

**CITATION:** *Inslay v Wilson* [2018] QCAT 79

**PARTIES:** Alwyn Edward Inslay  
(Applicant)  
v  
Luke Gilmore Wilson  
(Respondent)

**APPLICATION NUMBER:** NDR206-16

**MATTER TYPE:** Other civil dispute matters

**HEARING DATE:** 1 December 2017

**HEARD AT:** Rockhampton

**DECISION OF:** **Member Deane**

**DELIVERED ON:** 23 March 2018

**DELIVERED AT:** Brisbane

**ORDERS MADE:** **1. The application is dismissed.**

**CATCHWORDS:** ENVIRONMENT AND PLANNING – TREES,  
VEGETATION AND HABITAT PROTECTION  
–  
DISPUTES BETWEEN NEIGHBOURS –  
whether compensation should be ordered  
where three trees fell on house and vehicle in  
category 5 cyclone – where something other  
than the tree contributed to the damage

*Neighbourhood Disputes (Dividing Fences and  
Trees) Act 2011 (Qld), s 41, s 46, s 47, s 52,  
s 61, s 63, s 65, s 66, s 68, s 74*

*Queensland Civil and Administrative Tribunal  
Act 2009 (Qld), s 28*

**APPEARANCES:**

**APPLICANT:** Alwyn Edward Inslay, self represented

**RESPONDENT:** Luke Gilmore Wilson, self represented

## REASONS FOR DECISION

- [1] Mr Inslay and Mr Wilson are neighbours. Mr Inslay's block of land fronts the street. Mr Wilson's land includes a strip of land, used as a driveway adjacent to Mr Inslay's block, leading to Mr Wilson's house, which is set back some distance from the street. During these proceedings, the strip of land was referred to as 'the easement'. There is limited evidence before me about the easement. From the photographic evidence there does not appear to be any fence between Mr Inslay's land and the easement. Its terms were not before me. A copy of the survey plan depicting the easement and its dimensions was not before me. Another neighbour, who was not a party to this proceeding, apparently has the legal benefit of the easement over Mr Wilson's land to access the neighbour's land, which is also set back from the street.
- [2] Mr Inslay's evidence is that there were three trees, which were located on Mr Wilson's land, which fell and caused damage to his house and a vehicle. Mr Wilson conceded at an early time that, during a category 5 cyclone, in February 2015, at least one tree on Mr Wilson's land fell on Mr Inslay's house.
- [3] The evidence is, and I accept, that many healthy trees fell and caused damage during that cyclone in Yeppoon and that as a category 5 cyclone it was an extreme event even for such a region.
- [4] Mr Inslay commenced these proceedings<sup>1</sup> seeking:
- a) to remove a bloodwood tree and a bluegum tree on Mr Wilson's land on the basis that they were an imminent risk of causing damage to Mr Inslay's property, if Mr Wilson did not attend to major pruning or removal of the trees; and
  - b) an order that Mr Wilson pay compensation to him in respect of damage to Mr Inslay's land or property in the amount of \$25,000 caused by other trees on Mr Wilson's land in February 2015.
- [5] A partial resolution of Mr Inslay's claim relating to the bloodwood tree resolved by direction dated 14 September 2017.
- [6] At the hearing, the parties informed me that the only issue remaining in dispute on Mr Inslay's claim was whether Mr Inslay was entitled to compensation for damage caused in February 2015. Mr Wilson had apparently attended to pruning the gumtree referred to in the Application.

### Have all pre-requisites to an order been complied with?

- [7] I am not satisfied that there has been compliance with all of the relevant pre-requisites set out in section 65 of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) (the Act) for the making of an

---

<sup>1</sup> Exhibit 1.

order under section 66 of the Act. On this basis, the application ought to be dismissed.

- [8] Mr Inslay produced a copy of correspondence from his solicitors to Mr Wilson dated 7 December 2015 and 2 September 2016 seeking to resolve this matter prior to bringing this application and copies of correspondence from Mr Wilson's insurer, who declined to offer Mr Inslay any compensation. Apparently, Mr Inslay did not hold insurance himself. In Mr Wilson's insurer's view, the damage was not caused or contributed to by any negligence of Mr Wilson but rather the loss was as a result of an Act of God. The terms of Mr Wilson's insurance policy were not before me. In any event, whether or not Mr Wilson's insurance policy responds to the claim is not a relevant consideration as to whether Mr Inslay has proved an entitlement under the Act to orders.
- [9] I am satisfied that there were reasonable efforts made to resolve this dispute prior to commencing this proceeding.<sup>2</sup>
- [10] A matter I must be satisfied about before making an order under section 66 of the Act is that Mr Inslay has taken all reasonable steps to resolve the issue under any relevant local law, local government scheme or local government administrative process.<sup>3</sup> There is no evidence before me about whether there exists such a scheme or process. Mr Inslay's application at question 6 indicated that there had been no attempt to resolve the dispute in such a way. A review of the Livingstone Shire Council's website does not clearly indicate that it has such a process.
- [11] Another matter I must be satisfied about before making an order under section 66 of the Act is that Mr Inslay gave a copy of the application to the local government authority.<sup>4</sup> Mr Inslay was directed to do so by direction dated 9 February 2017. There is no evidence before me that Mr Inslay complied with this direction nor that the requirement was waived.
- [12] I am not satisfied that a copy of the application was given to the local government authority as required. I am therefore not satisfied that I have jurisdiction to make orders under section 66 of the Act, including the payment of compensation.

**If the pre-requisites had been met, has Mr Inslay proved an entitlement to compensation?**

- [13] Even if I was satisfied that there had been compliance with all of the pre-requisites for the making of an order under section 66 of the Act, I would not be satisfied on the balance of probabilities that Mr Inslay is entitled to an order for compensation under the Act for the reasons set out below.

---

<sup>2</sup> *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld)* (the Act), section 65(a).

<sup>3</sup> *Ibid*, section 65(b).

<sup>4</sup> *Ibid*, section 65(d) and section 63(1)(b).

- [14] Mr Inslay is the applicant and bears the onus of establishing on the balance of probabilities his entitlement to compensation.
- [15] The Tribunal has broad powers to hear and decide  
any matter in relation to a tree in which it is alleged that, as at the date of the application to QCAT, land is affected by the tree.<sup>5</sup>
- [16] Land is '*affected by a tree*' at a particular time if the tree has caused serious damage to the land or any property on the land<sup>6</sup> and the land adjoins the land on which the tree is situated.<sup>7</sup> A tree is situated on land if the base of the tree is or was previously situated wholly or mainly on the land.<sup>8</sup>
- [17] For the purposes of the Act, I accept that Mr Wilson was the tree-keeper of a tree or trees, which fell during the cyclone and Mr Inslay is a neighbour and that Mr Inslay's land was affected by a tree.
- [18] A tree-keeper is responsible for:
- a) the proper care and maintenance of the tree-keeper's tree;<sup>9</sup>
  - b) ensuring a tree does not cause serious damage to a person's land or any property on a person's land.<sup>10</sup>
- [19] The Act specifically provides that section 52 of the Act does not create a civil cause of action based on a breach of a tree-keeper's responsibility.<sup>11</sup>
- [20] The Tribunal has broad powers to make orders it considers appropriate in relation to a tree affecting the neighbour's land to remedy serious damage to the neighbour's land or any property on the neighbour's land.<sup>12</sup> The Tribunal may make an order even if the tree has been completely removed unless the tree-keeper has sold the land on which the tree was situated since the damage was caused.<sup>13</sup> There is suggestion that Mr Wilson had sold the land.
- [21] Where serious damage is alleged, the Tribunal may consider whether anything other than the tree has contributed to the damage including any act or omission of the neighbour and any steps taken by the tree-keeper or the neighbour to prevent or rectify the damage.<sup>14</sup>

---

<sup>5</sup> Ibid, section 61.

<sup>6</sup> Ibid, section 46(a)(ii)(B).

<sup>7</sup> Ibid, section 46(b).

<sup>8</sup> Ibid, section 47(1).

<sup>9</sup> Ibid, section 41.

<sup>10</sup> Ibid, section 52(2)(b).

<sup>11</sup> Ibid, section 52(3).

<sup>12</sup> Ibid, section 66.

<sup>13</sup> Ibid, sections 68(1) and (2).

<sup>14</sup> Ibid, section 74.

- [22] There was a lack of precision in setting out Mr Inslay's claims as a number of trees were referenced without clearly identifying, which tree was being referenced. Further, despite directions, Mr Inslay did not file a statement of evidence setting out his own evidence explaining his account of his conversations with Mr Wilson, what transpired when the cyclone occurred, what the various photographs demonstrated and explaining the quotes.
- [23] In these circumstances, I allowed Mr Inslay an opportunity to explain his case, by way of oral evidence. Mr Inslay was of the view that the documents were self-explanatory as the photographs showed the damage to the house and the vehicle.
- [24] Mr Inslay filed a paginated copy of documents, most of which had previously been filed.<sup>15</sup> His evidence was that photographs showed:
- a) two sizeable trees rather than minor branches leaning on his house after the cyclone.<sup>16</sup>
  - b) the size of the trees, which fell given that the distance between his yard and the neighbour's house is approximately 20 metres.<sup>17</sup> The photograph shows that the trees took up much of that space after they had been cut into pieces.
  - c) the third tree, which fell on the vehicle.<sup>18</sup> Mr Inslay's oral evidence was that the vehicle was parked toward the front of his house.
- [25] During the hearing, Mr Inslay produced a revised map showing the approximate location of the three trees, which fell on his house or the vehicle.<sup>19</sup> Mr Wilson conceded their approximate location although considered they were likely located somewhat closer to the street than as shown on the map.
- [26] I find, on the balance of probabilities, that three trees situated on Mr Wilson's land fell on Mr Inslay's house and a vehicle during a category 5 cyclone in February 2015.
- [27] There is little evidence before me about which species those trees were. Mr Wilson conceded that one of the trees was a mature gum tree.<sup>20</sup>
- [28] Mr Wilson's evidence is, and I accept, that between 1997 and 2015 there were a number of severe weather events affecting his property and that

---

<sup>15</sup> Filed 20 October 2017. During the hearing, I did not give this bundle a separate exhibit number because document number one purported to be a copy of the application together with its annexures. On review, Annexure B contains more photographs than contained in the original application. I refer to the paginated bundle as Exhibit 12.

<sup>16</sup> Exhibit 12, page 41.

<sup>17</sup> Ibid, page 51.

<sup>18</sup> Ibid, page 40.

<sup>19</sup> Exhibit 11.

<sup>20</sup> Exhibit 9 at [6].

the trees, which fell in 2015, did not cause damage in those previous extreme weather events. He also gave evidence that in addition to severe winds, heavy rainfall was associated with the cyclone in February 2015. The evidence is, and I accept, that up to 300 mm of rain was recorded in 6-8 hours on the afternoon and evening of 20 February 2015.<sup>21</sup>

- [29] There was limited evidence before me about the trees that fell onto Mr Inslay's land during the cyclone and limited evidence about whether the damage to Mr Inslay's house and the vehicle were caused by the falling of Mr Wilson's trees or by the cyclonic wind or by other debris or a combination of factors.
- [30] No detailed evidence or report about the damage and its causes was before me. There was no evidence before me about the state of the house or the vehicle before the cyclone. There was no written evidence before me about whether all of the repairs set out in the quotes were associated with the damage caused by the trees falling or other factors or any pre-existing conditions.
- [31] Mr Inslay simply produced a number of photographs and quotes.
- [32] I accept that the three trees, which fell on the house and vehicle, caused at least some of the damage sustained, including allowing rain to enter the house and vehicle, which also caused further consequential damage. '*Serious damage*' is not defined in the Act. I accept that the damage to the house and vehicle, as shown in photographic evidence before me would constitute serious damage.
- [33] No report by an arborist was in evidence before me, however the undisputed evidence was that the trees, which damaged Mr Inslay's house and the vehicle, which were situated on Mr Wilson's land, were healthy prior to the cyclone.
- [34] Mr Nielsen, a tree lopper, gave evidence that:
- a) he is a trainer/assessor and level 2 tree feller but is not a qualified arborist;
  - b) he is trained in risk assessments for the mining industry;
  - c) branches of gum trees are prone to drop;
  - d) at the end of 2014 he looked at the trees for Mr Inslay:
    - i) at that time Mr Nielsen considered that the trees were a hazard, because even though the trees were healthy they were tall given the proximity of Mr Inslay's house;

---

<sup>21</sup> Ibid, Attachment A.

- ii) who did not have the financial resources to pay to have them professionally lopped;
  - e) gum trees are prone to fall in cyclones.
- [35] Mr Inslay's evidence is that he spoke to Mr Wilson about his concerns that Mr Wilson's trees, which fell in the cyclone, might fall on his house. His evidence is that he spoke to Mr Wilson on at least three occasions.
- [36] One occasion was in or near his shed in 2014. Mr Wilson accepted that Mr Inslay mentioned that he should be chopping down his trees in 2014.
- [37] Another occasion was about three weeks before the cyclone hit in February 2015, when Mr Wilson had stopped whilst driving on the easement. Mr Wilson's evidence was that he could not recall this conversation.
- [38] Mrs Lambrick, another neighbour, gave evidence that she overheard part of the conversation between Mr Inslay and Mr Wilson, which occurred on the easement. Her recollection was that the conversation occurred during the cyclone warnings in February 2015 and that Mr Inslay asked Mr Wilson if he could lop the trees and that he pointed to the '*second tree*'. Mrs Lambrick was cross-examined on her evidence. I am satisfied that this discussion took place and that she overheard part of it.
- [39] There was no evidence before me about whether in the time available Mr Wilson could reasonably have secured a tree lopper or arborist to perform the work required. There was no evidence before me of what was the required work.
- [40] The third occasion, upon which Mr Inslay relies, was also on the easement when Mr Wilson was checking his mail. Mr Inslay's recollection was that his brother-in-law was upstairs on that occasion. Mr Wilson's evidence was that he could not recall this conversation.
- [41] Mr Tucker, Mr Inslay's brother-in-law, gave evidence that one Christmas time, when visiting Mr Inslay's house, he recalled seeing Mr Inslay and Mr Wilson talking and Mr Inslay pointing to trees. However, he conceded that he did not really know what was said. I place little weight on this evidence.
- [42] There is limited supporting evidence about the three occasions. Much of the supporting evidence relied upon by Mr Inslay, given by friends and relatives, is simply that Mr Inslay discussed with them his concerns about Mr Wilson's trees. This is not evidence that Mr Inslay discussed his concerns with Mr Wilson.
- [43] Some of the supporting witnesses state that Mr Inslay mentioned to them that he had contacted the neighbour about his concerns. This is hearsay evidence. Some of them do not identify that the relevant neighbour to which they refer was in fact Mr Wilson. Hearsay evidence is not generally

admissible as evidence of the truth of what a person was told, as distinct from evidence that a person was told something. Whilst the Tribunal is not bound by the strict rules of evidence<sup>22</sup> I place little weight on this hearsay evidence.

- [44] Mr Inslay's oral evidence was that he was only concerned about the trees within falling distance of his house, as distinct from other trees on Mr Wilson's land and that he pointed to the trees when discussing it with Mr Wilson.
- [45] I accept Mr Inslay's evidence that he was concerned about trees on the easement falling on his house.
- [46] Mr Wilson's evidence, which I also accept, was that he could not recall any specific concerns being raised about specific trees.
- [47] In view of the lack of specificity in the way Mr Inslay conducted this proceeding and gave his evidence, I find it is more likely than not that he did not make his concerns clear to Mr Wilson about which trees he had an issue with and why he had an issue with them.
- [48] Mr Inslay acknowledged that:
- a) he had never formally requested Mr Wilson remove specific trees prior to the trees falling in the cyclone; and
  - b) he had never presented to Mr Wilson a report by an arborist or other relevant information from an expert, including the advice from Mr Nielsen, the tree lopper, about the likelihood of specific trees falling in the direction of his house.
- [49] There is no evidence before me that Mr Wilson was aware that gum trees are prone to drop branches or prone to fall in cyclones or prone to fall after a lot of rain.
- [50] A number of Mr Inslay's witnesses essentially gave evidence that Mr Wilson did not carry out regular maintenance of his trees in the same way, which the previous owner carried out maintenance and that the trees posed a risk to Mr Inslay. I place little weight on this evidence because it was quite vague<sup>23</sup> and based on observations by people, who did not hold relevant qualifications to express such opinions. I do not doubt that each of them gave their evidence honestly.
- [51] There is little evidence before me about what Mr Wilson's regime for the maintenance of his trees had been. However, as previously identified in these reasons the trees, which fell, were healthy. Mr Inslay did not produce evidence of the maintenance or lopping short of removing the

---

<sup>22</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (QCAT Act), section 28(3)(b).

<sup>23</sup> The trees to which reference was being made were not specified.

trees, which Mr Wilson ought reasonably to have undertaken to minimise the likelihood of the trees causing damage or falling.

[52] Mr Inslay's position is largely that:

- a) Mr Wilson had not trimmed the trees regularly since he purchased his land in 1997 and in that time the trees had grown sufficiently tall so that if they fell in the direction of his house they would hit it;
- b) it is well known that gum trees are prone to fall in cyclones;
- c) Yeppoon is in a region prone to cyclones;
- d) Mr Wilson had a duty to maintain the trees so he shouldn't have needed to ask Mr Wilson to lop or remove the trees;
- e) the tops of the trees did not snap, they came out '*roots and all*';
- f) they live on the top of a hill so that it is to be expected that it is windy;
- g) it is to be expected that trees will fall over after a lot of rain.

[53] Mr Wilson's evidence was that the trees were mature when he bought the land. There is no clear evidence before me about how much the trees had grown or the extent to which they had been trimmed.

[54] Whilst the primary consideration under the Act is the safety of any person<sup>24</sup> the Act also recognises the importance of trees in residential neighbourhoods. It makes clear that a living tree should not be removed or destroyed, unless the issue cannot otherwise be satisfactorily resolved.

[55] Mr Wilson's evidence is that if he had known that the trees were likely to drop branches or told of the specific risk of specific trees falling he would have done something about it.

[56] On the evidence before me, I find that something other than Mr Wilson's three trees has contributed to the serious damage sustained.

[57] Those other things are the winds and heavy rainfall associated with a category 5 cyclone. I find that it is more likely than not that the wetness of the soil contributed to the trees falling over in the high winds.

[58] Another matter, which contributed to the serious damage sustained, was Mr Inslay's failure to inform Mr Wilson in a clear way of the information he received from Mr Nielsen about Mr Nielsen's hazard/risk assessment. As stated earlier in these reasons, I am not satisfied that Mr Inslay made Mr Wilson aware of specific concerns about specific trees.

---

<sup>24</sup>

The Act, section 71.

- [59] In these circumstances, I am not satisfied that an entitlement to compensation has been established, even if the pre-requisites had been established.
- [60] I make some further comments about the evidence of loss.
- [61] Mr Inslay produced quotes to repair the damage to his land and property, namely his house and a vehicle, totalling \$28,595.39. The quotes were as follows:
- a) Ray Burrows Plastering – to remove and dispose of water damaged plasterboard and re-sheet in the sum of \$1,950.
  - b) Ultimate Flooring Xtra – pull up and dispose of existing carpets and to supply and install new carpet in the sum of \$2,038.60.
  - c) Keppel Coatings – painting interior and exterior in the sum of \$2,061.95.
  - d) Marty Flowers, builder – to repair cyclone damage to dwelling as listed in the sum of \$18,266.60 (incl GST).
  - e) Yeppoon Panel & Paint – to repair a Toyota land cruiser in the sum of \$4,278.24 (incl GST). This quote notes the owner as Jay Inslay, who I understand is Mr Inslay's son. Mr Inslay's oral evidence is that he is the owner of the vehicle but that he allows his son to use it. In the absence of evidence to the contrary, I accept that Mr Inslay is the owner of the vehicle.
- [62] Mr Inslay's oral evidence was that he only obtained one quote for each item of work. Mr Wilson contended that Mr Inslay ought to have obtained more than one quote but did not lead any specific evidence himself as to the reasonable costs to repair.
- [63] Mr Wilson also contended that Mr Inslay, a carpenter, and some associates had repaired his house and he ought not be permitted the costs claimed if I found he was liable to pay compensation.
- [64] During the course of the hearing, arrangements were made for Mr Flowers to give oral evidence by telephone about his quote and be questioned by Mr Wilson and by myself. Mr Flowers gave frank evidence. His evidence, which I accept, was that Mr Inslay had performed temporary repair work before he attended to provide his quote and that his quote did not factor in any premium arising out of being particularly busy at the time.
- [65] I accept Mr Inslay's evidence, which was supported by Mr Flower's evidence, that he had made some temporary repairs to the house but had not yet rectified the damage to the house to which the quotes relate.
- [66] Mr Wilson and I questioned Mr Inslay about the various quotes and the need for the items of work. Based on the evidence before me, it is likely that most of the work set out in the quotes in respect of the house was

required to repair damage arising from the two trees falling on the house and the consequential damage from rain entering the house.

- [67] During the course of the hearing, Mr Inslay gave evidence that:
- a) the vehicle was parked in the front yard during the cyclone as the garage had two other vehicles in it and was full and there was nowhere else for it to be parked in the cyclone;
  - b) his son had repaired the damaged vehicle himself rather than Yeppoon Panel & Paint;
  - c) his son had acquired some parts, he assumed from wreckers;
  - d) he was unable to inform me of the actual costs incurred;
  - e) his son was not available to give evidence of the costs actually incurred in repairing the vehicle.
- [68] Mr Wilson submitted that parts bought through a wrecker were likely to be less costly than the quote provided. Intuitively that submission has attraction but there is no evidence before me to allow me to make such a finding.
- [69] There is no evidence of the actual loss incurred in respect of the vehicle and insufficient evidence before me upon which I could rely to estimate the loss if I was minded to award compensation. In light of the evidence that the vehicle had been repaired other than by the supplier of the quote I cannot accept the quote as evidence of the loss sustained.

### **Use of easement**

- [70] Mr Wilson sought orders to restrict Mr Inslay's use of the easement. Mr Wilson was unable to refer me to any basis upon which I could rely to be satisfied that the Tribunal has jurisdiction to make such an order.
- [71] I am not satisfied that I have jurisdiction in these proceedings to make any such order, which is in the nature of an injunction in respect of a claim for trespass.
- [72] The Tribunal is a creature of statute. It has no inherent power. It must find its power to make orders either in the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (QCAT Act) or in an enabling Act, such as the Act. The Tribunal has limited jurisdiction relating to claims in trespass in relation to certain building disputes under section 77 of the *Queensland Building and Construction Commission Act 1991* (Qld). This is not a building dispute. I do not consider the issue further.