

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Sullivan and Sullivan v Turner* [2020] QCAT 82

PARTIES: **TOBY COLIN SULLIVAN AND JESSICA ROSE SULLIVAN**
(applicants)
v
GWENYTH TURNER
(respondent)

APPLICATION NO: NDR121-18

MATTER TYPE: Other civil dispute matters

DELIVERED ON: 4 March 2020

HEARING DATE: 2 December 2019

HEARD AT: Townsville

DECISION OF: Member Pennell

ORDERS:

1. That the applicants be at liberty to engage a suitably qualified arborist to undertake pruning of the mango tree situated on the common boundary of the properties owned by both parties;
2. That any pruning of the mango tree is to be undertaken by a suitably qualified arborist pursuant to the recommendations of the ‘arborist report’, and in particular any pruning of the tree should:
 - (a) be back past the common boundary by utilising the collar cut pruning method to the Australian Standard; and
 - (b) be only to reduce the overall size of the tree to a height of no less than 10 metres.
3. That the respondent will allow an arborist or any other person acting under the direction of the arborist or under the direction of the applicants to enter the respondent’s property for a reasonable time for the purpose of undertaking the pruning of the mango tree.
4. Any costs associated with the pruning of the mango tree are to be borne by the applicants.

CATCHWORDS: ENVIRONMENT AND PLANNING – TREES,
VEGETATION AND HABITAT PROTECTION –
DISPUTES BETWEEN NEIGHBOURS – dispute

between neighbours – where the applicants filed an application for resolution of a tree dispute – where the applicants claimed a tree interfered with the use and enjoyment of their land –whether the tree was likely to cause serious injury or damage – where the tree has substantial overhang onto the applicants’ property – where the tree is growing on both sides of a common boundary – where a tree-keeper is responsible for proper care and maintenance of the tree

Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld), s 3, s 12, s 14, s 15(1), s 45, s 46, s 48, s 48(1)(a), s 52, s 65 and s 66.

APPEARANCES & REPRESENTATION:

Applicant: Self represented
Respondent: Self represented

REASONS FOR DECISION

- [1] This is a tree dispute arising out of the failure of two neighbours to reach an agreement regarding a large mango tree¹ (‘the tree’). The tree is growing on the common boundary between their two properties. The applicants are Toby and Jessica Sullivan who live at 17 Garrick Street, West End, Townsville. They purchased their home and moved in sometime around 2012. The respondent is Gwyneth Turner. She has lived in the neighbouring property at 15 Garrick Street since her family moved into that address in 1958 when she was a small child. She has remained living in those premises since that time. In 1996 she purchased the property in her own right.²
- [2] The tree which is considered to be over 80 years old.³ Understandably it is a very large and well-established tree. It stands approximately 20 metres in height with its foliage spanning approximately 10 to 15 metres in radius out from the trunk. The trunk itself encompasses the common boundary between the properties owned by the parties.

The parties’ competing cases

- [3] Since 2013, there have been multiple attempts by the applicants to resolve or negotiate a solution with the respondent in regard to the issues relating to the tree. In 2017, the applicants initiated mediation with the respondent, however she did not respond to letters or phone calls from the dispute resolution service which had been engaged. In 2018, the applicants engaged solicitors and correspondence was sent to

¹ *Mangifera indica*.

² Both parties are the owners of their own properties. There is no dispute between the parties that they each fall within the ambit of the provisions of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld)*, s 15(1).

³ The mango tree is clearly shown in a 1938 aerial photograph of the properties belonging to the parties.

the respondent with an attempt to initiate negotiations between the parties about resolving the issue. All attempts by the applicants to enter into any type of meaningful or fruitful discussions with the respondent have been met with a negative response.

- [4] The applicants' position is that there is a necessity for the tree to be pruned because it drops large limbs and leaf litter into their yard. When in season, the tree also drops its fruit into their yard. Other added concerns relate to the tree attracting fruit bats during the mango season, who in turn deposit bat faeces onto the roof of the applicants' house, as well as on the walls of the house and the living area consisting of the rear patio. That in itself creates a health risk.
- [5] Another concern raised by the applicants relates to the shade from the tree restricting the effectiveness of the solar panels which are fixed to the roof of their house. The applicants also argue that there is little use installing additional solar panels because the shade from the tree would make any additional solar panels ineffective. Other shading issues relate to the applicants being unable to grow a lawn in the area shaded by the tree. The tree's shade also inhibits the natural daylight from entering into the interior of the house.
- [6] There is also an insurance issue associated with the tree. The applicants' insurer has suggested that the applicants would not be covered for insurance if damage was caused to their property or any injury was caused to a person because of the tree. That insurance risk is due to not only the tree being in its location, but also the lack of maintenance to the tree.
- [7] During the period that the applicants have lived in their house, they have arranged for the tree to be pruned twice. An arborist had been engaged since litigation of this matter commenced in the tribunal. The arborist undertook an inspection and provided a written assessment ('the arborist report') on the methods that could be best utilised to restrict the growth of the tree onto and over their property.
- [8] The arborist report indicated that the tree was in good health, with indications that it had been pruned but only to the fence line. The type of pruning previously undertaken only encouraged fast growing regrowth. It was the opinion of the arborist that any future pruning of the tree should take place past the fence line by using the proper collar cut method. This type of pruning limits fast growing regrowth and maintains the health of the tree. It would also eliminate the leaf litter and the shade issues that the applicants are experiencing.
- [9] The respondent has rejected all efforts made by the applicants to resolve this dispute. Her position is not one which could be described as conciliatory. The respondent suggested that she cannot understand why people buy into 'these older suburbs' and then want to cut down everything to avoid maintenance, turning it into the pristine environment which is found in the new suburbs, instead of enjoying the charm that the older suburbs offer. She added that the applicant's enjoyment of their yard seems to be purely clinical, preferring the artificial shade of their new deck instead of mother nature's free shading from the tree.
- [10] The respondent said that the enjoyment she gets from her yard is sitting in the shade of the tree, which is a relief from the hot and humid conditions that she experiences inside her own home. She finds the atmosphere calm and relaxing and she enjoys

observing the bird life and animals that frequent the tree. She added that nothing can compare to the coolness of nature's breeze through the canopy of trees. She went on to describe that there was a certain degree of sentimental attachment to the tree because it has always been in the yard. She has lived much of her life in that house and grew up enjoying the tree during her childhood.

The law as it applies to this application

- [15] The relevant legislation is the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) ('the Act'). The objects of the Act include the provision of rules about each neighbour's responsibilities for dividing fences and trees. Neighbours should generally be able to resolve issues without a dispute arising, and if a dispute did arise, then the legislation facilitates for the resolution of that dispute.⁴
- [16] A dividing fence is a fence on the common boundary of the adjoining lands.⁵ Although there is a conflict between the parties about where specifically the designated common boundary lies, when the tribunal undertook a viewing of the tree's location in respect to the common boundary, both parties accepted that the trunk of the tree was growing inside the properties belonging to both parties and the base of the trunk spanned across the common boundary.
- [17] The Act provides that a tree, amongst other things, is any woody perennial plant, or any plant resembling a tree in form or size.⁶ The tree involved in this application is undeniably a tree as provided for in the Act.
- [18] Land is affected by a tree if the branches from the tree are overhanging the neighbouring land, or the tree has caused or is causing, or is likely to cause in the next 12 months serious injury to a person on the land, or serious damage to the land or property on the land, or substantial ongoing and unreasonable interference with the neighbour's use and enjoyment of the land.⁷ The real issue is the substantial or ongoing and unreasonable interference with the applicants' use and enjoyment of their property and the potential for damage or injury if the tree is not pruned accordingly.
- [19] It was earlier described in these reasons that the base of the tree is growing inside the properties belonging to both parties. The Act provides for who is a tree keeper.⁸ That is, if the land on which the tree is situated is a lot recorded in the freehold land register.⁹ For the purposes of this application, the tree is situated on the land belonging to both parties, therefore, both parties are the tree keepers for that tree.
- [20] The Act makes provision for the responsibilities of a tree keeper, including ensuring that the tree does not cause serious injury to a person; or serious damage to a person's land or any property; or cause substantial and ongoing and unreasonable interference with the use and enjoyment of that land.¹⁰

Conclusion

⁴ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld), s 3.

⁵ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld), s 12.

⁶ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld), s 45.

⁷ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld), s 46.

⁸ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld), s 48.

⁹ As provided for in the *Land Title Act 1994* (Qld), s 48(1)(a).

¹⁰ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld), s 52.

- [21] The tree subject to the dispute is a large tree traversing the common boundary between the properties owned by both parties. The visual inspection undertaken of the tree revealed that not only were the leaves and branches protruding into the applicants' property by some considerable distance, but there were other nuisances caused by the tree such as branches and fruit bat faeces being deposited into the applicants' property, and onto their house.
- [22] The Act provides the tribunal with a discretion to make orders if it is satisfied that the applicants have made a reasonable effort to reach an agreement with the respondent, and that they have taken all reasonable steps to resolve the issue under any relevant local law, local government scheme, or local government administrative process.¹¹
- [23] In determining the outcome of this application, the general matters considered were the location of the tree in relation to the boundary of the land, and any premises, fence, or other structures affected by the location of the tree.
- [24] The tree involved in this dispute is not a protected species and nor does it hold any significance with regards to the cultural heritage of the area. There is no evidence to suggest that the tree makes up the local ecosystem, or that it is part of the biodiversity of the area.
- [25] There have been a number of attempts made by the applicants to resolve this dispute with the respondent. The respondent has been objectionable and refuses to accept that the tree is causing a nuisance. It is clear that she has an emotional attachment to that tree which links back into her childhood and the occupancy of the premises by both herself and her parents. That occupancy has spanned over a number of decades. However, emotional attachment to a tree does not abrogate the responsibility to act in accordance with the law. With all conciliation attempts exhausted, a determination is required by the tribunal.
- [26] Having regard to all the facts, circumstances and evidence of this matter, the tribunal is satisfied that there is substantial or ongoing and unreasonable interference with the applicants' use and enjoyment of their property. The tribunal is also satisfied that because of the size of the tree, there is a potential for damage or injury if the tree is not pruned accordingly. It appears that the most appropriate manner to resolve the dispute is to have the tree pruned in line with a method which would at the very least, alleviate the nuisance the applicants are experiencing.
- [27] During the hearing, the tribunal was informed that the applicants had engaged an arborist, and that if the services were required of the arborist, then any costs would be borne by them. I agree with that proposal, that is, that the applicants should engage a suitably qualified arborist to undertake pruning of the tree back past the fence line and ensure that proper collar cuts are undertaken in accordance to Australian Standards.
- [28] In having the pruning undertaken on the tree, it may be necessary for the arborist to access the respondent's property for the effective undertaking of the pruning. The respondent should allow that to occur.

Orders

¹¹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld), s 65 and s 66.

- [29] Therefore, the orders that the tribunal considers appropriate in relation to the tree are that the applicants should be at liberty to engage a suitably qualified arborist to undertake pruning of the tree situated on the common boundary of the properties owned by both parties.
- [30] Furthermore, any pruning of the tree should be undertaken by a suitably qualified arborist pursuant to the recommendations of the ‘arborist report’ dated 8 July 2019. Any pruning of the tree should be back past the common boundary and it should not reduce the overall height of the tree to a size less than 10 metres in height.
- [31] To facilitate the pruning of the tree, the respondent will allow an arborist or any other person acting under the direction of the arborist, or under the direction of the applicants to enter the respondent’s property for a reasonable time for the purpose of undertaking the pruning of the tree.
- [32] In respect to the costs associated with having the tree pruned, the tribunal is satisfied that given the financial circumstances of both parties, any costs associated with the pruning of the tree will be at the applicants’ expense.