

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Marra v Miles* [2024] QCAT 162

PARTIES: **JOEL WAYNE MARRA**
(applicants)
KRISTINA JAYNE MARRA
(applicants)

v

ANN MILES
(respondent)

APPLICATION NO/S: NDR146-21

MATTER TYPE: Other civil dispute matters

DELIVERED ON: 16 April 2024

HEARING DATE: 23 February 2024

HEARD AT: Brisbane

DECISION OF: Member Poteri

ORDERS:

1. The African Tulip tree situated on the Respondent's property at 54 Alec Avenue, Mermaid Waters, should be removed.
2. The Applicants must arrange contractors with the necessary expertise, permits and insurance to have the tree removed and to grind the stump to ground level.
3. All parts of the tree (and associated rubbish or debris) that have been cut down by the contractors must be removed from the Respondent's property and disposed of by the contractors.
4. The Applicants must pay all costs associated with having the tree removed and disposed of by the contractors.
5. The Applicants must ensure that the area on the Respondent's property from which the tree is removed is left in a clean and tidy condition.
6. The Respondent must allow the Applicants' contractors access onto the Respondent's property to carry out any works to have the tree removed and any parts of the tree disposed of by the contractors. Such access must be allowed on the giving of 7 days' notice by the Applicants to the

Respondent's agent.

- 7. The Applicants must pay the sum of \$400 into the Respondent's nominated bank account by 26 April 2024 to enable her to purchase a replacement tree.**

TREES – VEGETATION AND HABITAT PROTECTION – DISPUTE BETWEEN NEIGHBOURS – Where the Applicants allege that the tree situated on their neighbour's property is affecting the ongoing use and enjoyment of their property by causing leaf debris to accumulate and the tree is likely to cause serious injury to a person or serious damage to property situated on the Applicants' property – Where the Applicants allege that the tree causes substantial ongoing and unreasonable interference with the use and enjoyment of their property – Where the Applicants are seeking an order for the removal of the tree – Where the Respondent denies the allegations of the Applicants.

Biosecurity Act 2014 (Qld)

Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld), s 52, s 53, s 65, s 72, s 73

McDonald v Henry [2013] QCAT 87

APPEARANCES & REPRESENTATION:

Applicant:	Self-represented.
First Respondent:	Represented by K Doroshenko, real estate agent.

REASONS FOR DECISION

- [1] The Applicants, Joel Wayne Marra and Kristina Jayne Marra (*'the Marras'*), are the owners of a residential property situated at 52 Alec Avenue, Mermaid Waters on the Gold Coast.
- [2] The Respondent, Ann Miles (*'Miles'*), is their next-door neighbour and is the owner of a residential property situated at 54 Alec Avenue. Miles is the tree keeper under the provisions of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld)* (*'NDR Act'*).
- [3] This matter was heard before me on 13 and 23 February 2024 by Teams. The Marras represented themselves and Miles was represented by K Doroshenko (*'Doroshenko'*), a real estate agent. Doroshenko informed me that Miles lives overseas and Miles's property is being rented to tenants.
- [4] The Marras filed an application (*'Application'*) in the Tribunal on 8 September 2021. They complain about an African tulip tree that is growing near the common boundary fence as shown in the plan on page 12 of the Application. Their complaints are:

- (a) The tree is a large tree that has grown substantially since the Marras purchased their property in 2017.
 - (b) Leaves and debris from the tree block the gutters and they require cleaning out at least on a monthly basis.
 - (c) Branches from a height of over 6 metres fall onto the Marras's property. The Marras are concerned that these branches may fall and cause injuries to themselves or their children or cause damage to the tiles on their roof, glass pool fencing and the fence in general.
 - (d) The leaves, debris and flowers from the tree block their pool filter and the filter requires daily cleaning to avoid the pool filter pump from burning out (with loss of water through the pool filter system).
 - (e) The leaves, flowers and other debris from the tree are a slipping hazard when this material becomes wet.
 - (f) The tree causes a shadow on the solar panels on their roof.
 - (g) The tree obstructs views from their property.
 - (h) The tree is a declared noxious weed by some local authorities and the tree detracts from the local ecosystem because native bees die in the flowers produced by the tree.
 - (i) Joel Marra says that he has trouble keeping up with the maintenance of the gutters, paths and pool filter because of a health problem with his back.
- [5] Miles says that the tree has sentimental significance. Doroshenko stated that the tree was planted by Miles's mother. She says:
- (a) That she has been pruning the tree to accommodate the Marras's concerns, and she is prepared to regularly prune the tree so that it is not a problem for the Marras.
 - (b) There are many African Tulip trees on the Gold Coast, and she does not believe that the Tree detracts from the ecology or amenity of the area.
 - (c) The tree has not caused any problems or injuries to any persons or property and the tenants of Miles have not made any complaints.
- [6] It is apparent that the issues with the tree have been ongoing for some years with complaints being made to the tenants of Miles and to Doroshenko. Doroshenko says that pruning did occur in 2018 costing \$1,200 and there has been other tree maintenance. Miles says that the reason why some of the correspondence has been ignored is because the Marras's solution is to have the tree removed or for Miles to pay the cost of removing rubbish and debris accumulating in the gutters of the Marras's house. Miles also alleges that the Marras have been aggressive and have made complaints to the tenants of Miles.
- [7] Miles also says that the Marras knew about the tree when they purchased their property, and they built the pool fence in an area which is close to the tree. Miles says that a glass fence, pool and pergola were erected on her property near the tree. She says the tree has

never caused any problems on her property or on the glass fence around the Marras's pool.

- [8] Miles also says that the previous neighbours to the Marras never made any complaints about the tree.
- [9] At the date of the hearings the Marras informed the Tribunal that they have demolished their house and their property is a vacant building site. They intend to erect a new house and make other improvements on their property.
- [10] It seems to me that there is a difference in the version of events leading up to December 2023. However, after a serious storm in December 2023 many branches of the tree fell onto the Marras's property and caused damage to the boundary fence. See the photographs of the aftermath of the storm filed in the Tribunal by the Marras on 6 February 2024. The photographs show that large branches fell from the tree and caused damage to the fence. The photographs were taken from the Marras's property. One of the photographs shows the size of the tree which has a large canopy.
- [11] Doroshenko stated that Miles arranged a clean-up and the damage to the fence was repaired by Miles.
- [12] A joint arborist report was prepared by David Gunter ('*Gunter*') dated 30 August 2022. This report was prepared before the storm of December 2023. The Tribunal called Gunter to give oral evidence. During Gunter's evidence he was informed of the 2023 storm and the damage that the storm caused to the tree. His report and evidence show:
 - (a) The tree is healthy considering all the improvements built around the tree.
 - (b) The tree is approximately 8.5 metres high with a large canopy.
 - (c) Dropped flowers from the tree can be slippery.
 - (d) Gunter noticed leaves from the tree in the Marras's pool.
 - (e) The African Tulip species is a restricted invasive plant under the *Biosecurity Act 2014* (Qld). However, there are many examples of it on the Gold Coast. The species is quick-growing and subject to spreading. There is an obligation on everyone to take steps to minimise the spread of these species. It is unlikely that the tree will spread because the tree is in a confined space.
 - (f) At the time of the inspection there was some overhang over the Marras' property. Gunter says that the tree is fast-growing, and he expects this overhang to increase significantly over the coming years.
 - (g) The tree does afford some shade and amenity to the Miles property.
 - (h) There are two options to deal with the tree. One is its total removal and the other is by a pruning management regime. Miles has agreed to a maintenance pruning as described in Gunter's report. See page 9 of Gunter's report.
 - (i) In evidence Gunter stated that pruning would have to occur every 6 to 12 months.
 - (j) Gunter stated that pruning the tree halfway up the tree would cause problems with the tree and make it weaker.

- (k) When giving oral evidence Gunter was asked if there was potential for the canopy to break off the tree in extreme storm weather. He conceded that this was possible, but he went on to say that this comment could apply to many trees on the Gold Coast during extreme weather.
- [13] I accept the evidence of the Marras. I found them to be open and honest in the way that they gave evidence. I accept their version of events on the substantial impact that the tree has on their ongoing use and enjoyment of their property. These issues include:
- (a) Rubbish and debris in their gutters and the pool.
 - (b) The flowers and debris from the tree are a slipping hazard when wet.
 - (c) There is potential for the branches and/or the canopy of the tree to break off in a cyclone or extreme weather and cause personal and property damage.
 - (d) The Marras have made many complaints to Doroshenko which have been ignored.
- [14] I have some reservations about the evidence of Miles that was provided by Doroshenko. It is my view that Miles was not prompt or diligent in dealing with the Marras's complaints. The history of pruning the tree by Miles indicates that the tree was pruned in 2018 and there was a clean-up when the storm hit the Gold Coast in December 2023. Gunter is suggesting a prune of the tree and canopy every 6 to 12 months. I am not convinced that Miles will adhere to this regime. Miles says that the pruning cost \$1,200 in 2018. I expect that pruning a canopy of a tree that is 8.5 metres off the ground would be expensive, certainly greater than \$1,200.
- [15] Doroshenko says that the tree has sentimental significance to Miles as it was planted by her mother. Gunter also mentions the sentimental value of the tree in his report. However, the wording of clauses 13 and 39 of the response filed by Miles on 6 December 2021 suggests that the tree was on the property when Miles first moved there in 1987. Notwithstanding any possible conflict, I accept that the tree does have sentimental significance to Miles.
- [16] During the hearing the Marras offered to cover the cost of having the tree removed and if necessary, a new replacement tree planted. This offer was rejected by Miles.

FINDINGS

- [17] Miles is the tree keeper. The tree provides some shade and amenity to her property. Pursuant to s 52 of the NDR Act the tree keeper (Miles) must:
- (a) Cut and remove any branches of trees that overhang the Marras's property.
 - (b) Ensure that a tree does not cause serious injury to the Marras, the Marras's property or any property on the Marras's property.
 - (c) Ensure the tree is not a substantial, ongoing and unreasonable interference with the Marras's use and enjoyment of their property.
- [18] The tree is 8.5 metres high with a large upper canopy. The tree is situated some 1.5 metres from the common boundary. The tree is healthy. Two options are open for management of the tree. They are:

- (a) To regularly prune the branches and the canopy of the tree. Gunter suggested that this may have to occur every 6 to 12 months; or
 - (b) The total removal of the tree.
- [19] Because of the history of management of the tree by Miles and the high cost of tree maintenance, I am not persuaded that Miles will keep up regular trimming and maintenance of the branches and the canopy of the tree. I also note the comments in paragraph 44 of the response filed in the Tribunal by Miles on 6 December 2021, where Miles is suggesting that a solution to the problem is for the Marras to trim any overhanging branches of the tree.
- [20] It is correct that pursuant to s 54 of the NDR Act that the Marras have the common law right of abatement to remove any overhanging branches. However, it is the tree keeper's obligation under s 52 of the NDR Act to regularly prune any offending branches.
- [21] The tree has sentimental significance to Miles and evidence was adduced at the hearings that Miles intends to return to live in her house in the future. However, currently Miles is an absentee property owner.
- [22] The tree is an African Violet Tree which is a declared invasive species but is grown on the Gold Coast. The tree does not add to the biodiversity of the area generally. In fact, the flowers of the tree may cause problems with native bees.
- [23] The tree is a fast-growing species requiring regular maintenance.
- [24] I find that it is likely that within the next 12 months large branches and/or the canopy of the tree will break off in extreme weather or in a cyclone. The Gold Coast area, like other areas close to the coast in South-East Queensland, is prone to extreme storms and cyclones. These serious storm events happen frequently within a 12-month period. The branches and the canopy of the tree are extremely heavy, and some branches are approximately 8.5 metres off the ground. If a large branch or the canopy of the tree was to break off in a storm it is very likely to cause serious damage persons or property on the Marras's property, including the common boundary fence. This is a substantial, ongoing and unreasonable interference with the Marras's use and enjoyment of their property.
- [25] The Marras complain about the tree obstructing sunlight from the solar panels on their roof. The tree was present when they purchased the property and they have not provided any analytical evidence from an expert of the impact that the tree has on their solar panels. Therefore, I dismiss this part of their Application.
- [26] The Marras also complain about a loss of views. This issue was not really explored in the hearings. Further, the Marras have not provided any expert evidence to support their claim. Therefore, I dismiss this part of the Application.
- [27] The leaf litter and debris from the tree does cause problems on the Marras's property. These problems include clogging the gutters requiring a monthly clean-out, clogging up the pool filter requiring a daily clean-out of the pool filter and general litter and leaf material on the property.

MATTERS FOR CONSIDERATION BY TRIBUNAL

- [28] In deciding this Application, I must consider the matters that are outlined in s 73 of the NDR Act. The relevant provisions are:

- (a) Location of the tree. The tree is very close to the common boundary fence. The tree is an invasive and fast-growing species but it is healthy.
 - (b) The tree does not add to the biosecurity or public amenity of the area. The tree may be detracting from the biodiversity of the area because the flowers of the tree cause problems for native bees.
 - (c) The tree does add shade, landscaping and amenity to the occupants of Miles's property.
 - (d) The tree does have sentimental significance to Miles.
 - (e) A serious storm is likely to occur on the Gold Coast in the next 12 months. In an extreme storm heavy branches or the canopy of the tree are likely to break off and cause serious injury/damage to persons or property on the Marras's land.
 - (f) The tree causes litter and leaf debris to accumulate in the gutters, pool and other areas on the Marras's property causing significant problems. At times the debris and the flowers from the tree become slippery when wet.
- [29] If the complaint with the tree was just the issue of the debris and the leaf litter, then I would not be inclined to make any orders regarding the tree. The issue of debris and leaf litter is part of urban living. There is clear authority in previous decisions of the Tribunal. See paragraph 25 in the matter of *McDonald v Henry* [2013] QCAT 87.
- [30] I find that the various issues with the tree (as previously outlined in my findings) are likely within the next 12 months to have a substantial, ongoing, and unreasonable interference with the Marras's use and enjoyment of their property.
- [31] I find that pursuant to s 65 of the NDR Act the Marras have made a reasonable effort to reach agreement with Miles.
- [32] The Marras's property is currently vacant land. When the Marras begin construction of their new house, the issues with the tree will apply to persons and property (i.e., contractors, construction material/assets and partly constructed house) during the construction phase.
- [33] The issues with the tree may be minimised by regular tree pruning but given my previous findings I am not persuaded that Miles will adhere to the necessary maintenance regime.
- [34] Miles as the tree keeper wishes to retain the tree as she says that it has sentimental significance for her. Miles also says that the tree is part of the amenity and landscaping of her property. I believe that the Marras's ongoing enjoyment of their property should take priority over Miles's rights.
- [35] I note that pursuant to s 72 of the NDR Act a living tree should not be removed unless the issue relating to the tree cannot otherwise be satisfactorily resolved. It is my view that the ongoing dispute between the Marras and Miles can only be satisfactorily resolved by the removal of the tree.
- [36] As the Marras have offered to pay for the cost of the removal of the tree and the cost of an advanced replacement tree, I propose to make orders for the Marras to pay for the costs associated with the removal of the tree and for the Marras to pay Miles an amount

for a replacement tree. I find that the notional estimated cost of an advanced replacement tree is \$400.