

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Chapman & Chapman v Gravesande* [2023] QCAT 418

PARTIES: **FRANCES THERESE CHAPMAN**
PAUL CHAPMAN
(applicants)

v

KAREN LISA GRAVESANDE
(respondent)

APPLICATION NO/S: NDR135-21

MATTER TYPE: Other civil dispute matters

DELIVERED ON: 30 October 2023

HEARD AT: Brisbane

DECISION OF: Member Goodman

ORDERS: **The application is dismissed.**

CATCHWORDS: ENVIRONMENT AND PLANNING – TREES –
DISPUTES BETWEEN NEIGHBOURS –
OBSTRUCTION OF VIEW – whether trees causing
substantial, ongoing and unreasonable interference with the
use and enjoyment of land or property

Neighbourhood Disputes (Dividing Fences and Trees) Act
2011 (Qld) s 46, s 61, s 66, s 71, s 72, s 73, s 75

Laing v Kokkinos (No 2) [2013] QCAT 247

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

BACKGROUND

- [1] The applicants own a home at the Gold Coast. The back of their property runs down to a canal. The respondent is their neighbour. Close to the boundary fence, the respondent has a number of mature Golden Cane palms (*Dyopsis lutescens*).
- [2] The neighbours have a very poor relationship, and the applicants say that the trees are one source of tension between them. The applicants claim that the trees interfere with their view and obstruct sunlight on their property.

[3] On 20 August 2021, the applicants lodged an application in the Tribunal seeking an order for removal of the trees at the respondent's cost.

[4] In support of their application, they state:

- (a) They are the registered owners of the land affected by the trees;
- (b) They have been unsuccessful in their previous attempts to resolve the dispute directly with their neighbours;
- (c) The branches and tree trunks intrude into their property by approximately 2.5 metres;
- (d) The branches are approximately 1.5 – 7.5 metres above the ground and still growing;
- (e) It is possible that a branch could fall on someone on the deck or the walkway. The nuts from the trees are particularly dangerous when walking down the walkway as they can easily cause a person to slip over. They also present a danger when mowing the lawn;
- (f) Serious damage to their land or property on the land was likely within the next 12 months because the palm fronds extend over their house and may break a tile or damage the guttering if they fall, and the debris and nuts will block the gutters, leading to internal water damage. They also interfere with the solar panels. The bases of the trees are getting larger as a new trunk grows and it is only a matter of time before they damage the fence and push it over;
- (g) Over the past approximately 15 years the situation has been getting worse. The trees are a type where if the trunk is cut down another one will shoot up and as the base of the tree spreads out more trunks will shoot up;
- (h) The growth of the trees has significantly interfered with their ability to enjoy what was previously a pleasure to sit on their decking and look out over the canal. The trees also block the morning sun from the decking and lounge room. They have experienced continual stress and heated arguments with the neighbours;
- (i) The trees were not on the respondent's land when the applicants acquired their land; and
- (j) Prior to the trees being planted, they enjoyed uninterrupted views over the canal from their lounge room and deck. They use their deck a lot, as they are retired, but the trees block out the morning sun and the view and all they see are palm trees with dead foliage.

[5] The respondent responded to the application on 26 October 2021, saying:

- (a) She is the registered owner of the land the trees are on;
- (b) The trees are planted in the centre of a 1.65m wide bed and the nuts are eaten by the birdlife so they do not pose a threat. They are cyclone resistant. They don't have heavy branches, but rather lightweight fronds which would not damage roof tiles or guttering, nor are they close enough to the house to cause any damage;

- (c) The trees do not impact the fence as the roots remain in a root ball and are nowhere near the fence. The roots have not spread over the last 16 years;
- (d) The applicants' lounge room windows face due East. The shading to the South facing deck area is created by the applicants' eaves and large roofed area over the deck. The applicants have a due South water / canal view;
- (e) She kept the palms thinned and trimmed until it became apparent that she needed privacy "to prevent them peering into our whole backyard and patio area";
- (f) The palms were in place when they bought the property in 2004;
- (g) Living on a canal entitles residents to water views straight out from their properties, which is due South to water, not East over and into our backyard and up the canal;
- (h) The palms self clean so there is no dead foliage. They are cyclone proof and can withstand extreme wind and weather conditions;
- (i) The palms do not interfere with sun to windows of the applicants' lounge and will not cause damage to the gutters or roof or solar panels as they are nowhere near them;
- (j) The palms do not impact the use and enjoyment of the applicants' deck; and
- (k) The palms have not and will not cause damage to the fence or property. The possibility of injury is unlikely, given the fronds are lightweight.

THE LEGISLATION

- [6] The relevant legislation is the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld)*. Under that Act, the Tribunal has broad powers to hear and decide matters when a tree is affecting a neighbour's land.¹ The Tribunal may make appropriate orders:
- (a) to prevent serious injury to any person; or
 - (b) to remedy, restrain or prevent:
 - (i) serious damage to the neighbour's land or any property on the neighbour's land; or
 - (ii) substantial, ongoing, and unreasonable interference with the use and enjoyment of the neighbour's land.²
- [7] I am satisfied that the parties are neighbours, and their lands are adjoined, and that the palm trees are "trees" as defined in the legislation.
- [8] The Tribunal may make orders if the applicants' land is *affected by a tree*. There are limited circumstances in which their land may be affected by a tree – if:
- (a) branches from the tree overhang the land;
 - (b) the tree has caused, is causing, or is likely within the next 12 months to cause:

¹ S 61 *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld)* (NDA)

² S 66 (2) NDA

- (i) serious injury to a person on the land; or
 - (ii) serious damage to the land or any property on the land; or
 - (iii) substantial, ongoing, and unreasonable interference with their use and enjoyment of the land.³
- [9] The Tribunal may only make an order dealing with interference that is an obstruction of sunlight or a view if it is established:
- (a) the tree rises at least 2.5 metres above the ground; and
 - (b) the obstruction is:
 - (i) severe obstruction of sunlight to a window or roof of a dwelling on the neighbour's land; or
 - (ii) severe obstruction of a view, from a dwelling on the neighbour's land, that existed when the neighbour took possession of the land⁴.
- [10] The primary consideration for the Tribunal in deciding an application is safety⁵. There is insufficient evidence to establish a risk to safety in this case.
- [11] Other matters for the Tribunal's consideration relevant to these circumstances are⁶:
- (a) the trees are located close to the boundary, and so relatively close to the applicants' house and deck;
 - (b) there is no evidence that the trees are of any particular historical, cultural, social or scientific value;
 - (c) there is no evidence as to any particular contribution the trees make to the local ecosystem and to biodiversity except that the respondent says that birds eat the nuts;
 - (d) there is no evidence of contributions the tree makes to public amenity;
 - (e) the Tribunal may consider any contribution the trees make to the amenity of the respondent's land. This includes contributions to privacy, landscaping, garden design or protection from sun, wind, noise, odour or smoke. I have no evidence regarding these factors, save for the issue of privacy, which is addressed later in this decision; and
 - (f) There is no evidence of risks associated with the trees in the event of a cyclone or other extreme weather except that the respondent says they are "cyclone proof".
- [12] If unreasonable interference is alleged, the Tribunal may consider⁷:
- (i) anything other than the tree that has contributed, or is contributing, to the interference; and

³ S 46 NDA

⁴ S 66 NDA

⁵ S 71 NDA

⁶ S 73 NDA

⁷ S 75 NDA

- (ii) any steps taken by the parties to prevent or minimise the interference; and
- (iii) the size of the applicants' land; and
- (iv) that the trees were planted after the applicants acquired the land; and
- (v) for interference that is an obstruction of sunlight or a view—any contribution the tree makes to the protection or revegetation of a waterway or foreshore. I have no particular evidence about this.

[13] A living tree should not be removed or destroyed unless the issue relating to the tree cannot otherwise be satisfactorily resolved.⁸

TREE ASSESSMENT REPORT

[14] On 27 July 2022, the Tribunal appointed an appropriately qualified arborist as an assessor to carry out an inspection of the trees and provide a report to the Tribunal on the issues raised in the application.

[15] On 12 August 2022, Mr Gunter, the tree assessor, visited the properties. He subsequently prepared a report for the Tribunal. Relevantly, the report states:

- (a) The trees are “trees” as defined. They are situated on land adjoining the land of the applicants. The trees are located along the boundary fence. The base of the trees is not in direct contact with the property boundary fence;
- (b) Some of the branches overhang the applicants' property by more than 0.5 to 1 metres in some instances. Overhanging branches, shading and leaf drop are not considered excessive;
- (c) The trees obscure the applicants' view of the canal to the South East of their property;
- (d) Both parties live on sloping waterfront properties with the ground sloping down to the canal from their homes. The applicants' deck is at the same height as the property boundary fence at its highest point enabling the applicant to look down into the respondents' property if the trees were not present / thinned out - the trees provide significant privacy to the respondents in their back yard and on their patio; and
- (e) Pruning would compromise the respondent's privacy.

THE RESPONDENTS' SUBMISSIONS

[16] The respondent submits that:

- (a) Council has advised that the “view” is restricted to the view directly out from a property, not left or right across adjoining properties;
- (b) The applicants had installed a deck which “towers above” the respondent's backyard, increasing the need for a privacy screen;

⁸ S 72 NDA

- (c) Any light restriction into the property is due to the applicants having their blinds down, or their eaves and other construction on their property providing shade; and
- (d) The trees are a privacy screen and are needed at their current height due to the height and length of the applicants' deck.

THE APPLICANTS' SUBMISSIONS

[17] The applicants submit that:

- (a) If the trees were trimmed back to 3.3 metres, the applicants would recover reasonable use and enjoyment of their view from their home and patio which they paid for when they bought the property;
- (b) Trees overhanging their roof should be maintained so as not to have fronds falling on their roof;
- (c) The trees have continued to grow since the report was prepared by the tree assessor;
- (d) The respondent previously cut down a hedge between the houses, which decreased her privacy; and
- (e) They have obtained a quote from an arborist to prune the trees back to the boundary at a cost of \$504.

THE DECISION OF THE TRIBUNAL

[18] I am satisfied that the applicants' land is affected by the trees because branches are overhanging. There is insufficient evidence to support a finding that the trees have caused or are likely to cause serious injury to a person or serious damage to the land or property on the land.

[19] I must determine whether the trees cause substantial, ongoing, and unreasonable interference with the applicants' use and enjoyment of the land. In relation to the claimed obstruction of sunlight, I am satisfied that the trees rise at least 2.5 metres above the ground. There is insufficient evidence to persuade me that there is severe obstruction of sunlight to a window or roof of a dwelling on the applicants' land. The tree assessor does not mention it in his report, and there is no other report to support the applicants' assertions.

[20] While it might be said that there is an interference with the use and enjoyment of the land arising out of plant matter dropping onto their property, I am not satisfied that interference is substantial or unreasonable. The trees will sometimes, it seems, drop fronds and / or seeds into the applicants' property. That is not a substantial interference.

[21] I must determine whether there is a severe obstruction of a view, from the applicants' home, that existed when the applicants took possession of the land.⁹ There is no doubt that the view from the back of the house to the left is obstructed. There is no doubt that it has become more obstructed since the applicants bought their land. The applicants have attached photographs showing that where in 1998

⁹ S 66 NDA

they had uninterrupted views of the canal across the respondent's backyard, the view is now interrupted by the presence of the trees. Is this a severe obstruction?

- [22] The Tribunal has noted that 'severe obstruction' is not defined in either the Act or the Explanatory Notes to the Neighbourhood Disputes Resolution Bill 2010. ... During Parliamentary Debates, the then Attorney General commented: 'The severity threshold requires that the view must be nearly blocked out.' Within this context, it would appear that use of the word 'severe' in s 66 of the Act means the obstruction must be considerable.¹⁰
- [23] I note that the applicants' deck was constructed after the trees were in place. I take into account that the view of the canal from the applicants' house is obstructed only at particular angles and from particular places in the house. It seems to me that the view is less obstructed if the applicants move their location within the house.
- [24] The parties have made submissions regarding a "right" to a view. I note that the Tribunal has previously considered section 66 and stated, "That section does not create a right to a view, the remedy referred to is a statutory one which is discretionary and will not be exercised if it is not appropriate in the circumstances."¹¹
- [25] I take into account that the construction of the deck by the applicants has amplified the impact on the respondents' privacy by granting anyone on the deck the ability to look into the respondents' backyard if not for the trees. That is a not a criticism of the deck construction but a simple statement of the position. Things have not remained static. There has been construction of the deck on the side of the applicants and allowing the trees to grow and thicken on the part of the respondents.
- [26] I take into account that the relationship between that parties is extremely poor, and has been for, it seems, over 15 years. Each accuses the other of harassment and unreasonable behaviour. I accept the assertions of the respondent that it is in this context that the trees have been allowed to grow to reduce contact between the parties, and to promote privacy.
- [27] I accept that the overhanging branches mean that the applicants' land is affected by the trees. I find the impact minimal, and to the extent that the view from the house is somewhat reduced, I find that there is no severe obstruction. The obstruction is not considerable. The trees do not form a solid block preventing any view of the canal to the left. The photographs provided show that the canal is partly visible through the trees. In any event, the applicants are able to minimise the obstruction by enjoying the canal views from alternative angles.
- [28] In summary:
- (a) The Tribunal may, as a matter of discretion, make orders to remedy, restrain or prevent serious damage to the applicants' land or any property on the applicants' land or substantial, ongoing, and unreasonable interference with the use and enjoyment of the applicants' land;¹²

¹⁰ *Laing v Kokkinos* (No 2) [2013] QCAT 247

¹¹ *Laing v Kokkinos* (No 2) [2013] QCAT 247

¹² S 66 (2) NDA

- (b) The applicants do not have a “right” to a view. When there is a dispute over a view, the Tribunal may only make an order if the obstruction of a view is severe;
 - (c) I am not satisfied that the trees have caused or are likely to cause serious injury to a person or serious damage to the land or property on the land;
 - (d) I have considered whether there is substantial, ongoing, and unreasonable interference with the use and enjoyment of the applicants’ land. When they bought their land, the applicants were able to look out over their block at the unobstructed view of the canal to the left, middle and right. Since that time, the trees have been planted, and the applicants have constructed a large deck;
 - (e) The view of the canal to the left over the respondent’s property is now largely affected. I am not satisfied, however, that the applicants’ view is severely obstructed as the trees only affect the view over the respondent’s land and not in any other direction, and the view is not completely blocked through the trees. As there is no severe obstruction, I am unable to make an order dealing with any interference.
 - (f) Even if I was satisfied that the view was severely obstructed, I find that the trees do not cause a substantial interference with the use and enjoyment of the applicants’ land given the factors discussed above; and
 - (g) Even if I was satisfied this was a severe obstruction and a substantial interference, I would not be inclined to make orders in relation to the trees as I do not consider that the interference is unreasonable taking into account that the applicants continue to enjoy unimpeded views in all directions except over the respondent’s backyard, and taking into account the privacy needs of the respondent.
- [29] Accordingly, I decline to make any orders as sought by the applicants or otherwise to interfere with the trees.
- [30] The application is dismissed.