code to s 251 which excuses a person from criminal responsibility for an act, omission or event, unless it was intended or foreseen by him as a possible consequence of his conduct. (*Coughlan v Thomas* JA21 of 1998). The onus is on the Crown to show that the defendant intended to damage the property or foresaw the damage as a possible consequence of his conduct. It was submitted that if I should be satisfied that the defendant intended or foresaw that the trees would be

damaged by his conduct in cutting them back, I should find that he is excused from criminal responsibility for that act, on the basis of an exercise of an honest claim of right pursuant to section 30(2). In my view a question also arises as to whether his act might be considered to be authorised by the exercise of a right granted or recognised by law pursuant to s 26(1)(a).

19. **Does the cutting back constitute damage to the trees?**

Although “damages” is defined in section 1 of the Code, the definition is not particularly illuminating. It is defined as follows:

“damages” includes destroys and, when used in relation to a document or writing, includes obliterating and rendering it illegible either in whole or in part”

The issue is whether the cutting back the trees as occurred and which is graphically shown in photos P1 and P2 which the defendant characterised as “pruning” and Mr South as “overpruning” constitutes “damaging” them. There is little doubt that in their state at that time they could properly be described as a number of witnesses did as “stumps”. Mr Castelli viewed the trees as damaged because they would not grow back to their former shape. The photos taken by the defendant (D2) show the regrowth over time of the tree that remained. To the untrained eye the tree appears healthy and green. Whether it now has a shape different from what it would have had without the cutting back I am unable to determine.

The Shorter Oxford English Dictionary defines damage, when used as a verb, as follows:

“To do or cause damage to; to hurt, harm, injure; now commonly to injure (a thing) so as to lessen its value”

Accepting that definition, in my view the alteration to the trees is sufficient for

the purposes of section 251 to constitute “damaging” them. I do not think that “pruning” *per se*, a very common occurrence in this city, both of trees and other foliage on private property and council nature strips by home owners and occupiers would amount to damaging the plants in question. However to the common eye taking the trees back to the condition of “stumps” from a situation of leafy growth might well be viewed as a harm or injury to the trees and a lessening of their value, at least from an amenity or aesthetic viewpoint. I am not aware of any authority that suggests that the damage must be permanent in nature though this would be the common case. Temporary, though I think not transitory, damage is sufficient. The period of time for the trees to grow back (or at least the one that was left by the council) would on that basis be sufficient to satisfy the requirement that they were damaged.

20. However the matter does not rest there. As I observed the criminal responsibility provisions of section 31 apply to the offence under section 251. The onus is on the prosecution to prove beyond a reasonable doubt that the defendant either intended or foresaw that his cutting back of the trees would damage them. The defendant’s evidence was very clear. He had been pruning the trees since 2004 in order to prevent them causing damage to the building in the way I have described above. These are not the only trees that he prunes around properties in the city, including other Darwin City Council trees. No one has ever complained and he clearly felt that with many properties he has done a good job of making the trees pleasant in appearance. He directed Mr Hastings and Mr Pieri to undertake the first cutting of the trees to get their branches away once more from the awnings. After reviewing their work he decided to cut the trees right back effectively to start again so that they would grow into a good shape as their appearance had diminished because they had been pruned many times along one side. He was also concerned as to the safety aspect of the trees in their lop sided condition. I can find nothing in his evidence that would support a finding that he intended to harm or injure

the trees or foresaw that would result. I do not think that there is any reason to doubt his evidence. This is not a case where the evidence must lead to an inevitable inference as to intent or foresight based on either the conduct or the resultant state of the property. That being the case the prosecution has not discharged its onus and I am not satisfied beyond a reasonable doubt that Mr Spadaccini either intended or foresaw that his conduct would damage the trees.

21. **Authorisation and claim of right**

Section 30(2) provides that a person is excused from criminal responsibility for an act done in the exercise of an honest claim of right.

30 (2) A person is excused from criminal responsibility for an act or omission done or made with respect to, or for an event caused to, property in the exercise of an honest claim of right and without intention to defraud.

Section 26 deals with authorisations. As observed an act is not unlawful according to the definition of “unlawful” or unlawfully” in section 1 of the Code if it is authorised. Section 26 provides that

26(1) An act, omission or event is authorized if it is done, made or caused –

(a) in the exercise of a right granted or recognized by law;...

Although in view of the finding I have made it is not necessary for me to further consider whether the conduct is further authorised or excused under other provisions of the Code, the case raises some interesting questions in this regard. Should I be wrong in my finding in regard to the question of intent or foresight it would be my view that the defence have discharged an evidentiary onus in respect of section 26 and section 30. As will become apparent it is my view that in the factual circumstances of this case it is section 26 which applies rather than as was submitted to me section 30 – an honest claim of right, although as will become clear there

may well be some overlap.

22. Mr Spadaccini introduced an interesting analogy in his evidence. When asked why he didn't contact council and tell them to do their job before he pruned the trees he commented that he also mows the lawn on his house verge, which belongs to Council and he doesn't ask them if he can mow the lawn next Friday – he just does it. His analogy is of course a common place. People not only mow the lawns which they have planted on the council owned nature strips or verges they also plant trees and other plants there and trim or prune them from time to time. They might also completely remove them and replant with something else. The vegetation planted on nature strips constitutes a fixture to the land and as such becomes council property. It would however introduce some absurdity to everyday life, and endless administration for the council if their permission had to be sought before any mowing or pruning occurred. I think it is likely that a common view would be that having planted out a nature strip there is an entitlement and perhaps indeed a responsibility to maintain it appropriately. Many would think that they retain ownership of the vegetation. Such a view might found an honest claim of right.

The situation is somewhat different in a situation in a city as opposed to a suburban environment where trees and other vegetation are planted by the Council on its street frontages. Mr Spadaccini did not claim that he had a right to simply deal with the trees of that nature as he saw fit. He did not believe members of the public would have a right to prune the trees. His claim of right however arose not from the proximity to the property for which he has responsibility a general manager but because the trees were causing property damage from the way in which they were growing under and to the awnings and from the foliage loss into the box drain. Mr Spadaccini's evidence was that having attempted to have the problem addressed by the council and failing to get any action he took it upon himself to regularly prune the trees to prevent damage to the building for

which he is responsible to maintain.

I was referred to the leading authority on honest claim of right *Walden v*

Hensler (1987) CLR 561 in which Dawson J said at 592-593

"It is not ignorance of the criminal law which founds a claim of right, but ignorance of the civil law, because a claim of right is not a claim to freedom to act in a particular manner - to the absence of prohibition. It is a claim to an entitlement in or with respect to property which goes to establish the absence of mens rea. A claim of that sort is necessarily a claim to a private right arising under civil law. See Cooper v. Phibbs (1867) LR 2 HL 149, at p 170 per Lord Westbury. As Hanger J. pointed out in Olsen at p 589: "Section 22, after stating that ignorance of the law is no excuse, does not proceed to say that ignorance of the law is an excuse in the case of an offence relating to property for an act done with respect to property. It refers to an act done in the exercise of an honest claim of right and without intention to defraud."

A claim of right must be honest though it need not be reasonable. An honest claim of right is aimed at a circumstance in which a defendant honestly, though incorrectly believes that he or she has an entitlement to act with respect to property in a particular way. As I have said I am satisfied on the evidence of the defendant, and of that of Mr Hastings and Mr Pieri which supports his evidence that the evidentiary onus in respect of establishing an honest claim of right is discharged based on the evidence that he had undertaken the maintenance of the trees since 2004 without complaint and in order to protect the building from damage.

23. An honest claim of right concerns however a misconceived view by the person claiming the right that they are entitled to deal with the property in that way. This is what has been put forward. As it happens Mr Spadacinni's belief may not have been misconceived. In Butt, "Land Law", Butterworth's 5th Edition, 2006 at pages 62-63 the learned author discusses the law in relation to trees planted on one persons land where there is an encroachment onto adjoining property. I have omitted his reference to authorities save for the most relevant.

“Specifically a landowner is liable in nuisance for reasonably foreseeable damage caused by tree roots or limbs that encroach onto neighbouring land. An injunction lies to restrain continuing damage caused by encroaching tree roots or limbs. **There is also the right to abate the nuisance by cutting off the offending roots or limbs** (*Norris v Baker* (1616) 1 Roll Rep 393; 81 ER 559), **if that can be done without trespassing** (*Lemmon v Webb* [1985] AC 1). **Notice must first be given, with the right to abate applying only if, after notice, the owner of the tree does nothing** (*Lemmon v Webb*; *Delaware Mansions Ltd v Westminster City Council* [2002] 1 AC 321).” (Emphasis added)

I have previously referred to the meeting Mr Spadaccini arranged with Mr McGill of the Darwin City Council and to the copy letter sent by Mr Spadacinni to Mr McGill following that meeting that was tendered in evidence and to the follow up meeting on site proposed with a council officer that did not eventuate. I see no reason to doubt Mr Spadaccini’s evidence that though he didn’t want the trees removed Mr McGill invited him to write in those terms and then he received a letter rejecting the request. In my view the letter dated 25 May 2004 (D1) clearly put the Darwin City Council on notice that the trees in front of the Mitchell Street building were creating a nuisance. It would appear that the meeting with Mr McGill also was aimed at that purpose. The failure of the council to abate the nuisance by regular pruning of the trees (the evidence of Mr Christopher Bailey, Parks Technical Officer being that the last prune by the Council was in 2004) gave rise in my view of the right, at law, to abate the nuisance and therefore satisfies the requirement of section 26(1) (a) of the Criminal Code. The pruning was therefore an authorised act within the terms of the Code because it was done pursuant to a civil right to abate a nuisance. If Mr Spadaccini went further than the right of abatement allowed by virtue of cutting the trees right back then, then that excess might well be said to be covered by a claim of right as I have

discussed above.

24. I should be very clear that what I have said does not suggest in any way that persons are free to deal with council trees or vegetation as they will. The circumstances of this case are quite peculiar to the circumstances surrounding them and events over a period of years. The findings are therefore particular only to those circumstances and should not be misinterpreted as giving rise to a right to landholders to deal with council vegetation at will.
25. Mr Spadaccini is found not guilty of the charge and discharged.

Dated this 7th day of March 2008.

Oliver

Sue

STIPENDIARY MAGISTRATE