

CITATION: *Cruz v Simmons* [2016] QCATA 55

PARTIES: Arturo Cruz
Clarissa Cruz
(Applicants/Appellants)
v
Mitchell Simmons
Lauren Simmons
(Respondents)

APPLICATION NUMBER: APL001 -16

MATTER TYPE: Appeals

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: **Senior Member Stilgoe OAM**

DELIVERED ON: 18 April 2016

DELIVERED AT: Brisbane

ORDERS MADE: **1. Leave to appeal refused**

CATCHWORDS: APPEAL – LEAVE TO APPEAL - MINOR CIVIL DISPUTE – DIVIDING FENCE – where order for Colorbond fence – where parties agreed to Colorbond fence for part of dividing fence – where appellant disagreed with Colorbond fence for front part of fence – where appellant submitted condition of front fence due to respondent’s actions – where tribunal apportioned cost of fence equally - whether grounds for leave to appeal

Neighbourhood Disputes (Dividing Fences and Trees) Act 2001 (Qld) ss 13(1)(c)(1), 26, 35(i)

Dearman v Dearman (1908) 7 CLR 549
Fox v Percy (2003) 214 CLR 118
Pickering v McArthur [2005] QCA 294
Clarke v Japan Machines (Australia) Pty Ltd [1984] 1 Qd R 404
Chambers v Jobling (1986) 7 NSWLR 1

APPEARANCES and REPRESENTATION (if any):

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

REASONS FOR DECISION

- [1] Mitchell and Lauren Simmons own a property next door to Arturo and Clarissa Cruz. There was a timber picket fence dividing the two properties. The back half of the fence, which was about 1800 mm high, was sound; the front half of the fence, which was about 1200mm high, was leaning dangerously toward the Simmons' property.
- [2] Mr and Ms Simmons wanted to replace the whole fence with a Colorbond fence. Mr and Ms Cruz were happy with a Colorbond fence at the rear but wanted a timber picket fence at the front. The tribunal ordered that the parties share the cost of a Colorbond fence along the length of the boundary.
- [3] Mr and Ms Cruz want to appeal that decision. Because this is an appeal from a decision of the tribunal in its minor civil disputes jurisdiction, leave is necessary.¹ Leave to appeal will usually be granted where there is a *reasonable argument* that the decision is attended by error, and an appeal is necessary to correct a *substantial injustice* to the applicant caused by that error.²
- [4] Mr and Ms Cruz submit that the tribunal's decision was "prejudicial, one-sided and arm twisting". They want the tribunal to send an inspector to investigate the condition of the fence. They say the fence is in reasonable condition and does not need replacing. They say that Mr and Ms Simmons should bear the cost of replacing the front fence because their stormwater discharge caused the damage to the fence. They say that, as the front fence is their fence, they should be able to do what they like with it. They say that a Colorbond fence is not the kind of dividing fence that is usual for the front dividing fences in the area.
- [5] Mr and Ms Cruz have filed fresh evidence with their application for leave to appeal. They filed photos of front yards in the area showing a variety of fencing.
- [6] The appeal tribunal will only accept fresh evidence if it was not reasonably available at the time the proceeding was heard and determined. Ordinarily, an applicant for leave to adduce such evidence must satisfy three tests. Could the parties have obtained the evidence with reasonable diligence for use at the trial? If allowed, would the evidence probably have an important impact on the result of the case? Is the evidence credible?³

¹ QCAT Act, s 142(3)(a)(i).

² *Pickering v McArthur* [2005] QCA 294 at [3].

³ *Clarke v Japan Machines (Australia) Pty Ltd* [1984] 1 Qd R 404 at 408.

- [7] An application for leave to appeal is not, and should not be, an attempt to shore up the deficiencies of a party's case at the initial hearing. Mr and Ms Cruz have provided no explanation as to why this material was not available earlier. That evidence should not be admitted and the application for leave to appeal must proceed on the basis of the evidence before the tribunal.
- [8] I have read the transcript of the hearing. I do not agree that the hearing, or the tribunal, was "prejudicial, one-sided and arm twisting". In fact, the tribunal made a special point of being fair to the parties. The tribunal allowed the parties five minutes of uninterrupted discussion to see if they could work out a solution by themselves⁴. The tribunal consistently clarified Mr and Ms Cruz' position and submissions, so that there could be no misunderstanding. It is almost inevitable that, after a hearing, one party will be dissatisfied with the result. That does not mean that the hearing was one-sided. I could find no evidence of arm-twisting.
- [9] The appeal tribunal's powers on appeal are limited. Those powers do not extend to sending out an inspector. The tribunal does have power to appoint assessors to assist the tribunal⁵ but it will not exercise those powers simply on a party's request to assess evidence that is not the subject of particular knowledge, expertise or experience. Even when this type of knowledge is required to make a decision, the tribunal usually looks first to the parties to provide it.
- [10] The appeal tribunal will not usually disturb findings of fact on appeal if the evidence is capable of supporting the conclusions.⁶ An appellate tribunal may interfere if the conclusion is '*contrary to compelling inferences*' in the case.⁷
- [11] On any view, the front fence was not in reasonable condition. It was leaning dangerously toward the Simmons' property and something needed to be done. I agree that the back fence looks in reasonable condition but Mr and Ms Cruz had already agreed to replace that part of the fence with a Colorbond fence. The only part of the fence that was in issue was the front, dilapidated, fence.
- [12] Mr Cruz did tell the tribunal that he thought Mr and Ms Simmons should bear the cost of the new front fence because of the stormwater issue. The tribunal acknowledged, but dismissed Mr Cruz's submission.
- [13] Section 26 of the *Neighbourhood Disputes (Dividing Fences and Trees) Act* 2001 (Qld) (the Act) states that, if a dividing fence is damaged or destroyed by the negligent or deliberate act or omission of an owner, the owner must restore the dividing fence to a reasonable standard, having regard to its state before the damage or destruction. Section 35(i) of the Act states that

⁴ Transcript page 1-23, line 21 to page 1-25, line 17

⁵ QCAT Act Chapter 2 Part 6 Division 7

⁶ *Dearman v Dearman* (1908) 7 CLR 549 at 561; *Fox v Percy* (2003) 214 CLR 118 at 125-126.

⁷ *Chambers v Jobling* (1986) 7 NSWLR 1 at 10.

the tribunal may consider an obligation under s 26 when deciding an application about fencing work.

- [14] The tribunal should have considered Mr Cruz's submission when they apportioned the cost of replacing the front fence.
- [15] The tribunal made reference to the fact that there was no evidence about the cost of repairing the front fence⁸. The tribunal also observed that Mr and Ms Cruz did not file any material about the cause of the damage to the front fence or the cost of material⁹. Mr Cruz may be a structural engineer¹⁰ but he still needed to provide some evidence about his complaint about the front fence. The parties had been in discussion about the front fence since July 2014; if Mr Cruz really had an issue about the Simmons causing damage to the front fence, he should have raised it well before a hearing in November 2015. Therefore, although there may have been an error by the tribunal, there is no substantial injustice to Mr and Ms Cruz caused by that error. For that reason, leave to appeal should be refused.
- [16] The issue of who owned the front fence arose in the context of where the fence posts were located and which way the fence leaned. The tribunal found that the fence was a dividing fence¹¹. I have considered the evidence and read the transcript. The evidence is capable of supporting the tribunal's finding and I can find no compelling reason to come to a contrary view. The tribunal was not in error.
- [17] At the hearing, Mr Cruz told the tribunal that a Colorbond fence was not the usual fence for the area¹². Mr Simmons contradicted that statement¹³ but gave no evidence to support his view.
- [18] Section 36(c) of the Act states that, in deciding what is a sufficient fence, the tribunal may consider whether the fence is of a kind normally used in the area. However, that factor is one of seven factors the tribunal may consider. Section 13(1)(c)(i) of the Act states that adjoining owners can agree the dividing fence is a sufficient dividing fence. The parties agreed that, at least for the back part of the fence, Colorbond was a sufficient dividing fence. The tribunal apparently decided that the fence should be made of the same material along its length. The evidence can support that finding and I can find no compelling reason to come to a different view.
- [19] Leave to appeal is refused.

⁸ Transcript page 1-25, lines 25 – 28, page 1-26, lines 1 – 3, page 1-29, lines 41 - 44

⁹ Transcript page 1-20, line 1

¹⁰ Transcript page 1-20, line 18

¹¹ Transcript page 1-29, lines 32 - 33

¹² Transcript page 1-15, lines 43 – 45; page 1-21, lines 38 - 39

¹³ Transcript page 1-21, line 45