

# QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Azzopardi v Smith* [2023] QCAT 417

PARTIES: **SAMUEL MARK AZZOPARDI**  
(applicant)

v

**ROGER EDWARD SMITH**  
(respondent)

APPLICATION NO/S: NDR092-22

MATTER TYPE: Other civil dispute matters

DELIVERED ON: 25 October 2023

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Member Deane

ORDERS: **The Application is dismissed.**

CATCHWORDS: ENVIRONMENT AND PLANNING – TREES,  
VEGETATION AND HABITAT PROTECTION –  
DISPUTES BETWEEN NEIGHBOURS - whether trees  
are causing substantial, ongoing and unreasonable  
interference – whether the interference that is an  
obstruction of sunlight is severe – whether an order is  
appropriate

*Neighbourhood Disputes (Dividing Fences and Trees) Act*  
2011 (Qld), s 46, s 47, s 52, s 61, s 65, s 66, s 72, s 73,  
s 74, s 75, s 76

*Queensland Civil and Administrative Tribunal Act 2009*  
(Qld), s 100, s 102

*Laing & Anor v Kokkinos & Anor (No 2)* [2013] QCATA  
247

*Ortlipp & Anor v Bowyer & Anor* [2017] QCAT 225

*Robertson v Darvas* [2016] QCAT 136

*Thomsen v White* [2012] QCAT 381

APPEARANCES &  
REPRESENTATION: 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] Mr Azzopardi filed an Application for a tree dispute – *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* at the Bundaberg Magistrates Court Registry

(the Application).<sup>1</sup> Mr Azzopardi says that there is a dispute with Mr Smith in relation to trees located on Mr Smith's land. He points to overhanging branches, which he says extend more than 50 cm into his land, which branches are more than 2.5 m above the ground. The evidence is that Mr Azzopardi and Mr Smith share a common boundary and that there are a number of trees on Mr Smith's land near the fence line. The Application sought an order that Mr Smith remove or prune the branches of the tree(s) and an order that a person can enter Mr Smith's land to carry out an order.

- [2] As I understand the very limited evidence before me, there are two trees on Mr Smith's land, which Mr Azzopardi says are causing substantial, ongoing and unreasonable interference with his use and enjoyment of his land currently and in the past.<sup>2</sup> He claims that the interference is an obstruction of sunlight and that the trees cause a substantial amount of shade to his property.
- [3] The Application states that Mr Azzopardi attempted to resolve the dispute with Mr Smith by correspondence dated 19 March 2021 and 6 April 2022. The Application states that copies are attached, however no copies of this correspondence are before me. I accept that it is more likely than not that such correspondence was sent to Mr Smith.
- [4] Directions were made for Mr Smith to file and serve a response to the Application.<sup>3</sup> Mr Smith did not comply with the directions and on 11 January 2023 a direction was made that Mr Azzopardi was entitled to a final decision on the material he files.
- [5] Mr Azzopardi was directed to file and serve statements of evidence and other documents to support the Application and it was also directed that a final decision would be made **after** 8 February 2023, the date by which Mr Azzopardi was to file his evidence.<sup>4</sup> Such a direction does not mean that a decision will be made soon after the stated date, merely that a decision will not be made before the stated date. Mr Azzopardi did not file any evidence in compliance with the direction.
- [6] At a directions hearing, directions were issued giving Mr Azzopardi a further opportunity to file evidence or pay money towards the cost of the Tribunal appointing a tree assessor so that a report about the trees could be prepared.<sup>5</sup> Mr Azzopardi did not comply with the directions.
- [7] The Tribunal's records indicate that Mr Azzopardi is extremely frustrated at the time taken for the Application to be determined. At least some of the delay is attributable to the quite limited resources of the Tribunal to progress all the matters before it and some of the delay is attributable to Mr Smith's failure to comply with directions and some of the delay is attributable to Mr Azzopardi's failure to file evidence as directed.
- [8] In view of Mr Azzopardi's latest non-compliance, the Application was listed for a determination on the papers before me. I proceed to determine the Application.

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<sup>1</sup> 21 April 2022.

<sup>2</sup> Plan and two pages of photographs filed by email 13 June 2022 and by post 15 June 2022.

<sup>3</sup> 23 May 2022 and 2 August 2022.

<sup>4</sup> Directions made 11 January 2023.

<sup>5</sup> 13 September 2023.

- [9] Although Mr Smith has not actively participated in these proceedings and has not disputed the matters in the Application it is necessary for me to be satisfied that an order should be made. Mr Azzopardi bears the onus of establishing his entitlement to orders on the balance of probability.

**Have the pre-requisites of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld) (ND Act)* been satisfied?**

- [10] I am satisfied that Mr Azzopardi has complied with the relevant pre-requisites set out in section 65 of the ND Act for the making of an order under section 66 of the ND Act.
- [11] As stated earlier, there is some evidence that he wrote to Mr Smith on 19 March 2021 and 6 April 2022 to seek to resolve the claimed issues with the trees. There is also evidence that he wrote to the Council on 1 June 2022 in relation to the trees and the Application.
- [12] Where, as claimed here, branches extend more than 50 cm over Mr Azzopardi's land at a height of more than 2.5 m I accept that the common law right of abatement does not assist to resolve the dispute.

**Should an order be made?**

- [13] I am not satisfied, on the balance of probabilities, that an order is appropriate for the reasons set out below.
- [14] The Tribunal has broad powers to hear and decide:<sup>6</sup>
- ...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.
- [15] Land is 'affected by a tree' at a particular time if branches overhang the land, the tree has caused, is causing or is likely within the next 12 months to cause serious injury to a person on the land, or serious damage to the land or any property on the land, or substantial, ongoing and unreasonable interference with the neighbour's use and enjoyment of the land,<sup>7</sup> and the land adjoins the land on which the tree is situated.<sup>8</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>9</sup>
- [16] On the limited evidence and in particular the photographic evidence, I find that it is more likely than not Mr Azzopardi's land is affected by the two trees identified as branches of the trees overhang his land and the two trees are situated on Mr Smith's adjoining land.
- [17] The Tribunal has broad powers to make an order it considers appropriate about a tree to remedy, restrain or prevent substantial, ongoing and unreasonable interference with Mr Azzopardi's use of his land.<sup>10</sup>
- [18] The ND Act recognises the importance of trees in residential neighbourhoods. It makes clear that a living tree should not be removed or destroyed unless the issue

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<sup>6</sup> The ND Act, s 61.

<sup>7</sup> Ibid s 46(a).

<sup>8</sup> Ibid s 46(b).

<sup>9</sup> Ibid s 47(1).

<sup>10</sup> Ibid s 66(2)(b)(ii).

cannot otherwise be satisfactorily resolved.<sup>11</sup> Mr Azzopardi does not seek removal of the trees.

[19] Under the ND Act the treekeeper, in this case Mr Smith, is responsible for ensuring the trees do not cause serious injury to a person or serious damage to a person's land or property or substantial, ongoing and unreasonable interference with a person's use and enjoyment of a person's land.<sup>12</sup>

[20] The primary consideration under the ND Act is the safety of any person.<sup>13</sup> There is no evidence before me that anyone's safety is at risk from the trees.

*Substantial, ongoing and unreasonable interference*

[21] I am not satisfied, on the balance of probability, that the trees cause substantial, ongoing and unreasonable interference.

[22] Mr Azzopardi say the trees cause substantial, ongoing and unreasonable interference. He relies upon obstruction of sunlight.

[23] Where the interference claimed is an obstruction of sunlight the tree must rise at least 2.5 metres above the ground and the obstruction to a window or roof of a dwelling must be severe.<sup>14</sup> The Tribunal has previously found that a severe obstruction is one that must be considerable.<sup>15</sup>

[24] There is no specific evidence before me about how it is said the trees have in the past caused or are now causing substantial, ongoing and unreasonable interference with his use and enjoyment of his land.

[25] There is no specific evidence as to the height of the trees nor extent of the shading of Mr Azzopardi's dwelling's windows or roof. I accept, based upon the photographs, that it is more likely than not that the 2 trees are at least 2.5 metres above the ground.

[26] There are some photographs which show some shade on his yard and on the side wall of his house but there is no explanation as to when the photographs were taken and what they are said to demonstrate nor any evidence of how much of the day during different months or seasons of the year the shading occurs nor any evidence that the shading is caused by the 2 trees the subject of the Application, as distinct from other trees in Mr Smith's yard.

[27] There is no sufficient evidence about which window or part of the roof of the dwelling the two trees shades and how this interferes with Mr Azzopardi's use and enjoyment.

[28] The tree identified as tree one is located near Mr Azzopardi's shed towards the rear of his land. On the photographic evidence this tree appears to be some distance from the dwelling or house. The tree identified as tree two is located towards the front of Mr Azzopardi's dwelling or house.

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<sup>11</sup> Ibid s 72.

<sup>12</sup> Ibid, s 52.

<sup>13</sup> Ibid, s 71.

<sup>14</sup> Ibid, s 66(3).

<sup>15</sup> *Laing & Anor v Kokkinos & Anor (No 2)* [2013] QCATA 247; *Robertson v Darvas* [2016] QCAT 136.

- [29] On the evidence before me, I am not satisfied the obstruction of sunlight to a window or roof of the dwelling by the trees is severe.
- [30] There is also no evidence before me including from a tree assessor or arborist as to:
- (a) the health of the trees;
  - (b) whether the pruning sought would be detrimental to the health of the trees or how frequently such pruning should be performed to maintain the health of the trees and restrain or prevent any substantial, ongoing and unreasonable interference with Mr Azzopardi's use and enjoyment of his land.
- [31] Where there is a claim that a tree has caused or is causing substantial, ongoing and unreasonable interference, I may consider whether there is anything other than the tree which has contributed or is contributing to the interference and any steps taken by the treekeeper or the neighbour to prevent or minimise the interference and whether the tree existed before the neighbour acquired the land.<sup>16</sup>
- [32] Mr Azzopardi acknowledges that the trees were in existence at the time that he acquired his land. The titles search shows that he acquired the land in or about October 2020. There is no evidence as to the size of the trees upon acquisition. This is a factor against making an order.
- [33] The photographs show that there is a power line close to tree two. There is no specific evidence as to the issue this is said to present nor how close the tree branch is to the power line. There is no evidence that Mr Azzopardi has brought this to the attention of Ergon Energy or its parent, Energy Queensland.
- [34] The photographs show some leaf litter or tree debris along the fence line and show a temporary fence erected by Mr Azzopardi. It is not clear whether this is said to be causing substantial, ongoing and unreasonable interference.
- [35] On many occasions the Tribunal has found that tree debris will not justify an order unless there is a finding that the debris is excessive.<sup>17</sup>
- [36] I am not satisfied, due to the state of the evidence, that the debris is excessive.
- [37] There is no evidence before me about the other matters under section 76 of the ND Act that I may consider.

*Other considerations*

- [38] I am required to consider various matters including the contribution to amenity the trees make to Mr Smith's land, the local ecosystem, public amenity and privacy.<sup>18</sup>
- [39] There is no specific evidence about these matters.
- [40] I may also consider any steps taken by the treekeeper or the neighbour to prevent or rectify the injury or damage or interference or the likelihood of injury or damage or interference.<sup>19</sup> There is no sufficient evidence as to these matters.

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<sup>16</sup> ND Act, s 75.

<sup>17</sup> *Thomsen v White* [2012] QCAT 381; *Robertson v Darvas* [2016] QCAT 136; *Ortlipp & Anor v Bowyer & Anor* [2017] QCAT 225.

<sup>18</sup> ND Act, s 73(1).

<sup>19</sup> *Ibid*, s 74, s 75.

*Summary*

- [41] I am not satisfied that Mr Azzopardi has demonstrated his entitlement to an order.
- [42] On 23 October 2023 Mr Azzopardi contacted the registry and as I understand it has advised that Mr Smith has cut down the trees.
- [43] Even if I had been satisfied that Mr Azzopardi was entitled to an order, I would not be satisfied that an order is now appropriate because the issue has been addressed.
- [44] The Application is dismissed.

Costs

- [45] Mr Azzopardi has expended money in bringing this Application. He was assisted in the preparation of the Application and in relation to some of the early directions in this matter by lawyers. A licensed field agent personally served Mr Smith with the Application. He likely incurred titles office search fees. There is no evidence before me as to any amounts incurred by Mr Azzopardi other than the filing fee of \$358. Mr Smith has not actively participated in the proceedings. There is no evidence of any costs he may have incurred.
- [46] Each party usually bears their own costs<sup>20</sup> unless the Tribunal makes an order requiring a party to pay all or a stated part of the costs of another party where the Tribunal considers the interests of justice require it to make the order.<sup>21</sup>
- [47] Mr Azzopardi has failed to make out his claims to the requisite standard. Although it appears that bringing these proceedings has encouraged Mr Smith, somewhat belatedly, to act in relation his trees, I am not satisfied that it is in the interests of justice to make an order as to costs.

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<sup>20</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 100 (QCAT Act).

<sup>21</sup> *Ibid*, s 102(1).