ENVIRONMENT, RESOURCES AND DEVELOPMENT COURT OF SOUTH AUSTRALIA

THE CORPORATION OF THE CITY OF UNLEY v CRICHTON & ORS (No 2)

[2019] SAERDC 43

Reasons for Decision of His Honour Judge Costello

13 December 2019

ENVIRONMENT AND PLANNING - TREES AND VEGETATION

ENVIRONMENT AND PLANNING - ENVIRONMENTAL PLANNING - PLANNING AND DEVELOPMENT PROSECUTIONS

Complaint in relation to alleged tree-damaging activity ('TDA'), pursuant to the Development Act 1993 ('the Act') by the defendants - complainant alleged that Mr Crichton, an owner of land adjoining land upon which there were two Regulated trees, had caused TDA by entering into an arrangement with another defendant, Tempest Trees and Gardens Pty Ltd ('Tempest Trees'), pursuant to which Tempest Trees severed branches and limbs of the two trees and that in so doing Tempest Trees had also undertaken TDA - furthermore the complainant asserted that Mr Tempest, the sole director of Tempest Trees had failed, without reasonable excuse, to produce documents sought and answer questions asked, by an authorised officer under the Act - consideration as to whether complainant was required to prove TDA in relation to both trees or only one - consideration of the meanings of 'cause', 'crown' of a tree and 'TDA' - consideration of onus of proving TDA generally and reasonable excuse in particular.

HELD:

Mr Crichton not guilty on count 1.

Complainant: THE CORPORATION OF THE CITY OF UNLEY Counsel: MR A CROCKER - Solicitor: NORMAN WATERHOUSE
First Defendant: TIMOTHY JAMES HANNAM CRICHTON Counsel: MR M RODER QC - Solicitor: HILDITCH LAWYERS
Second Defendant: ZBIGNIEW BENDYK Counsel: MR T GAME - Solicitor: BOTTEN LEVINSON
Third Defendants: TEMPEST TREES AND GARDENS PTY LTD Counsel: MRS M SHAW QC - Solicitor: CALDICOTT LAWYERS
Fourth Defendant: DYLAN GARETH HUGH TEMPEST Counsel: MRS M SHAW QC - Solicitor: CALDICOTT LAWYERS
Hearing Date/s: 01/04/2019 to 05/04/2019, 23/05/2019 to 24/05/2019, 15/10/2019 to 16/10/2019, 29/10/2019
File No/s: ERD-17-72
B

Tempest Trees and Gardens Pty Ltd not guilty on count 3.

Mr Tempest guilty on counts 4 and 5.

Development Act 1993 ss 4, 18, 19, 32, 44, 105; *Development Regulations 2008* reg 6A; *Environment Resources and Development Court Act 1993* s 7(3a); *Summary Procedure Act* s 56(2); *Broadcasting and Television Act 1942 (Cth)* ss 100(5A), 100(10); *Planning Act 1982* s 4, referred to.
R v Bonython (1984) 38 SASR 45; *R v Bjordal* (2005) 93 SASR 237; *Corporation of the City of Adelaide v BFR Pty Ltd & Anor* [2014] SAERDC 37; *Overland Corner Station Pty Ltd & Anor v Gould* (2010) 106 SASR 428; *Wollongong City Council v Eusile Pty Ltd* (2008) 71 NSWLR 563; *Director of Public Prosecutions v United Telecasters Sydney Ltd* (1990) 168 CLR 594; *R v Hunt* (1987) 1 AC 352; *Brinkworth v Dendy* (2007) 97 SASR 416; *Hutchison 3G Australia Pty Ltd v City of Mitcham* (2006) 225 ALR 615; *R v Marion City Corporation* (1984) 37 SASR 415; *Burton v Samuels* (1973) 5 SASR 201; *The Corporation of the City of Unley v Crichton & Ors* [2018] SAERDC 13, considered.

THE CORPORATION OF THE CITY OF UNLEY v CRICHTON & ORS (No 2)
[2019] SAERDC 43

Introduction

1 The first defendant, Timothy James Hannam Crichton ('Crichton') has been charged with the following offence:

First Offence

1. On or around 2 October 2015 at Hyde Park in the State of South Australia, the First Defendant undertook development, namely, tree-damaging activity in relation to two regulated trees (hereafter called '**the Trees**'), where that development was not an approved development under the *Development Act 1993* (hereafter called '**the Act**'), CONTRARY TO Section 44(1) of the Act.

PARTICULARS

1.1 The Trees are situated on land commonly known as 28 Commercial Road, Hyde Park as comprised and described as Certificate of Title Volume 5731 Folio 361 (hereafter called '**the Land**').

1.2 The Land was and is owned by Amy Alice Simons.

1.3 The Land is within the area of the Complainant.

1.4 The First Defendant is a joint owner of land adjacent to the Land, namely Unit 1, 7 Charra Street, Hyde Park.

1.5 The Trees are both of the species *'Eucalyptus Camaldulensis'*, commonly known as River Red Gum.

1.6 Each of the Trees:

1.6.1 had a single trunk with a circumference in excess of 2.0 metres, measured 1 metre above natural ground level; and

1.6.2 were 'regulated trees' within the meaning of section 4(1) of the Act and regulation 6A of the *Development Regulations 2008*.

1.7 On or around 2 October 2015 the First Defendant caused branches, limbs and the trunk of each of the Trees to be severed ('**the Severing**').

1.8 The Severing was physically performed by or on behalf of the Third Defendant pursuant to an arrangement between the First, Second and the Third Defendants to prune the Trees.

1.9 The Severing constituted 'tree-damaging activity', and therefore, 'development' within the meaning of section 4(1) of the Act.

1.10 The Severing was not an approved development under Division 1 of Part 4 of the Act.

2 The second offence charged a second defendant, Zbieniew Bendyk ('Bendyk') with undertaking development, namely tree-damaging activity. Mr Bendyk has pleaded guilty to this offence.

3 The third defendant, Tempest Trees and Gardens Pty Ltd (ACN 119 727 249) ('Tempest Trees') has been charged with the following offence:

Third Offence

3. On or around 2 October 2015 at Hyde Park in the State of South Australia, the Third Defendant undertook development, namely, tree-damaging activity in relation to two regulated Trees, where that development was not an approved development under the Act, CONTRARY TO Section 44(1) of the Act

PARTICULARS

3.1 The Particulars at paragraphs 1.1 – 1.3, 1.5, 1.6, 1.8 – 1.10 are repeated.

3.2 The Third Defendant was engaged to undertake pruning works in relation to the Trees.

3.3 On or around 2 October 2015 the Third Defendant caused the severing of the branches, limbs, and the trunk of the Trees.

4 The fourth defendant, Dylan Gareth Hugh Tempest ('Tempest') has been charged with the following offences:

Fourth Offence

4. On or around 26 September 2016 in South Australia, the Fourth Defendant without reasonable excuse, failed to obey a requirement or direction of an authorised office under the Act CONTRARY TO Section 19(7)(c) of the Act.

PARTICULARS

4.1 Paul Weymouth is a person authorised under Section 18(1)(a) of the Act to be an authorised officer for the purposes of the Act.

4.2 In exercise of his powers under Section 19(1)(c) and 19(1)(h) of the Act, by written notice dated 16 August 2016, Mr Weymouth required the Fourth Defendant to produce copies of certain documents.

4.3 Despite knowing that Mr Weymouth was exercising his powers, the Fourth Defendant failed to obey that direction.

Fifth Offence

5. On or around 26 September 2016 in South Australia, the Fourth Defendant without reasonable excuse, failed to answer, to the best of the Fourth Defendant's knowledge, information and belief, a question by an authorised officer, CONTRARY TO Section 19(7)(d) of the Act.

PARTICULARS

5.1 The particulars at paragraph 4.1 are repeated.

5.2 In exercising his powers under Section (19)(1)(g) of the Act, Mr Weymouth asked the Fourth Defendant questions concerning works undertaken on the Land.

5.3 Despite knowing Mr Weymouth was exercising his powers, the Fourth Defendant did not answer certain questions to the best of his knowledge, information and belief.

5 Each of the first, third and fourth defendants pleaded not guilty to the respective charges.

6 As may be seen, the offences with which the defendants have been charged all involve alleged contraventions of the *Development Act 1993* ('the Act'). It is therefore convenient to set out the statutory scheme pursuant to which the alleged offences fall to be considered.

The Relevant Legislative Scheme

Development Act 1993

7 The Act relevantly provides:

> **4—Interpretation**
>
> …
>
> ***development*** means—
>
> …
>
> (fa) in relation to a regulated tree—any tree-damaging activity; or …
>
> ***regulated tree*** means—
>
> …
>
> (b) a tree declared to be a significant tree, or a tree within a stand of trees declared to be significant trees, by a Development Plan (whether or not the tree is also declared to be a regulated tree, or also falls within a class of trees declared to be regulated trees, by the regulations);
>
> …
>
> ***significant tree*** means—
>
> (a) a tree declared to be a significant tree, or a tree within a stand of trees declared to be significant trees, by a Development Plan (whether or not the tree is also declared to be a regulated tree, or also falls within a class of trees declared to be regulated trees, by the regulations); or
>
> …

tree-damaging activity means—

...

(c) the severing of branches, limbs, stems or trunk of a tree; or

…

and includes any other act or activity that causes any of the foregoing to occur but does not include maintenance pruning that is not likely to affect adversely the general health and appearance of a tree or that is excluded by regulation from the ambit of this definition;

to undertake development means to commence or proceed with development or to cause, suffer or permit development to be commenced or to proceed.

...

Part 2—Administration

…

Division 2—Authorised officers

18—Appointment of authorised officers

(1) The Minister or a council—

(a) may appoint a person to be an authorised officer for the purposes of this Act; and

…

19—Powers of authorised officers to inspect and obtain information

(1) An authorised officer may—

...

(c) require any person to produce any documents (which may include a written record reproducing in an understandable form information stored by computer, microfilm or other process) as reasonably required in connection with the administration or enforcement of this Act;

…

(g) require a person who the authorised officer reasonably suspects has knowledge of matters in respect of which information is reasonably required for the administration or enforcement of this Act to answer questions in relation to those matters;

(h) give any directions reasonably required in connection with the exercise of a power conferred by any of the above paragraphs or otherwise in connection with the administration or enforcement of this Act.

…

(7) Subject to subsection (8), a person who—

…

(c) without reasonable excuse, fails to obey a requirement or direction of an authorised officer under this Act; or

(d) without reasonable excuse, fails to answer, to the best of the person's knowledge, information and belief, a question put by an authorised officer; or

…

Part 4 – Development assessment

Division 1 – General scheme

Subdivision 1 – Approvals

32 – Development must be approved under this Act

Subject to this Act, no development may be undertaken unless the development is an approved development.

...

44 – General offences

(1) A person must not undertake development contrary to this Division.

Maximum penalty: $120 000.
Additional penalty.
Default penalty: $500.

…

Development Regulations 2008

8 The *Development Regulations 2008* ('the Regulations') relevantly provides:

Part 2—Development

…

6A – Regulated and significant trees

(1) Subject to this regulation, the following are declared to constitute classes of regulated trees for the purposes of paragraph (a) of the definition of ***regulated tree*** in section 4(1) of the Act, namely trees within the designated area under subregulation (3) that have a trunk with a circumference of 2 metres or more or, in the case of trees with multiple trunks, that have trunks with a total circumference of 2 metres or more and an average circumference of 625 millimetres or more, measured at a point 1 metre above natural ground level.

…

(3) For the purposes of subregulation (1), the designated area will be constituted by—

(a) the whole of Metropolitan Adelaide, other than—

…

(8) For the purposes of the definition of ***tree damaging activity*** in section 4(1) of the Act, pruning—

(a) that does not remove more than 30% of the crown of the tree; and

(b) that is required to remove—

(i) dead or diseased wood; or

(ii) branches that pose a material risk to a building; or

(iii) branches to a tree that is located in an area frequently used by people and the branches pose a material risk to such people,

is excluded from the ambit of that definition.

Complainant's Case in Overview

9 The land, which is the subject of this Complaint, and where the two trees are located, is situated at 28 Commercial Road, Hyde Park ('the subject land'). The first defendant, Mr Crichton owns land at Unit 1/7 Charra Street, Hyde Park. The subject land, in its north-western corner, adjoins the south-eastern portion of Mr Crichton's land. In that corner it also shares a common boundary with Mr Bendyk's land (at 9 Charra Street, Hyde Park) to the west. As a result, Mr Bendyk's eastern fence forms part of the western fence of the subject land.

10 The subject land also adjoins the southern boundary of the land at Unit 3/7 Charra Street, in the south-western corner of which was at one time situated a very large *'Eucalyptus Camaldulensis'* or River Red Gum.

11 I propose to call the two trees, which are the subject of this complaint, 'T1' and 'T2' respectively. The tree on Unit 3/7 Charra Street I will call 'T3'. T1 is situated 2 metres south of the Crichton boundary and 1.5 metres east of the Bendyk boundary. T2 is situated 4.5 metres south of the Crichton boundary and 3 metres east of the Bendyk boundary.

12 In late 2004 Mr Back, the owner of 3/7 Charra Street, was desirous of having T3 removed, due to his concerns with respect to falling branches, particularly in high winds. To that end he engaged an arborist, Dr Nicolle who prepared a report opining *inter alia* on the fact that T3 represented a moderate to high risk to the safety of persons in the vicinity of the tree. On the basis of his report Mr Back

applied to have T3 removed, but at that time the Corporation of the City of Unley ('the Council') refused his application.

13 Some considerable time later, in February 2015, Mr Back made another application to remove T3. On this occasion, he enlisted the aid of both an engineer and an arborist, the latter on this occasion, in the person of Mr Lawson, both of whom supported the removal of the tree. Upon receiving approval to remove T3 from the Council, Mr Back engaged Tempest Trees to remove T3. On 16 September 2015, T3 was removed.

14 In 2015, Messrs Crichton & Bendyk had discussions about limbs falling from T1 and T2 onto their respective properties. Consequent upon their discussions, Mr Crichton contacted Tempest Trees. In September 2015, Mr Tempest attended at Charra Street and provided a quotation to Messrs Crichton and Bendyk for work to be done on T1 and T2, which, in terms of the quotation that he supplied, was expressed to be for pruning the trees back to the fence lines, of their respective properties, with the subject land.

15 On or about 2 October 2015 Tempest Trees carried out work on T1 and T2. The work which was undertaken was carried out without the knowledge or approval of Ms Simons, the owner of 28 Commercial Road. On 2 October 2015, Ms Simons was absent from the subject land. Upon returning and seeing the work that had been done on T1 and T2 without her approval, Ms Simons complained to the Council.

16 By letter dated 16 December 2015, Mr Weymouth, the Council's Manager of Development, wrote to Mr Crichton regarding alleged tree-damaging work ('TDA') having been undertaken on T1 and T2, which work he asserted had been done in breach of the Act.

17 In his letter, Mr Weymouth also sought information regarding the identities of both the contractor who had undertaken the work and the person who had authorised the contractor to carry out the work.

18 Mr Crichton contacted Mr Weymouth a couple of days later and, (according to Mr Weymouth) told him that he and Mr Bendyk had engaged Tempest Trees and that he had 'left it up' to Tempest Trees, as the arborist, to determine what work had to be done and the manner in which it would be carried out.

19 In February 2016, the Council requested an interview with Mr Crichton concerning the matter generally. He responded by reiterating that he and Mr Bendyk had engaged Tempest Trees to 'review' and manage the trees where appropriate, and that in response to the Council's queries, he had contacted Mr Tempest who, in turn, had told him that he was happy to speak to the Council.

20 On 31 March 2016, the Council wrote to Mr Tempest and asked whether he would be prepared to attend for an interview. Then, on 23 May 2016, the Council sought,

from Mr Tempest, a series of documents relating to the works carried out on T1 and T2. The documents which it sought included copies of quotes, invoices, and payment records, as well as any written notes concerning the work that had been done.

21 In June 2016, Mr Tempest responded by providing the Council with the quotation which he had prepared (for the work to be undertaken) under cover of a letter, wherein he said that the work involved pruning out several large dead branch sections, together with a small amount of live tissue, stopping at the known fence line.

22 In August 2016, the Council issued Mr Tempest with a written notice, pursuant to s 19 of the Act, requiring him to produce specified documents and to answer specified questions. Thereafter, the Council's solicitors and Mr Tempest's solicitors exchanged various pieces of correspondence, but Mr Tempest did not answer any questions, and nor did he provide any other documents apart from the written quotation, which had been provided to the Council in June 2016.

23 In these circumstances, the Complainant asserted that:

1 Mr Crichton undertook development without approval by causing branches, limbs and the trunk of each of T1 and T2 to be severed;

2 Tempest Trees undertook development without approval by causing branches, limbs and the trunk of each of T1 and T2 to be severed;

3 Mr Tempest failed, without reasonable excuse, to obey a Requirement or Direction of an authorised officer to produce documents; and

4 Mr Tempest failed, without reasonable excuse, to answer, to the best of his knowledge information and belief, a question put by an authorised officer.

24 Prior to considering the evidence in the trial, I record that I have reminded myself of the basic directions that are generally given in trials involving criminal offences, where a judge is sitting with a jury.

Legal Issues

1 The complainant bears the burden of proving each particular charge beyond reasonable doubt and this requirement extends to proof beyond reasonable doubt of each and every element of each offence.

2 Subject to a qualification to which I will refer to in a moment, the defendants do not carry any onus of proof and to the extent that each of them has put forward a defence, he (or 'it' where it applies to Tempest Trees) does not have to prove it.

3 It is not sufficient for the complainant to show suspicion of guilt or even to demonstrate probable guilt. Only proof beyond reasonable doubt can give rise to a conviction. If I am left with a reasonable doubt as to the establishment of any element of a charge, then I must give that defendant the benefit of that doubt and find that defendant not guilty of that charge.

4 Each of the counts on the Complaint concerns a separate offence. I must treat each separately and consider only the evidence relevant to that charge. If I were to find a defendant guilty of one of the charges, on the evidence relevant to that charge alone, I must not use that evidence nor the fact of that finding to conclude that the defendant is therefore guilty of any of the other charges. Nevertheless, such evidence may be relevant to the background or circumstances surrounding the events said by the complainant to give rise to another of the offences charged.

5 The charges do not stand or fall together. If I were to be satisfied beyond reasonable doubt that a defendant committed one of the offences charged, it does not follow that the defendant also should be found guilty of any other offence charged. Depending on my findings on the evidence, I may find a defendant guilty or not guilty of an offence or offences or guilty on one of the offences and not guilty on the other.

Evaluating the Witness Evidence Generally

6 As I have indicated already, subject to the qualification mentioned, the defendants carry no onus. They were not obliged to give evidence but they chose to do so. Their evidence is to be considered alongside the other evidence in this case. I have given them credit for adopting a course which they were not obliged to adopt. In assessing their evidence and the weight to be given to it, I have approached that task in exactly the same way as with any other witness.

7 I have considered how much weight I can place on the evidence of various witnesses who have been called. In assessing the reliability or truthfulness of each, I have had regard to demeanour and, in particular, to my impressions of each witness gathered by watching and listening to that person in the witness box, the likelihood or unlikelihood of what that person has said, any bias or motive for lying that person may have, how the evidence was given, how it stood up to cross-examination and how it fitted with other evidence that I find I accept.

I have taken account of the ordinary differences and the capacities of each of the witnesses to remember or give a faithful account of observation. I have been guided by those factors and have kept in mind that witnesses may be truthful and reliable about some matters and not about others and that a witness may be attempting to tell the truth, but

may be mistaken. Therefore, I may accept some parts of what a witness says and not others.

8 In this case, evidence was received from two persons whom, I accept, had expertise in the field of arboriculture and who proffered opinions on matters within that field of expertise. In considering that evidence, I have assessed it in the same manner as I would assess the evidence of any other witness, but in doing so have had regard to their respective qualifications and experience in their field and, as well, the extent to which I accepted the various factual matters relied upon by each of them in reaching his opinion.

9 Finally, I remind myself that I must determine whether or not the prosecution has proved the elements of each charge considered separately and beyond reasonable doubt. If I am unable to say where the truth lays in respect of a charge, then it necessarily means that the prosecution has failed in respect of that charge.

The Trial

Complainant's Case

25 In addition to witnesses who gave oral evidence, the complainant tendered a range of documents, together with a witness statement from Mr Bendyk.

26 The complainant called the following witnesses:

Ms Simons

27 Ms Simons, who was at the material time, the owner of the subject land.

28 She said that, from 1 October 2015 to 4 October 2015, she and her family had been away in Normanville. Upon her return she noticed that extensive work had been done on T1 and T2. She said that she was angry with what she saw and subsequently contacted the Council to complain. By reference to photographs in Exhibit P2 she described the condition of T1 and T2 before the work was done, and approximately how far each of the trees projected into the properties owned by Messrs Crichton and Bendyk. She said that no persons had been given permission to carry out work on T1 or T2.

Assessment of Witness

Ms Simons

29 I am satisfied that in giving her evidence, Ms Simons was both truthful and reliable. In particular, I accept her evidence that prior to going away on the October long weekend, neither Mr Crichton nor Mr Bendyk had spoken to her about doing

any work on T1 and T2 and that she had not given any permission to anyone to carry out any work on those trees.

Mr Weymouth

30 Mr Weymouth is the Development Manager at the Council. The correspondence and other documentation in Exhibits P7 and P8 were tendered through him.

31 In cross-examination by Mr Roder SC, he agreed that Mr Crichton had expressed concerns for the safety of his young children, when he had addressed the Council in support of the removal of T3. He conceded that Mr Crichton might have said that he believed development approval was not required during a telephone call with him on 18 December 2015.

Assessment of Witness

Mr Weymouth

32 I am satisfied that Mr Weymouth was a truthful witness. I also accept that he was a generally reliable witness. However, where his evidence differs from that of Mr Crichton as to their communications, on 18 December 2015, I prefer the evidence of Mr Crichton. I have done so, in part, because, during cross-examination, Mr Weymouth very properly conceded that not every part of their conversation was detailed in his notes and that although he had tried to record the conversation accurately, Mr Crichton may have been correct in his assertion that he had said to him that he believed development approval was not required, rather than him expressing a belief that he believed he didn't think it was required.

Dr Nicolle

33 Dr Nicolle is a consulting arborist, botanist and ecologist. In July 2016, he inspected and measured T1 and T2 and noted that, at 1 metre above natural ground level, the circumferences of T1 and T2 were 2.57 metres and 2.53 metres respectively. He said that each tree satisfied the requirements, in the Act and the Regulations, to qualify as Regulated Trees.

34 He was asked to assume that T1 and T2 had been pruned in October 2015. He said that, based on that assumption, the structures of both T1 and T2 had been 'highly modified'. On the further assumption, that the cuts to T1 and T2 which he observed had been made to the trees in the previous October, he concluded that at that time both T1 and T2 would have been fully healthy and leafy.

35 He confirmed that, in his view, between 95% and 99% of the crown of T1 had been removed and between 45% and 65% of the crown of T2 had been removed.

36 He reached his opinion by comparing '*the [circumference of] the final cuts in T1 with the circumference of the remaining branches with leaves on them and*

[looking] at that as a ratio or a percentage'.[1] He conducted a similar exercise with respect to T2.

37 He was also asked to assume that each tree had been cut to a point which aligned with the boundary fences and to opine what percentage of crown would have been removed if the cuts had stopped at those points. He said that in the case of T1, it would have been at least 95% of the crown and for T2 between 40% and 60%.[2]

38 In cross-examination by Mrs Shaw QC, he said that he did not physically measure the diameter of the pruning cuts but rather determined the diameter by making a visual estimate from ground level. The cuts, to which he was referring, had been made at various points between 5.5 metres and 12 metres above ground level.

39 He was unable to name any scientific article or text where the methodology, which he had adopted for evaluating the amount of crown that had been removed, was referenced. He said that he could not provide any record of any tests where this methodology had been used or any textbook that said this was a permissible method for estimating the amount of tree crown that had been removed.

40 He reiterated that he was unaware of any research where his methodology had been used or of any peer reviewed papers or texts where such a methodology had been adopted. In the absence of any such material, he relied on his knowledge of general biology with respect, for example, to circumstances where a tree splits into two trunks. In such cases, he said that the size of the trunk is proportional to the amount of live foliage on that part of the tree.

41 He did not agree with the use of the terms 'dominant' and 'sub-dominant' for trees T1, T2 and T3. Such terminology could however be appropriate where one was considering trees in a plantation setting which this was not.

42 He conceded that he did not know whether, in October 2015, any of the branches on T1 or T2 were dead or cracked prior to their being pruned. He also accepted that he could not say whether either tree was structurally flawed before being pruned.

43 He said that Mistletoe was well known to occur in this species of tree, but that it was not very common in such trees in metropolitan Adelaide. He was unable to say whether, in October 2015, there would have been Mistletoe on T1 and T2. Generally, in his opinion, Mistletoe would not adversely impact the health of a large tree unless there was a significant amount of Mistletoe present. He did not agree that Mistletoe 'mimics' this species or that, for an arborist, it was difficult to identify.

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1 T131.

2 Exhibit P5 – Addendum Report of Dr Nicolle p 3.

44 He said that if there had been Mistletoe in T1 and T2 to such an extent as to detrimentally affect their health, he would have expected to have seen evidence of it in the form of reduced growth rates and thinner bark relative to the amounts of heartwood.

45 He accepted that he had not pruned Mistletoe on a commercial basis, but he had removed it from trees in his own Eucalypt arboretum. He said that he had not recommended removing Mistletoe in the past, but accepted that other arborists may well have done.

46 He disagreed that, in Adelaide, Mistletoe is seen as a pest. He accepted that in certain circumstances when Mistletoe progresses, it can lead to a point where little or no host foliage remains on the tree.

47 He confirmed that his opinions were formed without having seen T1 and T2 prior to pruning, and that they were based 'on assumptions provided to [him] and what [he] could observe in the trees from [his] site visit and [his] experience of the species'.

48 When certain propositions, as to the bowing of trees, from the publication, '*Tree Risk Assessment Manual'*, were put to him, he said that they applied to conifers and winter deciduous trees, rather than eucalypts.

49 He said that the presence of cracks in a tree did not necessarily mean that there was anything structurally unsound about the tree.

50 In re-examination, he said that although the species is a very long lived species, T1 and T2 were relatively young trees. He said that when looking at some of the photos in Exhibit P2, he could not see any evidence of Mistletoe in T1 and T2. He said that if Mistletoe was present he would have expected to have been able to detect it from looking at the photos.

Assessment of Witness

Dr Nicolle

51 Dr Nicolle presented as a highly skilled expert in his field. He gave his evidence in a truthful manner. I accept his evidence as to the manner in which the nature and extent of the 'crown' of a tree is determined, namely by reference to the branches in the tree that have live foliage. I also accept his evidence that T1 and T2 were 2.57 metres and 2.53 metres respectively in circumference when measured 1 metre above natural ground level.

52 However, I do not accept the opinion proffered by him in his oral evidence, with respect to the percentage of tree crown which was removed during the process of these works. I do not accept his opinion because I am not persuaded that his approach or methodology, for the ascertainment of the extent of crown which has been removed, is a matter in relation to which expert testimony can be given.

53 Matters of general biology to one side, he could offer no scientific support for the opinions he proffered. In the absence of any such material, I am not satisfied that the subject matter of the opinion he expressed '*forms part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court'*.[3]

54 Moreover, Dr Nicolle said that he did not examine T1 and T2 prior to the pruning work being undertaken. As a result, he conceded that he was not in a position to determine whether Mistletoe was present on T1 and T2 prior to them being pruned.[4] Nor was he able to gainsay, other than in the most general of terms, that each of the trees contained dead, diseased or cracked branches.

55 Accordingly, although I accept his general expertise, where his evidence differs from the evidence of Mr Tempest, and particularly for reasons I will refer to later, Mr Cook, as to the existence of a significant infestation of Mistletoe and/or dead, diseased or cracked branches in T1 and T2, prior to the trees being pruned, I prefer their evidence.

First Defendant's Case

Mr Crichton

56 Mr Crichton was, at the material time, the owner of Unit 1/7 Charra Street, Hyde Park, which he purchased in 2011.

57 During the time when he was occupying this property, of particular concern to him were two branches from T1 which projected over the patio and outdoor play areas. He said in the period 2011-2015 leaves and branches from T1 regularly fell on his property, which resulted in the clearing of his roof and yard becoming a routine occurrence. As a consequence, he felt that it was unsafe for his children to play outside in the yard.

58 He said that he obtained Mr Tempest's details from Mr Back and first contacted Mr Tempest on 14 September 2015. At that time, he and his family were no longer residing at Unit 1/7 Charra Street, having moved at the end of August 2015. At this time, he was looking to lease the property.

59 At or about this time, he had also spoken to Mr Bendyk. He and Mr Tempest viewed T1 and T2 from his property and then from Mr Bendyk's property. He said that he told Mr Tempest that he and Mr Bendyk wanted work done on the trees because of their respective concerns for family and property. He said that he told Mr Tempest that the work was to be performed within the limits of the law and that the fence line was at no point in time to be crossed. He said that he was sure

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[3] See *R v Bonython* (1984) 38 SASR 45 at 46-47; also see *R v Bjordal* (2005) 93 SASR 237 at [26]-[31].
[4] T198.

about this last statement because he had a handbook entitled '*Trees and the Law'* with him at the time of the conversation. He also said that in their discussions reference was made to T1 and T2 being Regulated or Significant trees.

60 He said that he did not instruct Mr Tempest as to the particular branches which were to be pruned, or how they were to be pruned, but left those matters for him to determine. In short, he said that he relied on Mr Tempest's expertise. Finally, he said that during their conversation he had a vague recollection of Mr Tempest mentioning 'dead branches'.

61 After the meeting with Mr Tempest, his expectation was that there would be 'a thinning of the trees and branches on his side – a pruning – more minor work'.

62 He said that he was not present on 2 October 2015 during the time when the work on T1 and T2 was carried out and, furthermore, that he had not inspected the results of the work by the time he paid for the job on 6 October 2015. Nor had he seen the state of T1 and T2 post the work at the time when he sent a text to Mr Bendyk on 13 October 2015. Finally, he said he had still not seen the work by 16 December 2015 when the Council's letter was sent to him.

63 On receipt of that letter he said that he had tried to call the Council. He then contacted Mr Tempest who reassured him that the work done by his team was within the limits of the law and suggested that he give the Council his details so that he could speak with them directly.

64 In terms of the work being within the '*allowed limits'* as referred to in his letter to Council of 18 December 2015,[5] by this phrase he meant not going over the fence line and not removing more than 30% of the crown of T1 and T2.

65 In his telephone call with Mr Weymouth, in December 2015, he said that he would have told him that the work did not require development approval. He said that he did not go to look at T1 and T2 after receipt of the Council's letter in December 2015 because he had contacted Mr Tempest and had been reassured by him that whatever may have been the state of the trees, he, Mr Crichton, had done nothing wrong. However, after he was charged, he said that he went to inspect the work. He said that the work was not the work that he had either expected or intended to have been undertaken.

66 In cross-examination by Mrs Shaw, he accepted that he had no idea what 30% of the canopy actually comprised and that his expectation of what he would see in terms of 30% of canopy was only a layman's expectation.

67 He said that he understood from Mr Tempest that he would do the work within the limits of the law. He said he did not specifically recall Mr Tempest referring to doing the work in accordance with the Australian Standard, but would not have been surprised if he did. He vaguely recalled Mr Tempest referring to dead portions

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5 Exhibit D1.

of the trees. He agreed that Mr Tempest may possibly have said that the trees were structurally defective and that he could have used the word 'disease' in connection with the trees.

68 In cross-examination by Mr Crocker, he said that the branch that initially went west and then north over his fence-line extended about 5 metres into his property. The smaller limb, which travelled north over the Simons/Crichton boundary extended about 3 metres into his property. He said that the quotation, for the work which he had signed, did not represent all of the conversation between himself, Mr Bendyk and Mr Tempest. He disagreed that the option for the trees that he expressly commissioned, was one where all the timber above his land was to be removed. Rather, he said that he had sought and relied upon the expertise of the arborist.

69 He said that his understanding of 'crown' in relation to a tree was 'the area at the top of the trunk that has branches and leaves'.

70 He said that, although his letter to Mr Weymouth did not expressly refer to the issue of 30% of the crown being removed, it was never intended to be an exhaustive summary of facts relating to what had happened.

71 He rejected the suggestion that his evidence, as to a figure of about 30% of the crown being mentioned in the conversation between himself and Mr Tempest on 15 September 2015, was a reconstruction. He said he did not inspect the trees until after being charged because of the reassurances he received from Mr Tempest.

72 On seeing T1 and T2 in March 2017, he said he was surprised and that their condition was 'not what [he] was expecting'.

73 He said that he did not recall any discussion concerning Mistletoe on 15 September 2015. He said that the instruction, in relation to T2, was '*pruning less than 30% … and not passing the fence line of [number] 9'*.[6] Finally he said that he did not remember reading the quotation before signing it.

74 In re-examination, he said by '*lopping'* he meant cutting large or very large branches whereas '*pruning'* was cutting smaller branches and leaves. He said that the quotation would have more accurately recorded their conversation if it had said '*prune to the fence line as per instructions or less than 30%*'.

75 He confirmed that he did not speak to Mr Tempest post-receipt of the Summons and that his omission so to do was based upon legal advice.

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6 T428.

Assessment of Witness

Mr Crichton

76 I am satisfied that Mr Crichton was a truthful and reliable witness. In particular, I accept his version of the conversation that he had with Mr Weymouth. I also accept his evidence that his instruction to Mr Tempest was for the work to be performed within the limits of the law and that at no time was the fence line to be crossed. I was reinforced, in the assessment that I made of him as a witness, because (as Mr Roder submitted) he did not at any point attempt to embellish his case. He did not, for example, attempt to suggest that Mr Tempest had mentioned the word 'Mistletoe', although he agreed that in his conversations with him there may have been a reference to 'disease'.

77 In summary, I found Mr Crichton to be an impressive witness.

Third and Fourth Defendants' Case

Mr Tempest

78 Mr Tempest is a director of the third defendant, a company which operates a business involving the provision of arborist services.

79 He holds a Certificate III in arboriculture which he obtained in 2013. He is currently studying for a level 5 Diploma in Arboriculture.

80 In September 2015, his understanding of the Act and Regulations, in the context of pruning Regulated trees, was that one could not prune any more than 30% of live crown without requiring approval. Dead, diseased branches and branches, posing a material risk to property and people, were also excluded from the definition of TDA. He said that he understood the term '*live crown'* to mean the branches on a tree that contain live leaves. In essence, he agreed with Dr Nicolle's definition of the meaning of the word '*crown'* as it related to trees.

81 He said that on 15 September 2015 he made a visual assessment of T1 and T2. As to T1, his assessment, on that day, was that it was:

- A suppressed, sub-dominant tree which had
    - Poor taper;
    - Over-extending branches;
    - A longitudinal radial crack in the hotspot of the stem;
    - A hazard-beam crack in the second branch over the Crichton home; and
    - A heavy infestation of Mistletoe

82 When describing it as a suppressed, sub-dominant tree he meant that it was deficient in water and mineral-nutrient supply.

83 The significant cracks in T1 meant, in his opinion, that there was a higher likelihood of failure, particularly with its history of 'branch failures' and in the context of the pending removal of T3.

84 His assessment of T2 was that it was a sub-dominant tree with:

- Elongated branches
- Poor taper
- A radial crack in the highest branch to the west; and
- Mistletoe infestation, particularly in the lowest two branches to the west

85 He said that T2 was supressed due to it having received less water and fewer mineral nutrients and reduced sunlight by reason of the presence of T3. He described '*Mistletoe'* as a tree-killing parasite and said that its form mimics Eucalyptus leaves.

86 His opinion, as to the health of T1 and T2, was informed by a series of publications including the following:

- *Tree Risk Assessment Manual*;
- *Principles of Tree Hazard Assessment;* and
- *Management and Disease and Pathogens of Eucalyptus*.

87 He said that, in relation to the pruning work which was undertaken on T1 and T2, he and Mr Cook had relied upon, and conducted the work, in accordance with Australian Standard AS4373-2007 for pruning trees.

88 He produced photographs of trees on Shepherds Hill Road in Bellevue Heights to demonstrate how Mistletoe can mimic the shape and colour of Eucalyptus leaves. On 15 September 2015 he said that he informed Mr Back that there was Mistletoe in T1 and T2 and that the branches, on those trees with Mistletoe, were 'as good as dead'.[7]

89 He said that shortly thereafter he had a conversation with Messers Crichton and Bendyk wherein he told them that T1 and T2 were heavily diseased, structurally defective, had branches which were as good as dead and which were a risk to

[7] T492 – cf Back at 760-761.

people and property. He said that he told them that he could remedially prune both trees to the fence line and that the work would be lawful.

90 In terms of Mistletoe, he said that, from his observations, T1 had 90% Mistletoe and T2 had about 20% Mistletoe. He could clearly see the Mistletoe based on his experience as an arborist. He said that he employed Brian Cook to carry out the work and that at the time of carrying out the work, Mr Cook had a Level III Certificate as an arborist.

91 On 2 October 2015, he said that he informed Mr Cook as to the location of the job. He told him that the trees were full of Mistletoe, structurally defective and with cracks. He said that at the time he was quite confident that less than 30% of live crown would be pruned because there were very few Eucalyptus leaves in the areas to be pruned.

92 In December 2015, he received a call from Mr Crichton, during which call he assured him that all the works were legal. He explained that, in his response to the Council in June 2016, the dead branches to which he referred were those branches heavily infested with Mistletoe.

93 In relation to the Council's request for information and documents, he said that he did not provide information or documents because he was receiving legal advice and acting upon that legal advice.

94 In cross-examination by Mr Roder, he said he agreed with Dr Nicolle's approach as to the way in which the '*crown'* should be defined.

95 He agreed, as between Mr Crichton and himself, that Mr Crichton instructed him to prune within the limits of the law. He conceded that it was possible that the 30% figure, in relation to the 'crown', was mentioned. He said that he told Messrs Crichton and Bendyk that he would be pruning to the Australian Standard and that he would be providing remedial, restorative pruning.

96 He agreed that his arrangement with them was that the pruning work was to stop at the fence line and that there was no authorisation to do any work on the other sides of the fence lines, in relation to either T1 or T2.

97 He agreed that Mr Crichton made it clear that the work had to be performed within the limits of the law. However, within those constraints on his authority, the arrangement was that he was to exercise his judgement as an arborist as to what pruning would occur, how the Mistletoe could be pruned out, which branches were to be removed and which were to be pruned.

98 He agreed that while the work which was actually done went beyond his expectations, it was ultimately left to Mr Cook to exercise his judgment as an arborist when carrying out the work.

99 In cross-examination by Mr Crocker, he said that his expectation was that, after the work was completed, there would be no branches north of the Crichton/Simons boundary fence and that this was because of the degree of Mistletoe infestation and the significant crack in one of the branches.[8] His expectation was, however, that any part of T1, on the western side of the Bendyk/Simons boundary south of the Crichton fence, would remain.[9]

100 In relation to T2, his expectation was that there would not have been any part of it west of the Bendyk boundary and that the final cuts would be in line with the fences.[10] From his observation, he estimated that some 20% of the tree contained Mistletoe. After that was removed, his expectation was that about 20% of the live tissue in the crown was also to be removed.[11]

101 He inspected the site after Mr Crichton's phone call and could see T2 was in accordance with his expectations. He said that he did not co-operate with the Council's request for an interview because he felt that they were being '*adversarial'*. He said that, upon being asked in May 2016 for various documents, he sent the Council a copy of the quotation. He did not even bother to check to see whether his office had raised an invoice because he believed that a copy of the quotation was sufficient.[12] He agreed that his business issued invoices and receipts and had payment records, but that he did not check to see whether any such documents existed for this work because the quotation was, in his mind, sufficient. He said that the '*record'* of Mr Bendyk paying was the notation on the quote '*Ben to pay ½*'. Finally, and somewhat belatedly he conceded that nowhere on the quotation did it record that Mr Bendyk paid for the work.[13]

102 He stated that the finished product was what he expected, save for the fact that the cuts had proceeded past the respective fence lines. He denied that the suggestion, that T1 was heavily infested with Mistletoe, was a recent invention. He accepted that he did not use the term Mistletoe to Mr Crichton. However, he said that he told him that the trees were heavily diseased and that many of the branches were 'as good as dead'. He said that the reason why Mistletoe was not evident in photographs 1 and 2 in Exhibit P2 was because of the poor quality of these photographs.

103 He said that his work had improved the health of the trees.[14] He strongly disagreed that his work involved TDA. He conceded that the pruning of the larger limb on T1 should have stopped at the Crichton/Simons boundary.

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8 T538-539.
9 T540-541.
10 T541.
11 T543.
12 T560.
13 T569.
14 T620.

104 He disagreed that he was trying to make himself appear to be '*clever'* in some of the scientific answers he gave. He again denied that his evidence, as to the presence of Mistletoe, structural defects in the trees and of branches being as good as dead, was 'made up for the purpose of the trial'. He disagreed that the timber in photographs 23 and 28 in Exhibit P2 was suggestive of a tree that is 'very healthy'. He also disagreed that Mistletoe does not ever infest limbs of the diameter shown in the photographs of T1 in Exhibit P2.

105 In terms of the questions in the s 19 Notice, he said that after 1 June 2016, he was waiting on legal advice from his solicitor. He said that he did not recall Mr Caldicott telling him that he was obliged to answer the questions in the Notice.

106 He said that during August and September 2016, Mr Caldicott was continuing to seek clarification on certain matters, and that he, Mr Tempest, was waiting on his advice with respect to the material being sought by the Council.

107 He conceded that Mr Caldicott may have asked him to look for the sorts of documents requested in the Notice, and that he may have told him that he was endeavouring to look for such documents. However, he said that his 'vague recollection' was that he never did obtain any such documents.[15] Nor could he recall even looking for such documents.[16]

108 In regard to answering the questions in the s 19 Notice, he did not believe that he provided Mr Caldicott with any information to answer those questions.[17] He could not say whether Mr Caldicott asked him a question in terms of '*what were the full names of the persons who paid for the work'*.

109 He agreed that in 'his office' there may have been documents which could 'respond' to the Notice, such as an email to Mr Crichton, invoices to Messrs Crichton or Bendyk, receipts from them, EFT records of their payments, and/or records of their credit card payments.[18] He also agreed that he was in possession of information to answer the questions posed in the Notice, but that '*it all [came] back to [him] waiting for advice from my lawyer'*.

110 He accepted that he must have told Mr Caldicott that the only relevant document he had was the quotation.[19] He said that he did not recall asking his staff to search for any such documents. In response to a question that, after 16 August 2016 he never caused any search to be made for any such documents, he said '*it appears so'*.[20]

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15 T671.
16 T672.
17 T676.
18 T682.
19 T687.
20 T694.

111 Finally, he reiterated his view that, even at the time of giving evidence, his view was the quotation was a sufficient response to Council's requests.[21] He also said that he did not recall asking Mr Caldicott as to what he should do about the Council's Directions in the s 19 Notice.

Assessment of Witness

Mr Tempest

112 I found Mr Tempest to be a somewhat unsatisfactory witness. Although I am prepared to accept parts of his evidence, I am only prepared to do so where that evidence is corroborated by other witnesses such as Mr Back or Mr Cook, whose assessment as witnesses I will come to in a moment.

113 On regular occasions, I found Mr Tempest to be evasive and/or disingenuous. In the result, I am not prepared to accept his explanations for not responding to the s 19 Notice, namely that he thought the written quotation he forwarded to the Council in June 2016 was a sufficient response and/or that prior to responding he was really waiting on further advice from his solicitors.

114 Of course, in making these observations, I repeat that it is not for Mr Tempest, or indeed any of the defendants, to prove anything. The onus of proving the case on each count remains throughout on the complainant.

115 With these qualifications, and in particular when his evidence is considered in conjunction with the evidence of Messrs Back and Cook, I accept those parts of his evidence which referred to the existence of Mistletoe, as well as the dead branches and cracks in T1 and T2, prior to pruning work being undertaken on T1 and T2 in 2015.

Mr Back

116 Mr Back is the owner of the premises at Unit 3/7 Charra Street. He spoke to Mr Tempest on 15 September 2015 when Mr Tempest came to his premises to brief him on the removal of T3.

117 He said that, in the course of a conversation that they had had in his front yard, Mr Tempest had told him that the removal of T3 would have a 'knock-on' effect on the other trees in the group, namely T1 and T2.

118 He said that Mr Tempest also told him that T1 and T2 were lop-sided; that they looked strangled by disease, that there was Mistletoe in those trees, which was probably strangling them and that it would probably kill the trees.[22] He said Mr Tempest told him that the Mistletoe had infested 'virtually all' of the trees and that he went into some detail to describe how the action of Mistletoe mimicked the

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[21] T730.
[22] T760.

action of Eucalypt leaves. He said that Mr Tempest told him that Mistletoe strangles the growth of a tree and that it takes over and deprives that tree of nutrients. He said that Mr Tempest used the expression '*parasite'* to describe its effect on a tree. He said that Mr Tempest described the health of T1 and T2 as being '*very poor'*.

119 He said that he, Mr Back, had seen branches from T1 and T2 dropping into the yards of Messrs Crichton and Bendyk on numerous occasions over the years, and that Mr Crichton had expressed his concerns to him for the safety of his family during the course of several conversations.

120 In cross-examination by Mr Crocker, he said he did not discuss with Mr Tempest the fact that another arborist, Mr Lawson did not consider that there would be any 'knock-on' effect from the removal of T3.

121 He said that he didn't think to contact the owner of 28 Commercial Road concerning the possible knock-on effects to T1 and T2. He believed that he had spoken to Mr Crichton and conveyed what Mr Tempest had said to him as to the poor health of T1 and T2. He believed that Mr Crichton told him that Mr Tempest was going to carry out remedial works on T1 and T2.[23] He said that Mr Tempest told him on 15 September 2015 that the state of T1 and T2 was such that they would probably die as a result of the Mistletoe.

Assessment of Witness

Mr Back

122 Mr Back was an impressive witness. I accept his evidence as being both truthful and reliable. In particular, I accept his evidence that Mr Tempest told him in 2015 that the removal of T3 would have a 'knock-on' effect on T1 and T2. I also accept him when he said that Mr Tempest told him that T1 and T2 were infested with Mistletoe and that it would probably kill the trees.

Mr Cook

123 Mr Cook was employed in September 2015 as a tree climber and supervisor with Tempest Trees. At that time, he had worked for the company for some three years. By September 2015, he had completed a Certificate III as an arborist.

124 In September 2015, while working on the removal of T3, he said that he had made observations of what he described as two smaller sub-dominant trees (T1 and T2) and noted Mistletoe in one tree and evidence of what looked like a crack.[24]

125 In October 2015, he attended to carry out work on T1 and T2. His understanding of the job was that he was to remove foliage as well as dead, decayed, damaged or unsafe branches to the fence line 'within the guidelines of the *Tree Act* and the

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[23] T794.
[24] T803.

guidelines of the quote'.[25] He intended to '*prune'* the trees which he understood would have the effect of making the trees '*healthy'*.

126 His initial assessment of T1 was that it had Mistletoe, dead branches and a crack he could see from the ground.[26] T2, he said, had some Mistletoe and twists and splits in the bark of some of the branches.[27]

127 He then climbed into T1. He said it felt '*very unsafe'*. There was a large split in one section of the timber, which he could put some fingers into and a '*fair bit'* of Mistletoe. There were also dead branches which they had to remove to make the tree safe.[28]

128 His practice (which he observed on this occasion) was to remove up to 20% of live foliage from such a tree.[29]

129 In relation to T2, he observed there to be Mistletoe, but less than T1, small twists in the tree with small stress twists in the bark. Again, his approach had been to remove up to 20% of the tree's live foliage.

130 He explained how Mistletoe threatens the life of a tree and how it mimics the leaves of the host tree in terms of shape and colour. It was detectable by him as an arborist, given the smell that it emits.[30]

131 When pruning a tree in these situations, his practice was to prune 'to the nearest growth point'. In this case, the nearest growth point to where there was existing damage was back at the main trunk. In this way, he said that the operator would not leave stubs which could lead to epicormic or unstable growth.[31]

132 In cross-examination by Mr Roder, he said he did not know whether it was Mr Crichton or a tenant of the property to whom he spoke when onsite in October 2015. Prior to attending the work site, he had a conversation about the quotation with Mr Tempest. He said that he was not told that he was not to go past the fence line, but that, in any event, he had done so because, in his view, '*under the guidelines it was best for the tree'*.[32] He said that it was not until he was in the tree that he could make an assessment (as to what needed to be removed) which was 100% certain.[33] He agreed that the assessment as to what was to be removed was left to his judgment as an arborist. He said that in this case, unless he had been able

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25 T809.
26 T812
27 T814.
28 T813.
29 T814.
30 T815-816.
31 T819.
32 T823.
33 T825.

to remove branches which went beyond the fence line, in his opinion, he would have had to leave '*large chunks of timber with splits in them [on the Crichton and Bendyk sides of the fence line which, in his judgement], would not have been professional'*.[34]

133 In cross-examination by Mr Crocker, he said he had worked for Mr Tempest since about 2011. He remembered the work on T1 and T2 because there was some '*potentially life-threatening risk in it to remove some of the sections'*.[35] He said that he took the quotation with him to the job.

134 He said that, prior to climbing into the tree, his aim was not to remove as much as he ultimately did.[36] Prior to seeing the cracks, the Mistletoe and the dead branches, he envisaged that it may have been possible to leave part of the larger limb on T1 north of the Crichton-Simons fence line.[37]

135 He said that he removed all the Mistletoe from both T1 and T2. His belief, in October 2015, was that he could prune up to 20% of live foliage from a Significant tree. He believed the law permitted more, but that this was the percentage he worked on.[38]

136 He was unable to explain the difference between Significant and Regulated Trees. It was not his role (rather he suggested it was Mr Tempest's) to assess whether a tree was Significant or Regulated. His practice was not to count Mistletoe, dead foliage or dead branches as part of the tree canopy (the crown) for pruning purposes.

137 On this particular job he was always working on pruning up to 20% because that was his practice. He did not believe that after finishing the work he told Mr Tempest that he had gone past the fence lines, and nor did he feel that it was necessary to do so because he and Mr Tempest had good trust in each other and he knew Mr Tempest trusted his judgment to do a professional job.[39] He said that he didn't contact the people at 28 Commercial Road on the day in question because, in the course of doing the work, he never felt that he was in their property.

138 He disagreed that photograph 28 in Exhibit P2 showed healthy timber. He said that it showed that it had cracks in it.[40]He said that photograph 36 in Exhibit P2 depicted the live foliage on T1 after his work and that it depicted 80% of the live foliage that was in T1 prior to the work being done.

139 In re-examination, he said his aim was to prune up to 20%, but within that parameter to '*leave as much as we could'*. He also said that leaving chunks of

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[34] T826.
[35] T839.
[36] T852.
[37] T856.
[38] T858.
[39] T870.
[40] T875.

timber was unprofessional because it could promote bugs or disease or decay and further damage the tree.[41]

Assessment of Witness

Mr Cook

140 I considered Mr Cook to be an honest and forthright witness who gave truthful and reliable evidence.

141 In particular, I accept his evidence as to the amount of 'crown' he removed, and as to the existence of Mistletoe and dead and cracked branches in T1 and T2. I also accept his explanations as to why he proceeded to cut beyond the respective fence lines, namely because, in his view, to do otherwise would have resulted in an unsightly and unprofessional job.

Preliminary Issues

The Onus of Proof

142 Prior to addressing the issues which arise for consideration in this trial, it is necessary to deal with a preliminary matter which relates to the question of the onus of proof with respect to counts 3, 4 and 5.

Count 3

143 In the *Corporation of the City of Adelaide v BFR Pty Ltd & Anor*[42] I had occasion to consider the question of the onus of proof in a prosecution alleging that the defendant had undertaken development, namely TDA, without approval contrary to ss 32 and 44(1) of the Act.

144 In considering this question I said:

> The provisions of s 105 of the Act make it clear that offences constituted by the Act lie within the criminal jurisdiction of this Court.[43] In an alleged summary offence such as this, the *Environment Resources and Development Court Act 1993*[44] requires this Court to deal with the charge in the same way as would the Magistrates Court and in so doing to apply the relevant provisions of the *Summary Procedure Act 1921*.
>
> Section 56 of the *Summary Procedure Act 1921* relevantly provides:
>
> **56—Exceptions or exemptions need not be specified or disproved by the complainant**
>
> (1) No exception, exemption, proviso, excuse, or qualification (whether it does or does not accompany in the same section the description of the offence in the

41 T892.
42 [2014] SAERDC 37 at [7]-[13].
43 *Development Act 1993* s 105(4).
44 s 7(3a).

Special Act or other document creating the offence) need be specified or negatived in the complaint.

(2) Any such exception, exemption, proviso, excuse, or qualification as aforesaid may be proved by the defendant, but, whether it is or is not specified or negatived in the complaint, no proof in relation to it shall be required on the part of the complainant.

In *Overland Corner Station Pty Ltd & Anor v Gould*[45] White J had occasion to consider the provisions of s 26(1) of the *Native Vegetation Act* ('NVA'), which provided that:

> A person must not clear native vegetation unless the clearance is in accordance with this part. (my emphasis)

Section 27 of the NVA specified the circumstances in which clearance of native vegetation may be cleared without contravening s 26 of the NVA. A question arose as to whether the words 'unless the clearance is in accordance with this part' constituted an 'exception, exemption, proviso or qualification' to which s 56(2) of the *Summary Procedure Act* referred with effect that it was not a matter upon which the prosecution bore the onus of proof, but rather a matter where the onus was on the defendants to bring themselves within the exception. White J identified the following propositions as being discernible in the authorities concerning the application of s 56:[46]

The following propositions are discernible in the authorities concerning the application of s 56 and its equivalents.

(i) The question of whether an enactment contains a provision in the nature of an exemption or proviso for the purposes of s 56(2) is to be resolved by the construction of the statute under which the charge is laid. When some matter is said to be an exception to an offence, the question is whether there is to be discerned a legislative intention 'to impose upon the accused the ultimate burden of bringing himself within it'.

(ii) The focus on the process of statutory construction should be on the substance ('the essence or thrust'), rather than the form, of the statutory provision in question. However, that does not mean that the form of the statutory provision is irrelevant as the way in which a section is set out may be a useful guide to the intention of Parliament with respect to any postulated exception or proviso.

(iii) A qualification or exception which assumes the existence of facts upon which the general rule of liability is based and which depends on additional facts of a special kind is, depending on issues of substance, more likely to be a qualification or exception to which s 56(2) applies, or, as it was put by Dawson, Toohey and Gaudron JJ in *Chugg v Pacific Dunlop*:

> 'One indication that a matter may be a matter of exception rather than part of the statement of a general rule is that it sets up some new or different matter from the subject matter of the rule. '

(iv) If a matter accompanies the description of an offence, then it will ordinarily be construed as an element of the offence which the prosecution must prove, unless there is something in the form of the language used or in the nature of the subject

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45 (2010) 106 SASR 428.
46 Ibid at [28].

matter to suggest that it is an exception upon which the defendant bears the onus of proof.

(iv) There are many authorities indicating that the fact that defendants are likely to have peculiar knowledge bearing upon the application of the exemption or proviso, or enabling them to prove the positive of any negative averment is immaterial in the process of construction involved. However, the circumstance that a relevant fact would be difficult for the prosecution to establish and easy for a defendant to establish might well dispose the legislature to make the proof of that fact an exception within the meaning of s 56. In this respect Dawson, Toohey and Gaudron JJ in *Chugg v Pacific Dunlop* said:

> 'If the new matter is a matter peculiarly within the knowledge of the defendant, then that may provide a strong indication that it is a matter of exception upon which the defendant bears the onus of proof.'

(v) Ultimately, the application of s 56 depends upon a postulated legislative intention which is to be determined by reference to all of the relevant circumstances. This makes it difficult to state any general rule on the subject and can limit the utility of comparison of one case with another.

[Footnotes omitted]

Applying the foregoing to the provisions under consideration here, it is possible to regard the combined effect of ss 32 and 44(1), in the context of tree-damaging activity, as establishing a norm that there should not be unauthorised severing of branches, limbs or stems whilst at the same time contemplating that there may be some limited or exceptional circumstances where such activity will be acceptable. That, in my opinion, is the 'essence or thrust' of the provisions under consideration here.[47]

Understood in this way, I am satisfied that the provisions of s 56(2) apply to a prosecution for this alleged offence such that it is for the defendants to bring themselves within one or more of the exceptions outlined in the Act or Regulations.

I am equally satisfied that the defendants bear an onus to do so on the balance of probabilities.[48]

145 In this trial Mr Crichton and Tempest Trees submitted that *BFR* was incorrectly decided. It was submitted that in *BFR* the defendant was unrepresented and, furthermore, that in *BFR* the Court did not have regard to a number of relevant authorities on the issue of onus in cases such as this.

146 Put simply, the defendants submitted that the reasoning in *Overland* was distinguishable. In *Overland*, so it was submitted, native vegetation could be cleared in certain circumstances, for example, with consent. Accordingly, if a defendant could show that he had prior consent, and therefore bring himself within

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47 See *Overland Corner Station* at [31].

48 *Wollongong City Council v Eusile Pty Ltd* (2008) 71 NSWLR 563 [20].

one of the exceptions (the onus of proving which lay on the defendant), the clearance would be lawful.

147 However, under the Act, there is no reference to TDA being able to be undertaken in certain circumstances. There is, therefore, no exception within which a defendant may bring himself. Rather, the wording of reg 6A(8) simply provides that TDA does not include certain things, one of which is the pruning of less than 30% of the tree crown.

148 So understood, reg 6A(8) may be seen as a provision which 'cuts down' the scope of activities which would otherwise constitute TDA.

149 In those circumstances, the observations of the High Court in *Director of Public Prosecutions v United Telecasters Sydney Ltd*,[49] are apposite.

150 In *United Telecasters,* a segment displayed during the course of the television broadcast, there under consideration, had led to the respondent being convicted for an offence under s 100(5A) of the *Broadcasting and Television Act 1942* (Cth) ('Cth Act'). Section 100(5A) relevantly provided that:

> A licensee shall not broadcast or televise an advertisement for, or for the smoking of, cigarettes or cigarette tobacco …

151 However, s 100(10) of the Cth Act exempted, from the prohibition in subs 5A, the televising of matters of an advertising character which were '*an accidental or incidental accompaniment of the broadcasting or televising of other matter … which the licensee does not receive payment or other valuable consideration for broadcasting or televising the advertising matter'*.

152 In the plurality judgment of Brennan, Dawson and Gaudron JJ, their Honours said:[50]

> Whilst sub-so (10) cuts down the scope of sub-so (5A) it does so by way of definition rather than by way of proviso, exception or saving and there is no reason to suppose that in so limiting sub-so (5A) the legislature intended that the sub-section should operate without limitation unless an accused brought himself within the terms of sub-so (10). (my emphasis)

153 In my view, the circumstances and reasoning in *United Telecasters* are applicable to this case. In this instance, as I said, reg 6A(8) cuts down the scope of s 4 of the Act by way of definition rather than exception.

154 I am satisfied that it does so in a way which does not mean that the severing of branches, limbs and trunks will be TDA, unless and until a defendant can prove that (for the purposes of this case) the pruning has not resulted in more than 30% of the crown being removed.

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[49] (1990) 168 CLR 594.
[50] Ibid at 601.

155 In the result, I am satisfied that the onus of proving that the defendants have undertaken TDA remains on the prosecution.

156 Accordingly, I decline to follow what I said on the issue of onus in *BFR*.

157 The issue of which party bears the onus of proof also arises in relation to counts 4 and 5 with respect to the issue of reasonable excuse.

Counts 4 and 5 – Onus of Proof on Reasonable Excuse

158 In addition to the matters identified in *Overland* and by the High Court in *Chugg*, the principles which determine where the onus should lie, in cases such as this, were further elucidated by the House of Lords in *R v Hunt*[51] (a decision cited with approval by the High Court in *United Telecasters*) where their Lordships said that:

- The burden of proving the guilt of an accused is on the prosecution, subject to any statutory exception;
- Such exception might be expressed or implied;
- The burden can be on the defendant whether the exception appear[s] in the same clause of the instrument or in a subsequent proviso. The burden on the defendant in those circumstances is on the balance of probabilities;
- Where the words of the Act do not indicate clearly where the onus lies, the court should look to considerations to determine Parliament's intention such as the ease or difficulty for the respective parties of discharging the onus and the mischief to which the provision is aimed.

159 Applying the principles enunciated in cases such as *Hunt*, *Overland* and *Chugg*, I am of the view that the onus of showing a reasonable excuse is on Mr Tempest. In this case, the matters relating to reasonable excuse 'depend on additional facts which are of a special kind' and are facts which are clearly easier for the defendant to establish.

160 Consequently, in my opinion, in the event that Mr Tempest did fail to comply with the directions in the s 19 Notice, to obey the Requirements to produce documents and/or answer questions, then it would be incumbent upon him to prove that, for any such failure, there was a reasonable excuse.

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[51] (1987) 1 AC 352.

Issues for Consideration and Determination

161 Against this legal and factual background, the following issues arise for consideration and determination.

1 Is the complainant required to prove TDA with respect to both T1 and T2, or is it sufficient to prove TDA to only one of the trees?

2 What constitutes the '*crown'* of the tree?

3 What is TDA?

4 Did Mr Crichton cause TDA to be undertaken?

5 Are the dates alleged in counts 4 and 5 essential ingredients of the Complaint?

1. Is the complainant required to prove TDA with respect to both T1 and T2, or is it sufficient to prove TDA with respect to only one of the trees?

162 On this issue, in counts 1 and 3, the Complaint relevantly provides that:

> … the … Defendant undertook development, namely, tree-damaging activity in relation to two regulated trees … (my emphasis)

163 This is to be contrasted with count 2 where the Complaint alleges that the second defendant undertook development, namely TDA in relation to a regulated tree.

164 Unaided by authority, I would have been content to accept that an essential element of the offence alleged in counts 1 and 3 is that TDA was undertaken in relation to both T1 and T2. In other words, in my view, the Complaint would not have been proved if the evidence demonstrated, e.g. TDA to only T1, but not T2 or vice versa.

165 However, Mr Crocker relied upon the decision in *Brinkworth v Dendy*[52] in support of his submission that the Complaint would be made out if the complainant could prove TDA to only one of the two trees.

166 I am not persuaded that *Brinkworth* provides support for the complainant's position. In *Brinkworth*, the Complaint alleged that the appellant/defendant had unlawfully cleared native vegetation.

167 On the appeal, the appellant alleged that, the Complaint was bad for duplicity. The duplicity was said to have arisen from the fact that each count in the Complaint stated, by way of particular, that native vegetation had been cleared from a number of separate areas in the land in question.

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[52] (2007) 97 SASR 416.

168 In dealing with this argument, Doyle CJ said:[53]

> The nature of the activity with which s 26 deals suggests that often it will not be possible to identify individually the plants that have been cleared. They might be too numerous to be so identified. Or, even though relatively few in number, the prosecution might be able to prove no more than that native vegetation (described in general terms) was present on the land and that after the relevant activity the native vegetation had gone. The vegetation might have been burned or removed.
>
> Practical considerations suggest that while the prohibited act is the clearance of plants, it should be possible to charge an offence that consists of the clearance of an unspecified number of plants, and that it should be permissible to lay the charge in a form that identifies the place or area where the plants were before they were cleared. Unless this is so, in many situations the prohibition in s 26(1) will be unenforceable.
>
> That in turn suggests that a charge of clearing native vegetation from or on a specified area of land must be a permissible form of charge.
>
> In fact, Mr Peek concedes as much. But once that concession is made, it becomes apparent that Mr Peek's submission relies on the fact that although the charge alleges that clearance of native vegetation from an identified area of land (called "the subject land"), the particulars indicate that the native vegetation in question was at 27 separate locations on that land. But, of itself, that is of no significance. There might have been only 27 plants on the land, or 27 groups of plants, or 270 groups of plants. The fact remains that the charge is a charge of having cleared native vegetation from the subject land, and the particulars indicate that the subject land contained 27 stands or collections or groups of native vegetation. The evidence will disclose the size of those stands or collections or groups, the area they occupy, the relationship between each of the areas, and their relationship to the subject land as a whole. But the charge itself relates to the area referred to as the subject land. I can see no reason why the complaint should be treated as duplicitous because the particulars disclose that the cleared native vegetation was not scattered uniformly across the land, but was in 27 stands or collections or groups.
>
> In short, once it is accepted (as it must be) that a charge of clearing native vegetation can be laid alleging the clearance of an area containing native vegetation (and not identifying individual plants), it must follow that a charge in that form is not on its face bad for duplicity merely because the particulars disclose that the native vegetation was not scattered across the whole of the area, but was found in a number of separate locations within the area.

169 In my view, the situation here is very different from that which applied in *Dendy*. Unlike the current situation, the Complaint in *Dendy* alleged the clearance of native vegetation from a specified area, namely the subject land. Thereafter, the Particulars of the charge detailed some 27 separate locations on that land where unlawful clearance had taken place.

170 Unlike *Dendy* the charge here does not specify TDA on the subject land and then, in the Particulars, identify two trees as being the subject of that TDA. On the contrary, as I earlier indicated, one of the ingredients expressly specified in counts

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[53] Ibid at [34]-[38].

1 and 3 is an allegation of TDA in relation to both T1 and T2. In short, it is in the charge itself (not the Particulars) that a reference to two trees is to be found.

171 It is therefore incumbent on the complainant, if it is to make out the Complaint, to prove all of the elements in those charges which allege TDA to both T1 and T2.

2. What Constitutes the 'crown' of a Tree?

172 The word 'crown' is not defined in either the Act or the Regulations.

173 In fact, the only reference to 'crown' in this context is in reg 6A(8) which states that, for the purposes of the definition of TDA in s 4(1), 'pruning, that does not remove more than 30% of the crown of the tree, is not tree-damaging activity'.

174 In terms of expert evidence as to the meaning of 'crown', in his expert report, Dr Nicolle expressed an opinion in the following terms:[54]

> I have defined the crown as the total of all branches in the tree that have live foliage. In estimating the percentage of the crown that has been removed by the pruning in each of the two trees, I have estimated what percentage of the pre-pruning live foliage was removed at the time of the pruning. In estimating this percentage, I have not considered how far down the branches or trunk the pruning occurred, nor the actual weight of the foliage/branches/wood removed, nor the reduction in aerially-assessed canopy coverage. Thus, if half of the foliage (the live leaves) are removed by a pruning event, I would consider that such pruning has removed 50% of the total tree crown, regardless how far down the branches or trunk the pruning occurred, the actual weight of the material removed, the canopy area removed, or any other factors.

175 Mr Tempest agreed with this view.[55] There is, in that sense, no contest on the evidence. However, in its final submission, the complainant submitted that in determining the meaning of the phrase '*crown of the tree'*, reg 6A(8)(b) should be construed in the following way:[56]

> 35 It is submitted that the correct construction of the regulation is reached by the following anaylsis:
>
> 35.1. The 'crown of the tree' is not comprised solely of 'foliage'. It is comprised of 'dead or diseased wood' (that is dead or diseased branches) and 'branches' (that is healthy wood).
>
> 35.2. Depending upon the season, species of the tree or health of the tree, there may or may not be foliage on the branches.
>
> 35.3. If the tree has no foliage, it still has a crown, comprised of:
>
> 35.3.1. dead or diseased branches, and/or
>
> 35.3.2. healthy branches

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54 Exhibit P5 p 10.
55 T509-510.
56 Outline of Submissions on behalf of the Complainant at [35].

35.4. If a tree has foliage, its crown is comprised of three elements, namely:

35.4.1. the foliage, and/or

35.4.2. dead or diseased branches, and/or

35.4.3. healthy branches.

176 I am not persuaded that the foregoing analysis of r 6A(8) necessarily reveals the true meaning of the word 'crown' for the purposes of the Act and Regulations.

177 This analysis would accord to the word, something in the nature of a term of art and certainly, a meaning different from the way in which it is used in common parlance. In the Macquarie Dictionary '*crown'* is defined as '*the leaves and living branches of the tree'*. In the Shorter Oxford Dictionary it is defined as '*the leafy head of a tree'*.

178 I am not persuaded that it should have anything other than the meaning used in common parlance, which, in turn, has been given expression in the aforementioned dictionaries.[57] In this sense, it may be understood to be a protean word. In the context in which it appears in the Regulations, I take it to mean the live leaves and branches of (in this case) '*Eucalyptus Camaldulensis'*.

179 Understood in this way, the word would not include Mistletoe and nor would it include the dead/dying or otherwise diseased leaves or branches.

3. What is TDA?

180 Applying the meaning I have identified to '*crown'* of a tree, the defendants will have caused TDA if I am satisfied that, of the live leaves and branches in each of T1 and T2 as at 2 October 2015, more than 30% has been removed.

4. Did Mr Crichton cause TDA to be undertaken?

181 In *Hutchison 3G Australia Pty Ltd v City of Mitcham*[58] the High Court had occasion to consider *inter alia* whether *Hutchison 3G* had caused a development to be undertaken as that word was used in the definition of the phrase 'to undertake development' in s 4 of the then *Planning Act 1982*. The wording in s 4 was not relevantly different from the wording used in the section under consideration here.

182 In *Hutchison* 3G, the Court said:[59]

> Nor can it be said that Hutchison caused or permitted a development to be commenced or to proceed. In *R v Hindmarsh Corporation* … the Supreme Court of South Australia (King

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[57] It is not without significance that this meaning is also one which, in general terms, appears to have been adopted by the experts who gave evidence.

[58] (2006) 225 ALR 615.

[59] Ibid at [79].

CJ, Millhouse and Prior JJ) considered the definition of the phrase 'to undertake' development, as it appeared in s 4 of the *Planning Act 1982* (SA). That definition was in terms similar to that which now appears in the *Development Act*. Though he was the dissentient in the outcome of the decision in *Hindmarsh*, King CJ attracted the agreement of Prior J to the proposition that the content of the word 'cause' in the definition was best understood by reference to what was said by this Court (in a different context) in *O'Sullivan v Truth and Sportsman Ltd* … In that case, Dixon CJ, Williams, Webb and Fullagar JJ said: …

> No doubt before [an] end may be said to be 'caused' within the meaning of s 35(1) [of the *Police Offences Act 1953* (SA)], it must appear that it was contemplated or desired. But preliminary or antecedent acts done in such contemplation or out of such a desire do not necessarily amount to a 'causing'… [The provision] should be interpreted as confined to cases where the prohibited act is done on the actual authority, express or implied, of the party said to have caused it or in consequence of his exerting some capacity which he possesses in fact or law to control or influence the acts of the other.

Kitto J spoke to similar effect. His Honour said: …

> [O]ne person cannot be said to cause another's act unless not only does the former express it as his will that the act shall be done by the latter but the latter's decision to do it is a submission to the former's will, that is to say a decision to make himself the instrument of the former for the effectuation of his will.

183 These observations effectively endorsed and confirmed comments previously made by the Full Court, in *R v Marion City Corporation,*[60] per Millhouse J, where his Honour, quoting Walters J in *Burton v Samuels*,[61] said:[62]

> The word 'cause' has a variety of meanings and applications but … I think the word must be taken to mean to bring about or procure the act which is forbidden with some intentional or conscious production of the effect … where it is made an offence for one person to cause another to do an act prohibited by statute, this must be interpreted as confined to cases where the prohibited act is done on the actual authority, express or implied, of the party said to have caused it or in consequence of his exerting some capacity which he possesses in fact or law to control or influence the acts of the other. He must moreover contemplate or desire that the prohibited act would ensue.

184 Elsewhere, the word '*cause'* has been expressed to be, having the power to order and the knowledge of what is being ordered, with an intention that the order will be carried into effect.

185 In context under consideration here, I am of the view that in order to prove its case that Mr Crichton '*caused'* the TDA alleged in count 1, the complainant would need to show that Mr Crichton:

- Had the authority to direct Tempest Trees to undertake the work that was done on T1 and T2;

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60 (1984) 37 SASR 415.
61 (1973) 5 SASR 201.
62 (1984) 37 SASR 415, 429.

- Knew that the work that was undertaken on T1 and T2 would be undertaken; and

- Intended that the work which was undertaken would be undertaken.

5. Are the dates alleged in counts 4 and 5 essential ingredients of the Complaint?

186 In relation to counts 4 and 5, I adhere to the views I expressed on this issue in my earlier decision in March 2018.[63] I am therefore satisfied that the obligation to comply with the requirements of the s 19 Notice was a continuing one.

187 With these considerations in mind, I turn now to set out my findings in relation to each of the counts.

Findings

Count 1

188 I am satisfied beyond reasonable doubt that on or about 2 October 2015:

1 T1 and T2 were situated on land commonly known as 28 Commercial Road, Hyde Park ('the subject land').

2 The subject land was owned by Amy Alice Simons.

3 The subject land was in the area of the complainant.

4 Mr Crichton was a joint owner of land adjacent to the subject land at Unit 1/7 Charra Street, Hyde Park.

5 T1 and T2 are both of the species '*Eucalyptus Camaldulensis'*, commonly known as River Red Gum.

6 Both T1 and T2 had single trunks with circumferences in excess of 2 metres, measured 1 metre above the ground.

7 T1 and T2 were regulated trees.

8 T1 and T2 were significantly infested with Mistletoe.

9 T1 and T2 also contained branches which were variously dead, cracked or structurally unsound.

10 On or around 15 September 2015 Mr Crichton (together with Mr Bendyk) entered into an arrangement with Tempest Trees whereby

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63 *The Corporation of the City of Unley v Crichton & Ors* [2018] SAERDC 13.

Tempest Trees was engaged to perform work on T1 and T2, which work involved the pruning of T1 and T2.

11 The terms of the arrangement required that:

a) T1 and T2 be pruned;

b) The pruning work be carried out in accordance with the law; and

c) The pruning work cease at the respective Crichton/Simons and Bendyk/Simons boundary fences.

12 The manner in which the pruning work was to be undertaken (including the particular branches/limbs to be removed) was left to the exercise of the independent judgement of the arborist undertaking the work.

13 Tempest Trees, in the guise of Mr Cook, carried out pruning work (which involved the severing of live leaves branches and limbs) to no more than 20% of the crown (as I have determined it to mean) of each of T1 and T2. The pruning work actually carried out by Mr Cook exceeded the work authorised by Mr Crichton in that it proceeded past the respective fence lines.

14 Nevertheless, the pruning work undertaken by Mr Cook, which extended beyond the respective fence lines, was undertaken in a professional manner and undertaken in order to obviate any potential for unsightliness and/or disease, which may have arisen from cuts stopping at the fence lines.

15 The degree of Mistletoe infestation and the extent of dead, diseased or cracked branches and limbs was such that a much greater degree of leaves and branches of T1 and T2, than Mr Crichton had anticipated were to be removed, were in fact removed.

189 It follows from these findings that I am quite unable to assess, with any degree of certainty, what was the percentage of total crown[64] which was in fact removed. However, I accept that it was likely to have been considerably more than 30% of the total crown.

Count 3

190 I repeat the findings I have made in relation to count 1.

[64] By the phrase 'total crown' I intend to mean, in addition to the live leaves and branches, the leaves and branches of the trees with Mistletoe, together with the dead, cracked or otherwise diseased wood.

191 In addition to those findings, I am satisfied that in or about September and October 2015, no permission to carry out the pruning work was sought by, or on behalf of, Tempest Trees from Ms Simons.

192 I am also satisfied that on 2 October 2015, Mr Tempest did not tell Mr Cook that he was not to 'cross' the fence line when severing limbs.

193 I repeat that whilst I am satisfied that although no more than 20% of what I have determined to be the crown was removed during the work by Tempest Trees, I am quite unable to say what was the percentage of total crown that was removed.

Count 4

194 In relation to count 4, I am satisfied beyond reasonable doubt that:

1 In August 2016 Mr Weymouth was an authorised officer for the purposes of s 18(1)(a) of the Act.

2 In the exercise of his powers as an authorised officer, Mr Weymouth wrote to Mr Tempest and gave him Notice, pursuant to s 19 of the Act, directing him to produce copies of certain documents.

3 The documents identified by Mr Weymouth were as follows:

- All written payment records which show who the payees were, the amounts paid and the dates on which payments were made if payments were made by electronic funds transfer (EFT) or credit card; and

- All receipts issued to those person(s) who made payment for the Works if payments were made by cash or cheque.

4 Subsequent to receipt of the Notice, Mr Tempest and/or his solicitor, communicated with the Council and/or its solicitors in the course of which there were a series of requests for information.

5 The Council, through its solicitors, responded to these requests for information in a timely and reasonable manner.

6 The documents provided by Mr Tempest, and/or his solicitors, in response to the Notice, comprised a copy of the quotation (with various notations and endorsements) dated 15 September 2015.

7 Mr Tempest could have, but did not, make any attempt to locate and then produce any other documents of the nature sought in the Council's Notice.

8 The reasons advanced by Mr Tempest, and/or his counsel, for not complying with the requirements in the Notice were:

i. his belief that the information in the quotation was a satisfactory response; and

ii. that he was acting in reliance upon and/or awaiting advice from his lawyers.

9 By letter dated 18 January 2017, Mr Tempest's solicitors confirmed that:

- The '*necessary documentation'* had been forward [to the Council] by Mr Tempest;
- This documentation was the only documentation that he had; and
- Sought advice as to whether any 'additional information' was required.

Count 5

195 In relation to count 5, I repeat the findings that I have made in relation to count 4. I make the following additional findings:

1 The questions identified by Mr Weymouth were as follows:

i. What are the full names of the person(s) who paid for the Works?

ii. What amounts were paid by each of the person(s) who made payments(s) for the Works?

iii. On what date were payment(s) for the Works made?

2 Subsequent to the receipt of the Notice, Mr Tempest did not answer any of the questions.

Conclusions

Count 1

196 I am not satisfied beyond reasonable doubt that the work actually undertaken by Tempest Trees on T1 and T2 constituted TDA.

197 Furthermore, and in any event, the authorisation provided by Mr Crichton to Tempest Trees was to undertake work which was specified to be lawful and for work which was less than that actually carried out by Tempest Trees.

198 As a result, Mr Crichton did not <u>cause</u> TDA to either T1 or T2.

Count 3

199 I am not satisfied beyond reasonable doubt that the work actually undertaken on T1 and T2 constituted TDA.

Count 4

200 I am satisfied beyond reasonable doubt that the Direction to comply with a Requirement of an authorised officer was a Requirement which continued after the period of 14 days referred to in the Notice, and constituted a continuing obligation to comply with the requirements in the Notice.

201 I am satisfied beyond reasonable doubt that, in providing only the quotation in response to the requirements in the s 19 Notice, Mr Tempest failed to comply with a requirement of the authorised officer, Mr Weymouth.

202 I accept that it was reasonable for Mr Tempest to seek legal advice and to refrain from responding to the Notice pending receipt of such advice.

203 However, I am satisfied beyond reasonable doubt that it was not reasonable for Mr Tempest to continue not to comply with the requirement after 26 September 2016.

204 In the result, I am satisfied beyond reasonable doubt that Mr Tempest failed to comply with the requirement to supply the documents sought and that his failure to so do was without reasonable excuse.

Count 5

205 I am satisfied beyond reasonable doubt that Mr Tempest did not comply with the requirement to answer questions.

206 I accept that initially his failure to comply was justified upon the basis that he was seeking legal advice. However, after 26 September 2016, I am satisfied beyond reasonable doubt that his continued failure to comply was without reasonable excuse.

Formal Findings

207 Count 1 – I find Mr Crichton not guilty.

208 Count 3 – I find Tempest Trees & Gardens Pty Ltd not guilty.

209 Count 4 – I find Mr Tempest guilty.

210 Count 5 – I find Mr Tempest guilty.