

# QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Bool v Constable* [2019] QCAT 99

PARTIES: **CAROL DAWN BOOL**  
(applicant)  
v  
**STUART WILLIAM CONSTABLE**  
(respondent)

APPLICATION NO/S: NDR167-18

MATTER TYPE: Other civil dispute matters

DELIVERED ON: 8 April 2019

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Senior Member Brown

ORDERS:

- 1. Carol Dawn Bool must file in the Tribunal two (2) copies and give to Stuart William Constable one (1) copy of an application for leave to proceed pursuant to s 49(2) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) within 14 days of the date of this decision.**
- 2. If Carol Dawn Bool fails to comply with direction 1, the proceeding will be dismissed.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – AMENDING, VARYING AND SETTING ASIDE JUDGMENTS AND ORDERS - ACTIONS TO REVIEW OR SET ASIDE JUDGMENT OR ORDER – where application to reopen under s 138 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) – whether decision by consent in a proceeding is a proceeding heard and decided by the tribunal – whether decision by consent in a proceeding is a dismissal of the proceedings under s 47 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) – where proceeding of the same kind relating to the same matter – consideration of s 49(2) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) – where leave of the president or the deputy president required before starting proceeding

*Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 47, s 49, s 133, s 136, s 138

*Barry-O'Neill v Masters & Anor* [2018] QCAT 415 (4 December 2018)  
*Bessarab Pty Ltd v Slater Leahy Investments* [2011] QCATA 298 (27 September 2011).  
*Bielby v Beilby & McGrath* [2010] QCAT 649 (22 December 2010)  
*Lindgren v Aaron Trigg Painting* [2011] QCATA 267 (24 January 2011).  
*Ramke Constructions Pty Ltd v Queensland Building Services Authority* [2012] QCAT 417 (30 August 2012)

REPRESENTATION:

Applicant: Self-represented  
 Respondent: Self-represented

APPEARANCES:

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld).

**REASONS FOR DECISION**

- [1] Ms Bool and Mr Constable live on adjoining waterfront properties on the Gold Coast. Ms Bool complains that trees situated on Mr Constable's land are affecting her land. She has filed an application for a tree dispute. This is the second application for a tree dispute brought by Ms Bool against Mr Constable.
- [2] The tribunal has directed that the present application for a tree dispute proceed as an application to reopen the earlier proceeding. The parties were directed to file submissions on the reopening application. The application to reopen now falls for determination.

*The statutory framework – Reopening proceedings*

- [3] By s 138(1) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('QCAT Act') a party to a proceeding may apply to the tribunal for the proceeding to be reopened if the party considers a reopening ground exists for the party. A reopening ground means:
- (a) the party did not appear at the hearing of the proceeding and had a reasonable excuse for not attending the hearing; or
  - (b) the party would suffer a substantial injustice if the proceeding was not reopened because significant new evidence has arisen and that evidence was not reasonably available when the proceeding was first heard and decided.<sup>1</sup>
- [4] The provisions of the QCAT Act dealing with applications to reopen a proceeding are contained in Chapter 2, Part 7, Division 7. By s 136 of the QCAT Act, Division

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<sup>1</sup> QCAT Act, sch 3 (definition of 'reopening ground').

7 is stated to apply to a proceeding, other than an appeal, that has been heard and decided by the tribunal.

[5] The tribunal may grant an application for reopening only if the tribunal considers:

- (a) a reopening ground exists for the applicant party; and
- (b) the ground could be effectively or conveniently dealt with by reopening the proceeding under this division, whether or not an appeal under part 8 relating to the ground may also be started.<sup>2</sup>

[6] If the tribunal decides to grant an application to reopen, the tribunal may:

- (a) confirm or amend the tribunal's previous final decision in the proceeding; or
- (b) set aside the tribunal's previous final decision in the proceeding and substitute a new decision.<sup>3</sup>

[7] If an application for reopening is successful, the proceeding cannot be reopened again.<sup>4</sup>

*The background to the tree dispute*

[8] Ms Bool filed an application for a tree dispute in the tribunal in 2015 (the earlier proceedings). Ms Bool complained about the impact of two cadaghi trees situated on Mr Constable's land. Ms Bool said that the trees posed a risk of serious damage to 'pool mechanisms, water quality and use of the entertaining areas'.<sup>5</sup> Ms Bool also referred in her application in the earlier proceedings to leaf litter from the trees being deposited into the gutters of her residence. Ms Bool's application included a diagram identifying the location of the trees. There are in fact four trees identified including an umbrella tree.

[9] Mr Constable filed a response in the earlier proceedings and the matter proceeded to a compulsory conference on 19 April 2016. The only direction made following that conference was that the parties each pay \$500.00 towards the costs of the Tribunal appointing a tree assessor.

[10] The Tribunal appointed an arborist, Ms Allen, to undertake an assessment of the trees. In her report<sup>6</sup> Ms Allen noted that the cadaghi trees had, in her opinion, been adequately pruned in the past to reduce the spread and foliage overhanging Ms Bool's land. Ms Allen did not provide an opinion as to the effects of the trees on Ms Bool's land. Ms Allen considered that the 'topping' (ie reduction in height) of the trees would be in breach of Australian Standard AS4373 (2007) *Pruning of amenity trees* and that complete removal of the trees was unnecessary and unwarranted to mitigate or remedy the claimed effects of the trees. Ms Allen made no mention in her report of the umbrella tree or any other trees.

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<sup>2</sup> Ibid, s 139(4).

<sup>3</sup> Ibid, s 140(4).

<sup>4</sup> Ibid, s 140(6).

<sup>5</sup> Application for tree dispute filed 4 December 2015.

<sup>6</sup> Report of Jan Allen dated 22 July 2016

- [11] A further compulsory conference was held on 25 August 2016. The matter resolved at the compulsory conference by agreement between the parties. A written agreement was signed by the parties and placed on the record for the proceeding. Whether an agreement reached at a compulsory conference, not in the form of a consent order, forms part of the record for the proceeding is not a matter I am required to determine in this application. I would however express some significant reservation as to whether it does or, indeed, should. I will nevertheless have reference to the agreement insofar as the *fact* of the agreement being reached is relevant to the determination of the present application.
- [12] The agreement provided that each of the parties would undertake certain tree related works. Relevant to the present application, Mr Constable agreed to trim the umbrella tree back to the fence line and to trim the cadaghi trees to the extent recommended by an arborist, including over the beach. The parties agreed that they would have annual meetings to discuss any ongoing concerns in relation to the trees. The agreement does not specify which trees are being referred to in relation to the annual meetings.
- [13] Following the compulsory conference, the Tribunal made a decision in the proceedings, by consent, dismissing the application.<sup>7</sup>
- [14] On 14 August 2018 Ms Bool commenced the present proceeding. Ms Bool complains about the cadaghi trees and repeats much of what she said in her earlier application about the effect of the trees on her land. In addition to the cadaghi trees, Ms Bool complains about ‘intertwined Rubber and Umbrella trees’.<sup>8</sup> Ms Bool says that Mr Constable has not complied with the agreement between the parties and that the trees have only undergone ‘minor tree trimming’.
- [15] Ms Bool has filed a report by an arborist, Mr Reid who identified the trees situated on Mr Constable’s land as two cadaghi trees, a number of umbrella trees and an Illawara flame tree.<sup>9</sup>

*The reopening application – the submissions by the parties*

- [16] Ms Bool says that she would suffer a substantial injustice if the proceedings are not reopened on the basis that the cadaghi trees and entwined umbrella trees and flame tree continue to impact upon her land. Ms Bool says that the ‘mass’ of the cadaghi trees has been ‘bulked up’ by the ‘heavily entwined umbrella trees’.<sup>10</sup> Ms Bool says a number of other things about the trees that need not be addressed for present purposes.
- [17] In his submissions, Mr Constable says that the cadaghi trees have been trimmed. He refers to a report by an arborist, Mr Lonsdale.<sup>11</sup> Mr Lonsdale says that the cadaghi trees were trimmed in October 2016, in May 2018 and in June 2018. Various tree works were undertaken including reducing and removing epicormic regrowth, reduction of lateral branches and raising the tree canopy. Mr Lonsdale opines that

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<sup>7</sup> Decision, NDR180-15 dated 25 August 2016.

<sup>8</sup> Application filed 14 August 2018.

<sup>9</sup> Report Craig Reid dated 24 September 2018.

<sup>10</sup> Applicant’s submissions filed 16 November 2018.

<sup>11</sup> Report Simon Lonsdale dated 17 September 2018.

the work required to contain the tree within the lot has been achieved. Mr Constable says that he has abided by the terms of the agreement between the parties.

*Consideration*

- [18] An application for reopening can only be made in a proceeding that has been heard and decided by the tribunal. A proceeding is heard and decided when there is a hearing on the merits followed by a decision. Aside on the papers hearings, this involves, generally speaking, the parties giving evidence, where appropriate the evidence being tested, submissions by the parties, the making of factual findings by the tribunal, the application by the tribunal of the law to the facts as found and a final decision.<sup>12</sup>
- [19] The earlier proceeding was not ‘heard and decided’ as required by s 136. There was no hearing on the merits. The decision of the tribunal on 25 August 2016 dismissing the application, whilst a final decision, was made with the consent of both parties after they had reached agreement to resolve the matter at a compulsory conference. Accordingly, Ms Bool cannot avail herself of the reopening provisions in the QCAT Act.
- [20] Under the QCAT Act, an application to renew a decision can be made if it is not possible for the tribunal’s final decision in a proceeding to be complied with or there are problems with interpreting, implementing or enforcing the tribunal’s final decision in a proceeding.<sup>13</sup> There can be no suggestion that either of these renewal grounds apply to the final decision in the earlier proceeding. Ms Bool, therefore, cannot avail herself of the renewal provisions in the QCAT Act.
- [21] That leaves the question of what is to be done regarding these proceedings which relate, in large part, to the same matters as the earlier proceedings. The starting point is to examine the way in which the earlier proceedings were brought to an end. This in turn requires a consideration of the QCAT Act and the way in which proceedings in the tribunal may be brought to an early end.
- [22] Chapter 2, Part 5, Division 1 of the QCAT Act deals with ending proceedings early. A proceeding may be brought to an early end in one of three ways:
- (a) A party may file and serve a notice of withdrawal;<sup>14</sup>
  - (b) A proceeding may be dismissed on the grounds that it is frivolous, vexatious or misconceived, lacking in substance or otherwise an abuse of process;<sup>15</sup>
  - (c) A proceeding may be dismissed on the grounds that a party is unnecessarily disadvantaging another party.<sup>16</sup>
- [23] In addition to the ways in which a proceeding may be brought to an early end outlined above, the tribunal may make a final decision if a party fails to attend a

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<sup>12</sup> See for example *Ramke Constructions Pty Ltd v Queensland Building Services Authority* [2012] QCAT 417 (30 August 2012); *Bielby v Beilby & McGrath* [2010] QCAT 649 (22 December 2010); *Barry-O’Neill v Masters & Anor* [2018] QCAT 415 (4 December 2018).

<sup>13</sup> QCAT Act, s 133(1).

<sup>14</sup> *Ibid*, s 46(1).

<sup>15</sup> *Ibid*, s 47.

<sup>16</sup> *Ibid*, s 48.

compulsory conference.<sup>17</sup> However it should be noted that, for the purposes of the reopening provisions of the QCAT Act, a *hearing* of a proceeding includes a compulsory conference if the proceeding is decided under s 72(1)(b) of the Act. Aside the application s 72(1)(b) of the QCAT Act, the various ways in which a proceeding may be brought to an early end clearly contemplate that there has been no hearing and determination on the merits. The tribunal, being a creature of statute, has only those powers given to it by the QCAT Act and various enabling Acts. Neither the QCAT Act, nor the *Queensland Civil and Administrative Tribunal Rules 2009* (Qld), provide any mechanism, other than as set out above, for bringing proceedings to an early end.

- [24] The consequence of the compromise reached by the parties in the earlier proceedings was the decision by the Tribunal to dismiss, by consent, the application for a tree dispute. This was presumably on the basis that, pursuant to s 47(1)(b) of the QCAT Act, the proceeding no longer had any substance, the dispute having been resolved. There was, in my view, no other basis upon which the order could have been made. There can be no doubt that the decision to dismiss the application was a final decision.<sup>18</sup>
- [25] By s 49(2) of the QCAT Act, where a proceeding is dismissed or struck out under s 47, another proceeding or a part of a proceeding of the same kind, relating to the same matter, can not be started before the tribunal without the leave of the president or the deputy president. It is therefore necessary to consider whether the present proceedings are of the same kind, relating to the same matter, as the earlier proceedings.
- [26] In the Application filed in the present proceedings, in response to the question ‘Have you tried to resolve the dispute with the respondent?’ Ms Bool states:

Starting with a friendship and discussions about invasive trees and plants, with some being removed. After a cyclonic weather episode and a outing (sic) incident, proceeded with a 2016 QCAT NDR180-15 application, resulting in Mediation which is proving unsuccessful, resulting in further letters, meetings and discussions with recorded minutes, without any result or compromise.<sup>19</sup>

- [27] Ms Bool also says in her application:

The first QCAT hearing (whilst not at the time listing the full problems these trees created) resulted in a mediation agreement to control and reduce the trees growth in height, spread and overhang. My partner was not completely happy with the wording realising that all of the onus to comply was held by Mr Constable, thus would not sign the agreement. To date the agreement has been futile because nothing has changed with just minor tree trimming. The agreements wording has been manipulated with Mr Constable and his Arborist’s decisions on the trees health, resulting in very minor trimming, that will never reduce the trees impact on adjoining neighbourhood properties.

Every thinkable excuse ‘cliché’ over time to now has been used to avoid trimming the Cadaghi trees, such as, ‘cannot afford costs of trimming’, too high to climb for trimming, ‘trees are not a problem you are’, why did you buy

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<sup>17</sup> Ibid, s 72(1)(b)(i).

<sup>18</sup> Ibid, sch 3 (definition of ‘final decision’).

<sup>19</sup> Application filed 14 August 2018.

your home knowing the Cadaghi trees were there', to my beach & wharf Cadaghi trees excessive overhang "you don't own the beach", 'need our privacy and shade', 'Arborists declaring the tree's health will be affected if over 10% is trimmed at 2-year intervals' and so on.<sup>20</sup>

- [28] It is clear from the application that Ms Bool is complaining about the same trees as were the subject of the earlier proceedings. Ms Bool also says the impact of the trees on her land and property on her land are the same as was alleged in the earlier proceedings. It is also clear from the application that Ms Bool asserts Mr Constable has not complied with his obligations under the agreement to resolve the earlier proceedings. That the relief sought is the result of what Ms Bool considers Mr Constable's failure to comply with the agreement is made clear from the Application where she states:

Unfortunately the only way that I can see relief is this time to petition for the removal of the Cadaghi, Rubber and Umbrella trees, mainly because as a tree keeper Mr Constable will never trim his existing trees (that are declared weeds) to reduce, or even stop the problems they cause me, is to instigate this 2<sup>nd</sup> complaint to QCAT.

- [29] Ms Bool does not, in her application, seek orders enforcing the agreement. She wants the trees to be removed.
- [30] The present proceedings are of the same kind as the earlier proceedings, being a tree dispute. The present proceedings relate, substantially, to the same matters as the earlier proceedings, that is to say the impact of Mr Constable's two cadaghi trees upon Ms Bool's land. One need only have reference to the diagrams contained in the application in the earlier proceedings and the present application, identifying the location of the trees, to form the view that both disputes relate to the same trees. Accordingly, Ms Bool was not entitled to commence the present proceedings without first obtaining the leave of the president or the deputy president of the tribunal. Leave may be given if the president or the deputy president considers the interests of justice requires it.<sup>21</sup>
- [31] There are sound reasons why a party cannot commence another proceeding of the same kind relating to the same matter as an earlier proceeding without leave. There must be finality in litigation. Parties must be able to order their affairs having certainty in relation to the outcome of litigation. Where parties reach agreement to resolve litigation it is usually the case that the terms of the agreement will determine the parties' rights. If a party fails to adhere to the terms of an agreement the aggrieved party may seek to enforce the agreement. That is not however what has occurred here. Having reached an agreement to resolve their dispute, Ms Bool is dissatisfied with Mr Constable's efforts to comply with the terms of the agreement. She now seeks an outcome quite different to that the parties previously agreed to. Rather than turning to the agreement for relief, she seeks to disregard the agreement in commencing these proceedings, seeking far more extensive orders being the total removal of the trees. By commencing these proceedings, Ms Bool is seeking to re-litigate the dispute the subject of the earlier compromise.

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<sup>20</sup> Ibid.

<sup>21</sup> Ibid, s 49(3).

- [32] However, s 49(2) of the QCAT Act stands in Ms Bool's way. Until such time as Ms Bool obtains leave pursuant to s 49(2), she may not proceed with a claim against Mr Constable.
- [33] I note the decisions of the QCAT appeal tribunal in *Lindgren v Aaron Trigg Painting*<sup>22</sup> and *Bessarb Pty Ltd v Slater Leahy Investments*<sup>23</sup>. In both matters, which concerned leave being sought pursuant to s 49(2) of the QCAT Act, the appeal tribunal waived the requirement for compliance with certain procedural requirements.
- [34] The tribunal has directed that the application for a tree dispute filed by Ms Bool proceed as an application for reopening. I have determined that there is no basis upon the earlier proceeding can be reopened nor is there any basis to renew the final decision of the tribunal in the earlier proceeding.
- [35] Accordingly, I will make a direction that Ms Bool must file an application for leave to proceed pursuant to s 49(2) of the QCAT Act within 14 days of the date of this decision. I will make a further direction that if Ms Bool does not file an application for leave to proceed, the present proceedings will be dismissed.

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<sup>22</sup> [2011] QCATA 267 (24 January 2011).

<sup>23</sup> [2011] QCATA 298 (27 September 2011).