



27 February 2017

Mills Oakley  
ABN: 51 493 069 734

Your ref: L10022599  
Our ref: EPAS/MEDS/3242259

All correspondence to:  
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**Cc:** Ms Kelly Brown,  
Manager, Risk and Human Resources  
Ballina Shire Council

**By email only.**

Dear Edwin and Kelly

<b>STATEWIDE</b>	
<b>PUBLIC LIABILITY CLAIM</b>	
<b>INSURED:</b>	<b>BALLINA SHIRE COUNCIL</b>
<b>CLAIMANTS:</b>	<b>Kenneth ARMSTEAD and Chris and Robyn LOWRY</b>
<b>POA:</b>	<b>7 AND 9 CASTLE DRIVE, LENNOX HEAD</b>
<b>CIRCUMSTANCES:</b>	<b>PROPERTY DAMAGE DUE TO STREET TREE ROOTS</b>
<b>NOTIFICATION:</b>	<b>ARMSTEAD – 6.9.07 re tree roots; LOWRY - 9/14 re tree roots</b>
<b>POLICY YEAR:</b>	<b>ARMSTEAD – 2007/2008; LOWRY 2014/2015.</b>
<b>YOA:</b>	<b>ARMSTEAD – 08; LOWRY – 2015.</b>
<b>LITIGATION:</b>	<b>NIL, TO DATE.</b>

Thank you for your instructions to advise further with respect to claims brought by Mr Kenneth Armstead of 9 Castle Drive, Lennox Head and his neighbours, Chris and Robyn Lowry of 7 Castle Drive, Lennox Head.

The Claimants seek compensation for damage sustained to their properties by roots emanating from a very large Moreton Bay Fig tree located on the road reserve (the Tree). The Tree has been described as probably being a remnant tree of littoral rainforest and would have been in existence prior to land clearing and development. It was said to be approximately 200 years old.

In 2004 the Tree was said to no more ten metres from any building. At that time approximately 15% of the Tree's canopy was leafless twigs or dying back. The central leader was dead. However, the arborist who prepared the 2004 report also indicated that the Tree was not beyond recovery and could live and provide "increasing function" for another 200 years.

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Both of the residences are constructed close to or under the Tree's drip line. The Tree became part of the road reserve on Council's approval of the sub division of the land. That approval included the two adjacent residential blocks. The Tree would have been of similar size, given its maturity, at the time the development/construction of each of the Claimants' residences was approved.

Council is the responsible road authority. Council was also the authority responsible for the approvals of the sub division and the construction on each of the adjacent properties.

Photographs we have seen show the Tree is of significant size.

Mr and Mrs Lowry have requested the removal of the Tree.

#### **Mr Armstead**

On 6 April, 2016 Mr Armstead complained that roots from the Tree were lifting the pavers on paths within his property, both at the front and the back. Prior to this time Mr Armstead's complaints related to the condition of the Tree and the collapse of some of the branches of the Tree (apparently without any harm or damage). The first of these complaints commenced in September, 2004.

We will not report on the extensive complaints which this Claimant made as to the Tree generally, but particularly in relation to the limbs of the Tree. They are not, in our view, relevant to the issues concerning the current claim for damage due to tree root invasion.

On 31 August, 2007 Mr Armstead first wrote to Council indicating that:

*"The roots of this tree are now causing considerable damage to the paved footpaths within our property"*

On 6 September, 2007 Statewide was notified by Council of this potential claim.

On 8 October, 2007 Council wrote to Mr and Mrs Armstead *"regarding the issue of damage to the paved footpaths within your property from a nearby Fig tree located on the road reserve adjacent to your property"*. Two inspections of the damaged pavers were conducted by Council. A large Fig tree root was found underneath a section of paving. Council proposed to rectify the damage affected by the Fig tree roots. There is a suggestion another area of paving was not affected by the Fig tree roots, but had been affected by the roots of a Melaleuca tree which appeared to be within the boundaries of the Armstead property.

Root pruning and paver repairs were undertaken by Council on 18 September, 2007 and 5 October, 2007. A number of photographs were taken of these paving works, which are adjacent to the front of the Armstead residence and show reasonably large roots which had led to the displacement of the pavers.

There does not appear to have been any issues with roots from the Tree (as discrete to complaints about the limbs of the Tree and weeds growing within the Tree's ramparts) until November/December, 2011. Mr Armstead indicated that the roots of the Tree were again starting to lift the pavers in their front path. They asked Council to correct the damage.

An inspection was undertaken by Council staff on 6 December, 2011. A total of four pavers were lifted and no roots found. The movement was said by Council staff to be due to the lack of any edging to the pavers. Mr Armstead appeared to accept that in the circumstances.

On 13 February, 2014 another complaint about the pavers being lifted by roots from the Tree was received by Council. This had been, it was suggested, *"positively established by excavation"*. As a result of what occurred in December, 2011, we expect this was correct.

On 12 May, 2014 Council received a further email claiming *"Yet another root of the subject tree causing damage to the paving in our driveway has been positively identified. This time the potential for damage to our dwelling caused by this tree is well demonstrated – the root has passed under the house and emerged under the driveway pavers under the side balcony. We assume Council will again repair the damage"*.

Further to more recent complaints, in 2016 you appointed Freeman Loss Adjusters to attend and inspect further to a claim for further damage to the pathways from roots from the Tree.

The first report from Freemans dated 8 August, 2016 confirm damage to the clay pavers and Freemans recommended that Council again undertake the necessary repairs to the pathways. Freemans also noted that the encroachment of branches from the Tree continued to be an issue. They suspected both would continue to be issues. On what we have read, we agree.

Council elected not to organise for its staff to undertake the recommended repairs and two quotations for the repairs were provided. One in the amount of \$21,500.00, the other in the sum of \$19,962.67. Both of the quotes involved the complete removal and relay of the clay pavers for the full extent of the front path and a section of the rear path. Freemans were satisfied the quotations were fair and reasonable.

Fortunately, though it would appear there are roots from the Tree in and under the Armstead residence, no structural damage has been sustained to their home, at least not claimed to date.

Freemans noted that the issues complained about by Mr Armstead would continue and that the only solution to a continuation of problems was for the removal of the Tree.

We understand that the type and size of the Tree and the vigorous nature of their root systems make the installation of a tree root barrier so ineffective as to not be recommended. We also understand that root pruning is not recommended due to the damage it would do to a mature tree, such as this Tree.

**Mr and Mrs Lowry**

This claim involves damage to:

- Blocked pipes
- Physical damage to the residence
- Physical damage to the driveway slab
- Pathway damage.

The first notice that Mr and Mrs Lowry had of issues with the Tree was in September, 2014. Further issues arose in May/June, 2015. There is a suggestion they had also complained about branches from the Tree since having purchased their home in 2011.

The 2014 issues were with stormwater drains being blocked with tree roots.

The most significant claim arose further to repairs being undertaken to the western side of their residence when it was noticed a root from the Tree had separated the concrete path from the house and also downpipes located on the wall of the house. Council was present on a site inspection later and verified this. Cracks were also noted in the pebbledriven driveway. The driveway also had slabs elevated.

Mr and Mrs Lowry were (and we understand still are) concerned about effecting the structural repairs whilst the Tree remains in situ. They reason that if the Tree's roots are still growing, further damage will be sustained. However, they have, it appears, agreed to resolve the claim relating to the stormwater damage for a figure of \$5,208.50.

Various photographs provided by Mr and Mrs Lowry show large, significant roots leading from the Tree through their property.

On 18 August, 2015 Peter Lucena of Peter Lucena and Associates, Consulting Civil and Structural Engineers, inspected the property with Mrs Lowry. Mr Lucena reported on 19 August, 2015. He did not accept all of the damage was the result of roots from the Tree and considered some elements might be related to subsidence of the fill used in the construction of the residence. The report certainly documents structural damage to the residence whatever the cause.

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**Liability Discussion**

Fig trees are renowned for the size and vigour of their root systems and for the damage they can do. Once a root from a Fig tree is found to be the cause of damage, Council's potential liability either in negligence or nuisance rests on the notice that Council had of the tree roots as causing damage and what, if anything, was done in response.

As shortly referred to above, there are clear instances where Council has been notified of issues with the Tree, including relevantly to these claims, roots emanating from the Tree. These can also be clearly seen in the photographs on your file.

In our view there is no doubt that a Court would find in these circumstances Council liable, as the relevant road authority and responsible for the Tree, for the nuisance which the Tree is causing to the properties owned by the Claimants. Council has been on notice of issues with roots from the Tree for a number of years. Whilst the Tree has been pruned and attended to, it does not appear that any significant root pruning has been undertaken or any root barriers installed.

The size of the roots and the damage sustained are sufficient, in our view, for a Court to reject any submission that the ingress of the roots of the Tree into the properties is not unreasonable, thereby being insufficient to constitute an actionable nuisance.

Once a nuisance is found, Council is liable to abate the nuisance. That is, the roots need to be removed. Council is not told by the Court what to do. However, it appears that the usual responses – root barriers, root pruning – are not considered appropriate because they will be either be ineffective (root barriers) or detrimental to the tree (root pruning). Council would be liable to compensate for damage sustained after the notification, if the nuisance was not then abated and further damage is sustained. Here there was earlier notice to Council of damage sufficient, in our view, for Council to be liable for damage to the properties caused by the Tree.

As such, it appears to us that despite the Tree providing general amenity, it ought to be removed to avoid further and significant damage, in respect of which it appears that Council will no longer have indemnity for from its relevant liability insurer.

Mr and Mrs Lowry have requested the removal of the Tree and are, it appears, uncomfortable undertaking repairs to their Property without what they consider the cause of the damage to their house (some of which has been agreed by an engineer is related to the Tree) – the Tree – being removed.

The most recent nuisance decision that was heard and determined in the Supreme Court of NSW was that of *Michos v. the Council of the City of Botany Bay*. That case involved a row of Fig trees located on the road reserve. Root barriers had been installed by the Council, but they were ineffective. There were a series of complaints made by Mr and Mrs Michos to the Council. Mr and Mrs Michos were fearful of using their front garden because of the incursion of significant roots. The Court granted a mandatory injunction requiring the Council to abate the nuisance. Damages were also claimed and awarded to Mr and Mrs Michos. These related to damage to pathways, fences, stairs and lawn. Damages of \$85,397.00 were awarded, plus a further \$40,000.00 for loss of enjoyment of the land.

The Court found also that the Fig trees were growing on the nature strip when Mr and Mrs Michos bought their property in 1979. The fact the Trees were in situ at the time they purchased the property did not prevent them from bringing a successful claim in nuisance and negligence.

The fact that the Tree has been in place for over 200 years, was not planted by Council and the houses were built when clearly the Tree was mature (but after the Council approval of the sub division and relevant constructions) are not features that would prevent a finding of an actionable nuisance against Council. It appears that the sub division was approved so that the Tree formed part of the road reserve. Once it became part of the road reserve, for which the Council is responsible, when knowledge of the interference by the roots of the Tree became known to Council, Council is then taken to have continued or adopted the nuisance.

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**Conclusion**

In our opinion there is no doubt that in the circumstances of these claims Council would be found liable for nuisance caused to the Claimants' properties by roots from the Tree. It does not appear there is any avenue available by which the Council can properly abate the nuisance which the roots of the Trees constitute. That is, roots barriers and root pruning will not be successful and indeed could be positively harmful to the Tree.


The only option, it appears to us, to prevent a continuation of claims is for the Tree to be removed.

If the Tree is not removed by Council, actionable nuisance will continue and Council will be liable for any further damage to the Claimants' properties caused by the Tree roots. There may also come a time when Mr and Mrs Lowry, who want the Tree removed, bring proceedings seeking an injunction. In our view they would succeed in obtaining an injunction. At that stage no doubt they would also claim further damages, including for loss of enjoyment. The amount awarded as damages could well be significant.

We understand from the correspondence from Statewide to Council that any future claims relating to damage caused by the Tree will not be indemnified. If so, Council will need to fund all defence costs relating to any proceedings and all damages awarded.

If you have any questions or require further information please do not hesitate to contact Michael Down on +61 2 8289 5852 or mdown@millsOakley.com.au.

Yours faithfully



**MICHAEL DOWN**  
**PARTNER**  
**MILLS OAKLEY**

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