

# QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *McDonald v Connolly* [2024] QCAT 139

PARTIES: **IAN LESLIE McDONALD and SHARON MARION  
McDONALD**  
(applicant)

v

**JOHN FRANCIS CONNOLLY and ROBYN LYN  
CONNOLLY**  
(respondent)

APPLICATION NO/S: NDR134-21

MATTER TYPE: Other civil dispute matters

DELIVERED ON: 4 April 2024

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Member Lumb

ORDERS: **The Application for a tree dispute filed on 19 August  
2021 is dismissed.**

CATCHWORDS: ENVIRONMENT AND PLANNING – TREES,  
VEGETATION AND HABITAT PROTECTION –  
DISPUTES BETWEEN NEIGHBOURS – whether trees  
caused substantial, ongoing and unreasonable  
interference with the use and enjoyment of the  
applicant’s property – where applicant complains of the  
impact of trees situated on adjoining property  
comprising: leaf litter which affects the applicant’s pool,  
yard and garden; reduction in light to applicant’s living  
room and side path; and interference with guttering –  
where applicant’s dwelling existing at date of application  
subsequently replaced – whether appropriate to make  
orders under s 66 of the *Neighbourhood Disputes  
(Dividing Fences and Trees) Act 2011* (Qld)

*Neighbourhood Disputes (Dividing Fences and Trees)  
Act 2011* (Qld), s 45, s 46, s 47, s 57, s 59, s 61, s 65, s 66

*Belcher v Sullivan* [2013] QCATA 304  
*Edwin & Anor v Campbell & Anor* [2024] QCAT 86

## 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

### Introduction

- [1] By an Application for a tree dispute filed on 19 August 2021 (the Application), Ian Leslie McDonald and Sharon Marion McDonald (collectively referred to as ‘the Applicant’) seek orders pursuant to the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) (the NDA) that John Francis Connolly and Robyn Lyn Connolly (collectively referred to as ‘the Respondent’) carry out work to remove trees and/or to remove or prune the branches of trees which are located on the Respondent’s property (and that the Respondent pay the cost of carrying out such work). The Applicant and the Respondent reside in adjoining properties at Enoggera in the State of Queensland.
- [2] A Tree Assessment Report dated 21 November 2022 (the Report) was prepared by Mr David Gunter, who holds a Diploma in Horticulture (Arboriculture) and a National Certificate in Arboriculture. Mr Gunter identified three groups of trees (collectively referred to as ‘the Trees’) along the side boundary of the Respondent’s property adjoining the Applicant’s property. The details of the Trees are set out in the Report as follows:

No	Species	DBH (mm)	Height (m) Approx.	Structure	Vitality	Notes
1	<i>Bambusa oldhamii</i>	N/A	6-8	Average	Average	Recently reduced in height. New growth culms are higher than the average height noted by approx. 3-4 metres
2	<i>Syzygium sp. Group</i>	250 (avg)	12-15	Average	Average	Copse/informal hedge. Entire canopy of one tree extends phototropically over the applicants property. Some minor overhanging branches in upper canopy of remaining trees.
3	<i>Bambusa gracilis Hedge</i>	N/A	6-8	Average	Average	Recently reduced in height and trimmed to fence. New growth culms are higher than the average height noted by approx. 2-3 metres

- [3] On 5 December 2022, the Tribunal proposed a written agreement between the parties to address the dispute between them. The Applicant signed the agreement; the Respondent did not.

- [4] On 21 June 2023, Mr Connolly, on behalf of the Respondent, proposed an alternative written agreement between the parties.<sup>1</sup> This has not been agreed to by the Applicant.
- [5] The dispute remains unresolved, and it falls to the Tribunal to make a decision in the proceeding.

### **The details of the Application**

- [6] The Applicant seeks the following specific orders:

An order that the trees be removed or cut to a manageable level.

An order that pruning and maintenance be carried out on a routine basis.

An order that the respondent covers all costs associated with this, including any tree assessment that have to be carried out in relation to this application.

- [7] The Reasons relied upon are stated as follows:

- To reduce the time and cost we have to expend maintaining our pool and yard due to leave litter.
- To enable us to the ability to enjoy our land.
- To ensure our gutter does not become clogged with tree overgrowth.
- We have already expended costs to financial and in time to this matter and believe any further costs should covered by the respondent as the owners of the trees.

- [8] The Applicant asserts that the ‘unmaintained and uncontrolled growth’ of the Trees has resulted in substantial, ongoing and unreasonable interference with the use of and enjoyment of their land in the following ways:

- Substantial leave litter in our pool resulting in increased maintenance and unsightly appearance of the pool.
- Reduction in the enjoyment and use of our pool due to the unsightly appearance and effort to clean the pool prior to use.
- Unreasonable interference with the use of our pool filter. The filter cannot run if we are not home as the skimmer box becomes filled with leave litter at such a rate we need to be home to empty it.
- The inability to run the filter has further implications if we are on holidays and away from our home for a prolonged period.
- Substantial leave litter in our yard resulting in an unsightly appearance and increased maintenance.
- Reduction in the enjoyment of the use of our garden as it appears unsightly often and requires regular and time consuming maintenance.
- Reduction in light entering our home due to overgrowth off leaves reaching our window shields at the front of our property.
- Interference with our guttering.

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<sup>1</sup> Attachment B to the Statement of Mr Connolly filed on 21 June 2023.

## The Respondent's Response

- [9] The Respondent filed a response to the Application on 28 October 2021. Amongst other matters, the Respondent contended that:
- (a) the 'plants' are inspected regularly and are not a risk of causing any damage to the Applicant's property or person;
  - (b) the gracilis bamboo is a screen to provide privacy on the front deck of the Respondent's property and it also blocks out hot air which is expelled from the Applicant's air-conditioning unit attached to the side of the dwelling (and it is contended that the hot air expelled from the unit in summer can be felt on the front deck and increases the temperature and causes discomfort when anyone sits on the deck when the unit is operational);
  - (c) the remainder of the plants on the boundary are for protection from noise from the pool pump on the Applicant's property;
  - (d) the plants also act as a screen which provides privacy from the yard and pool on the Applicant's property.

## The Report

- [10] In the Report, Mr Gunter made the following conclusion and recommendations:

- The affects [sic] of the trees on the applicant's property are considered minimal and most have been rectified by recent management work as described above.
- As noted above some minor additional work, and ongoing maintenance will minimise impacts upon the applicants property and also improve the effectiveness of the trees as privacy screens which are considered beneficial to both parties The works recommended are as follows:
- Maintain Tree 1 at the existing cut height (see Fig. 2, above). Given the species this work will likely be required on a six-monthly basis. This work does *not* require the services of an arborist.
- Reduce trees in Group 2 to the proposed height in Fig. 2 - initial reduction work (and removal of one small tree overhanging the boundary fence) should be completed by a suitably qualified arborist (Minimum AQF Cert III in Arboriculture). Subsequent management at the cut height will be required annually (depending upon growth rates over the year) and will *not* require the services of an arborist if the trees are to be maintained as a formal hedge.
- Maintain Group 3 at the existing cut height (see Fig. 2, above). Given the species this work will likely be required on a six-monthly basis. This work does *not* require the services of an arborist. If recommendations are accepted it is important that:
  1. The Contractor engaged to complete the work (whether hedging or pruning) must be suitably qualified to complete the work they are engaged for.
  2. The Queensland Arboricultural Association (QAA) has a register of Qualified Contractors.

3. A minimum AQF Cert III in Arboriculture is required for initial reduction work and removal of one tree from within Group 2

### **The change to the Applicant's property**

- [11] In the Application, the Applicant included a photograph of an aerial shot of the adjoining properties showing what was said to be the overhanging trees, and a further photograph taken from the front of the property showing that the Trees exceeded the gutter line of the Applicant's house.
- [12] The Report included a photograph by way of an aerial shot showing the adjoining properties (Figure 1) but included a note that the house shown as the Applicant's property was 'no longer present'. Further, the photographs at Figures 3 and 4 of the Report show that the existing house had been removed and that there was a new concrete slab visible on the Applicant's property.
- [13] The starting point for consideration of the Application is whether the Applicant's property 'is affected by' the Trees (or any of them).

### **Was the Applicant's property affected by the Trees?**

- [14] By s 61 of the NDA, the Tribunal has jurisdiction to hear and decide any matter in relation to a tree in which it is alleged that, as at the date of the Application, 'land is affected by the tree'. As is evident from the terms of that provision, the position is determined as at the date of the Application.
- [15] Having regard to the Report, I am satisfied that:
  - (a) the issue cannot be resolved under Part 4 of Chapter 3 of the NDA (see s 59(b) and s 65(c) of the NDA) given the height of the Trees (and branches) as identified by Mr Gunter (see s 57(1) of the NDA);
  - (b) each group of Trees is a 'tree' as defined in s 45 of the NDA, specifically s 45(1)(a) in the case of the *Syzygium* (Lilly-pilly), and s 45(1)(b) in the case of each type of bamboo.
- [16] As to when land is 'affected by a tree', s 46 of the NDA provides:

Land is ***affected by a tree*** at a particular time if—

- (a) any of the following applies—
  - (i) branches from the tree overhang the land;
  - (ii) the tree has caused, is causing, or is likely within the next 12 months to cause—
    - (A) serious injury to a person on the land; or
    - (B) serious damage to the land or any property on the land; or
    - (C) substantial, ongoing and unreasonable interference with the neighbour's use and enjoyment of the land; and
- (b) the land—
  - (i) adjoins the land on which the tree is situated; or

- (ii) would adjoin the land on which the tree is situated if it were not separated by a road.

[17] As at the date of the Application, there is no dispute that, and I am satisfied on the material that:

- (a) branches from the Trees did overhang the Applicant's property;
- (b) the Trees were situated on the Respondent's property (see s 47(1) of the NDA);
- (c) the Applicant's property adjoined the Respondent's property.

[18] The remaining issue is whether s 46(a)(ii)(C) was satisfied (I am not satisfied that there is any arguable basis for concluding that s 46(a)(ii)(A) or s 46(a)(ii)(B) was satisfied). Subsection 46(a)(ii)(C) requires that any of the Trees had caused, are causing, or are likely within the next 12 months to cause 'substantial, ongoing and unreasonable interference with' the Applicant's use and enjoyment of the Applicant's property.

[19] As to the meaning of 'substantial', in *Belcher v Sullivan*,<sup>2</sup> K.S. Dodds, Judicial Member, said:<sup>3</sup>

'Substantial' also is a word not given any special meaning in the Act. It is a word in common usage. In the context in which it is used in the Act it indicates on-going and unreasonable interference with enjoyment or use of land which has substance, is of real or considerable importance.

[20] The individual complaints of the impact of the Trees can be summarised as follows:

- (a) the impact of leaf litter from the Trees on:
  - (i) the Applicant's pool, including increased maintenance, unsightly appearance, interference with the pool filter, and reduction in enjoyment of the pool;
  - (ii) unsightly appearance and increased maintenance of the Applicant's yard and garden;
- (b) 'interference' with the guttering;
- (c) 'blocking' of or 'reduction' in light to Applicant's living room and side path.

[21] In the context of leaf litter, I respectfully adopt the following statements extracted by Member Scott-Mackenzie in *Edwin & Anor v Campbell & Anor*:<sup>4</sup>

[63] In *Barber v Kyriakides*, a decision of the New South Wales Land and Environment Court, the Court formulated the principle to be applied in considering urban trees and the ordinary maintenance issues arising from them in the following terms:

For people who live in urban environments, it is appropriate to expect that some degree of house exterior and grounds maintenance will be required in order to appreciate and retain the aesthetic and environmental benefits of having trees in such an

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<sup>2</sup> [2013] QCATA 304.

<sup>3</sup> At [23].

<sup>4</sup> [2024] QCAT 86, [63]-[64].

urban environment. In particular, it is reasonable to expect people living in such an environment might need to clean the gutters and the surrounds of their houses on a regular basis.

The dropping of leaves, flowers, fruit, seeds, or small elements of deadwood by urban trees ordinarily will not provide the basis for ordering removal of or intervention with an urban tree.

[64] The Tribunal, in *Finch v Grahle*, citing *Vecchio v Papavasiliou* and *Thomson v White*, said:

Generally speaking, leaf litter will not, of itself, be sufficient to constitute a substantial, ongoing, and unreasonable interference with the use and enjoyment of land.

(citations omitted)

- [22] The difficulty with the Applicant's case in relation to the leaf litter is that the Applicant's evidence does not descend into detail of the increased maintenance of the pool, yard and garden, or the interference with the operation of the pool filter (including skimmer). Having regard to the available evidence and the principles set out above in relation to leaf litter, I am not satisfied that the leaf litter amounted to a substantial, ongoing and unreasonable interference with the Applicant's use and enjoyment of the Applicant's property at the date of the filing of the Application.
- [23] Again, there is little detail about the 'interference' with the guttering. The specific complaint appears to be a concern that the gutters were becoming 'clogged with tree overgrowth' (see item 40 of the Attachment to the Application). Whilst I consider that, of itself, the interference with the guttering may not constitute a substantial, ongoing and unreasonable interference with the use and enjoyment of the Applicant's property, I am satisfied that, when considered in conjunction with the Applicant's complaint about the blocking of sunlight into the living room, this threshold question is satisfied. The photograph identified as Figure 2 in the Attachment to the Application depicts a dense clump of branches overhanging the Applicant's property and either coming into contact with the Applicant's house or in very close proximity to the house. It is evident that the extent of the overhanging branches would then have severely obstructed the amount of sunlight coming into the house.<sup>5</sup> I find that at the date of the Application, the section of Trees depicted in Figure 2 constituted a substantial, ongoing and unreasonable interference with the use and enjoyment of the Applicant's property.
- [24] The next issue is whether it is appropriate to make the orders sought by the Respondent.

### **Is it appropriate to make any orders under s 66 of the NDA?**

- [25] Pursuant to s 66, the Tribunal 'may' make orders it considers appropriate to 'remedy, restrain or prevent' substantial, ongoing and unreasonable interference with the Applicant's use and enjoyment of the Applicant's property. I am not satisfied that it is appropriate to make any orders under s 66 for the following reasons.

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<sup>5</sup> It is unclear what specific interference with the use and enjoyment of the Applicant's property was caused by the shading of the side path.

- [26] First, Mr Gunter expressed the view that the impact of the Trees on the Applicant's property was considered 'minimal' and 'most' had been rectified by recent management work caused to be undertaken by the Respondent. I also note that, subsequent to the date of the Report, the Respondent arranged for further tree trimming to be undertaken.<sup>6</sup>
- [27] Second, as noted above, there has been a change in the Applicant's dwelling since the Application was filed. In these circumstances, the evidence submitted at the date of the Application is an unsatisfactory basis for assessing the present impact of the Trees on the new dwelling. In particular, s 66(3)(b) of the NDA provides that s 66(2)(b)(ii) applies to interference that is an obstruction of, relevantly, sunlight if the obstruction is, relevantly, 'severe obstruction' of sunlight to a window or roof of a dwelling on the neighbour's land. I am not satisfied that there is now any severe obstruction of sunlight to a window or roof of the new dwelling.<sup>7</sup>
- [28] In short, on the material before the Tribunal, I am not satisfied that the Trees (or any of them) are causing (or that it is more likely than not that they will cause) substantial, ongoing and unreasonable interference with the use and enjoyment of the Applicant's property.
- [29] For the above reasons, I consider that the Application should be dismissed.

### **Order**

- [30] The Application for a tree dispute filed on 19 August 2021 is dismissed.

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<sup>6</sup> Statement of Mr Connolly filed on 21 June 2023, [17]-[23].

<sup>7</sup> In this regard, I note the photograph which is Annexure D to the Statement of Mr Connolly.