

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Ka Fai Cheng v Chavda & Anor* [2018] QCATA 80

PARTIES: **KA FAI CHENG**
(appellant)
v
BIPINKUMAR J CHAVDA
(first respondent)

VARSHABEN B CHAVDA
(second respondent)

APPLICATION NO/S: APL224-17

ORIGINATING APPLICATION NO/S: MCDO327-17 (Brisbane)

MATTER TYPE: Appeals

DELIVERED ON: 28 May 2018

HEARING DATE: 21 May 2018

HEARD AT: Brisbane

DECISION OF: Member Howe

ORDERS:

- 1. Leave to Appeal granted.**
- 2. Appeal allowed.**
- 3. The order of the Tribunal made 23 June 2017 is set aside.**
- 4. The respondents' application in matter MCDO327-17 is dismissed.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – whether the tribunal had jurisdiction to make orders about a retaining wall – where the tribunal has no jurisdiction to grant equitable relief – where orders made beyond the power of the tribunal

REAL PROPERTY – BOUNDARIES OF LAND AND FENCING – FENCES AND FENCING – ADJOINING LAND – where no existing dividing fence – whether orders about a retaining wall possible where no existing retaining wall – where appropriate relief not available under the *Neighbourhood Disputes Act (Dividing Fences and Trees) Act 2011 (Qld)* – where the

relief sought equitable relief available in higher Courts

Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld), s 11(2), s 35
Property Law Act 1974 (Qld), s 179

Fin One Pty Ltd v Kucharski [2018] QDC 25
Jackson v Randall [2002] 2 Qd R 31
Pickering v McArthur [2005] QCA 294

**APPEARANCES &
 REPRESENTATION:**

Applicant: Self-represented
 Respondent: Self-represented

REASONS FOR DECISION

- [1] Mr Cheng and Mr and Mrs Chavda are neighbours.
- [2] Mr Cheng purchased his land to build a house after Mr and Mrs Chavda purchased their land and built their house. The street slopes from above the Chavdas down through Mr Cheng's property then down through other allotments.
- [3] Because the block slopes, Mr Cheng had to cut and fill his land. He cut near the Chavdas' land and used the cut material to fill and level the rest of his land. The parties want to build a retaining wall and fence between their respective properties but they do not agree on the contribution to the cost.
- [4] Mr and Mrs Chavda say they paid for their cut on the high side of their property and paid for the whole cost of a retaining wall there. They say Mr Cheng should pay for the retaining wall where he in turn has cut at the boundary between their properties.
- [5] The parties could not agree and Mr and Mrs Chavda applied to the Tribunal for orders that Mr Cheng pay for the retaining wall and also be directed to replace soil lost from their property at the cut. They wanted Mr Cheng to be ordered to pay half the cost of a dividing fence on top of the retaining wall after it was built.
- [6] The matter was heard in the Tribunal on 23 June 2017. The Tribunal ordered that Mr Cheng restore the land at the Chavdas' property to the state it was in in May 2015. Further, that Mr Cheng erect a retaining wall between the properties. Further again that Mr Cheng arrange for the construction of a dividing fence between the properties after which the Chavdas' were directed to pay Mr Cheng \$1,040.
- [7] Mr Cheng wants to appeal that decision.
- [8] Given this is an appeal from a decision made in the Tribunal's Minor Civil Dispute jurisdiction, leave to appeal must first be obtained before any appeal proceeds.¹

¹ QCAT Act, s 142(3)(a)(i).

- [9] Leave to appeal will usually only be granted where an appeal is necessary to correct a substantial injustice to the appellant and where there is a reasonable argument that there is an error to be corrected.²
- [10] Mr Cheng made application for leave to adduce fresh evidence at the hearing of the appeal. He filed nothing in the original hearing. Mr Cheng maintained that he had the material available at hearing but the Tribunal refused to accept it. The transcript shows however that the Tribunal asked for evidence but Mr Cheng, or his witness Mr Ng who seems to have given most of the evidence in the matter for Mr Cheng, said it was not available.³ There is nothing in the transcript of the hearing to suggest the Tribunal refused to accept evidence.
- [11] Mr Cheng claimed he was overseas when the first hearing date was set and could not prepare for the hearing properly. But the Tribunal adjourned the first date of hearing because of Mr Cheng's overseas travel and the hearing took place 3 weeks after he returned to Australia.
- [12] On this basis leave to adduce fresh evidence at the appeal was refused.
- [13] As with many matters in the Minor Civil Dispute list, the parties are self-represented. Additionally, in this matter, English is not the first language of the parties. The Tribunal below commented that the parties were difficult to understand and the matter was confusing. From the transcript it is clear that was the case.
- [14] Mr Cheng's ground of appeal appears to be that the Tribunal erred in concluding Mr Cheng excavated his land when it was the Chavdas who filled their land. On that basis he says they should share the cost of the retaining wall.
- [15] The issue between the parties is an order about a retaining wall. There was no dispute about the dividing fence during the hearing, because the matter did not get to that point. The only matter canvassed was the issue of the retaining wall.
- [16] In concluding the matter the Tribunal made orders about the levelling of Mr Cheng's land and directed him to build the retaining wall. The order about a dividing fence appears to have been virtually an afterthought.
- [17] The Tribunal clearly fell into error in making the orders it did. There is no power in the Tribunal to make orders about construction of a retaining wall or about significant land work on a party's property in conjunction with orders about building a retaining wall.
- [18] Under the former *Dividing Fences Act* 1953 (Qld), "fence" was defined as:
- a structure of posts and boards, palings, rails, galvanised iron ... enclosing or bounding land, and includes any foundation, foundation wall, or support reasonably necessary for the support and maintenance of the fence, but does not include a wall which is part of a house or other building.⁴

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

³ Transcript 1-17 Line 29-44, T1-34 L36, T1-35 L23, T1-37 L37.

⁴ S 6(1).

- [19] In *Jackson v Randall*⁵ the Supreme Court found that under the definition in that Act it was irrelevant that the section at the base, the retaining wall, consisting of sleepers, formed a separate purpose to a dividing fence, that is that it was for the purpose of soil retention. A retaining wall was not excluded by the definition from being part of a fence if it was not a wall of a house or other building.
- [20] The *Neighbourhood Disputes (Dividing Fences and Trees) Act* 2011 (Qld) (the Act) remedied that and the definition of dividing fence under s 11(2) of the current Act excludes a retaining wall:
- 11(2) However a fence is not –
- (a) a retaining wall; or
- (b) a wall that is part of a house, garage or other building.
- [21] The Tribunal has power under the Act to make orders about dividing fences. It has no power to make orders about a retaining wall.
- [22] The Act does say that the Tribunal can order:
- S 35(1)(f) ... any other work to be carried out that is necessary to carry out the fencing work ... including work for a retaining wall;
- [23] However such orders about retaining walls are only ancillary and secondary to making orders about fencing work. Where there is no existing fence or retaining wall such as here in the present dispute, the power in s 35(1)(f) is not enlivened.
- [24] The rationale behind the exclusion of any power to make orders for construction of retaining walls is explained in the explanatory notes to the legislation:⁶

A retaining wall is not a fence. It serves a different purpose which is to support excavated or filled earth.

As the NSW Law Reform Commission explained in its Report 59 (1988) Community Law Reform Program: Dividing Fences, at paragraph 4.8:

“Retaining walls serve quite different purposes from fences. They are usually substantial and expensive structures which repose within the subsurface of the land of one adjoining owner, and are therefore required to withstand considerable lateral stress. They also interfere with the cross-flow of subterranean water and so must normally include weep holes and other drainage works. The foundations or footings often encroach substantially upon the downward adjoining landowner. Retaining walls are usually erected solely for the benefit of the owner who undertakes excavation work:...”

Alternatively, retaining walls can be established to support “built up” earth. Generally retaining walls involve engineering specifications prior to construction. They are more than the mere levelling of dirt.

Unlike fences, it is not usually possible to make both adjoining owners

⁵ [2002] 2 Qd R 31, 32-3.

⁶ Neighbourhood Disputes Resolution Bill 2010, page 14.

liable for the cost of maintaining, repairing or replacing a retaining wall. This is because usually a retaining wall is of greater benefit to one of the adjoining owners.

However, the kinds of orders which QCAT can make about carrying out fencing work include work for a retaining wall if the repair of the fence is dependent upon the work for the retaining wall.

- [25] Hence, unlike dividing fences, the owner who benefits most from a retaining wall will usually be responsible for the cost of its construction. To determine who gets the benefit may not be obvious. It may require significant engineering evidence, which may not be appropriate for the quick, efficient hearings set down for the Tribunal's Minor Civil Dispute jurisdiction, particularly with self-represented parties.
- [26] What avenues are available to neighbours in the position of the present parties? The answer is, unfortunately, not many.
- [27] Matters may sometimes be transferred from the Tribunal to a Court with more appropriate powers. No application for that was considered at the hearing below. But a transfer to which Court would be appropriate in any case?
- [28] The Magistrates Court does not exercise any greater power than the Tribunal in dividing fence matters. The Magistrates Court is an inferior court (as is the Tribunal) and only has jurisdiction granted it by statute, which here is limited to the Act. The Magistrates Court does have a greater monetary jurisdiction where the cost of the dividing fence exceeds \$25,000. But the Magistrates Court has no power to grant equitable relief, such as injunctive relief directing construction or precluding construction of retaining walls.⁷
- [29] The District Court and the Supreme Court have the necessary powers to grant equitable relief such as to direct construction or prevent construction of retaining walls, and to determine which party is responsible for such. The cost of such proceedings however would, for most home owners, be impossible to meet.
- [30] By s 179 of the *Property Law Act 1974* (Qld):
- Right to support of land and buildings
- For the benefit of all interests in other land which may be adversely affected by any breach of this section, there shall be attached to any land an obligation not to do anything on or below it that will withdraw support from any other land or from any building, structure or erection that has been placed on or below it.
- [31] Where s 179 is breached with say one neighbour cutting land at the boundary and thereby withdrawing support from the adjoining neighbour's land, that work may constitute an actionable nuisance both under s 179 and under the common law. That claim might be brought in the Magistrates Court however it would only sound in damages.

⁷ *Fin One Pty Ltd v Kucharski* [2018] QDC 25, [6].

- [32] Section 179 however clearly does not give the Tribunal power to make orders directing a party to build a retaining wall or to stop excavating land.
- [33] The situation is unsatisfactory and requires legislative intervention. Conditions attached to building approvals might apply to require a home owner to construct a retaining wall as part of his development approval, but only in certain circumstances.⁸ There was no such requirement placed on Mr Cheng building his house, apparently.
- [34] In the matter at hand, the Tribunal erred in making the orders it did. There was no power to make them. This was an error of law. There has been a substantial injustice to the appellant. Leave to appeal must be granted and the appeal allowed for the reasons set out above.
- [35] The parties agree no order about a dividing fence is possible until the matter of the retaining wall is resolved. The Tribunal cannot help them with the retaining wall.
- [36] Accordingly the decision made below on 23 June 2017 is set aside and in lieu thereof the original application is dismissed.

⁸ See *Building Regulation* 2006, s 4 and schedule 1, s3 – eg where the retaining wall is over 1 metre high.