QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Shome v Nuttall* [2019] QCATA 138
PARTIES:	**ANTHONY SHOME** (applicant) **v** **KEVIN NUTTALL** (respondent)
APPLICATION NO/S:	APL080-19
ORIGINATING APPLICATION NO/S:	MCDQ86-18; MCDQ87-18 (Richlands)
MATTER TYPE:	Appeals
DELIVERED ON:	11 September 2019
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	Acting Senior Member Browne
ORDERS:	**Leave to appeal is refused.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – where minor civil dispute applications for minor debt and fencing dispute dismissed at first instance – where applicant argues that Adjudicator erred in not finding the existence of a legally binding agreement – whether Adjudicator erred in dismissing the applications below for lack of jurisdiction – whether leave to appeal should be granted – whether error in the findings made by the Tribunal *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 32, s 47, s 143 *Felthouse v Bindley* (1862) 11 CBNS 869 *Hampstead Meats Pty Ltd v Emerson & Yates Pty Ltd* [1967] SASR 109 *Pickering v McArthur* [2005] QCA 294
REPRESENTATION:	
Applicant:	Self-represented
Respondent:	Self-represented
APPEARANCES:	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] Anthony Shome sent a number of emails to the respondent about the installation of a Colorbond fence and, more importantly, the cost of installing a fence along the exposed portion of boundary between Mr Shome’s property and the respondent’s property.

[2] Mr Shome installed the fence and later applied to the Tribunal seeking a contribution from the respondent for the cost of the fencing work in the amount of $640 plus filing and service fees.[1] In the application for minor civil dispute – minor debt (MCDQ8-18), Mr Shome stated:

> The first file shows the exposed portion of the boundary between our properties, and showing a number of vehicles parked on their property. It also shows my flower bed that has been much trampled on by the neighbour’s children when their ball goes into my property. The ball has also hit my window and garage door. The second file shows the Colorbond fencing installed on the previously exposed and unfenced portion of the boundary. The third file is a chronology of emails with the respondent.[2]

[3] Mr Shome later filed an application for minor civil dispute – dividing fences (MCDQ87-18) under the *Neighbourhood Disputes (Dividing Fences and Trees) Act* 2011 (Qld) (‘the Act’) and *Building Act* 1975 (Qld).[3] In the application, Mr Shome sought: an order that fencing work be done; an order about the amount the parties have to contribute or pay for fencing work; and an order for payment of the filing fee for the application.

[4] On 13 February 2019, both applications MCDQ86-18 and MCDQ87-18 proceeded to a hearing and an Adjudicator sitting in the Tribunal’s minor civil dispute jurisdiction dismissed the applications.[4]

[5] Mr Shome seeks leave to appeal the learned Adjudicator’s decision and seeks an order for reimbursement for his half share of the cost of the boundary fence. Mr Shome says that there was implied acceptance by the respondent to contribute towards the cost of the boundary fence. More importantly, Mr Shome says that there was implied acceptance by the fact that the respondent had offered an alternative quote for a timber fence instead of the colour bond fence. Further, Mr Shome contends that the issue is urgent because of the ongoing nuisance by the tenants and the respondent merely changed his mind to contribute to the cost of the fence as he felt he was being rushed. Mr Shome submits as follows:

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1 See application for minor civil dispute – dividing fences filed 21 December 2018 in MCDQ87-18 (Richlands) and application for minor civil dispute – minor debt filed 12 November 2018 in MCDQ86-18 (Richlands).

2 Application for minor civil dispute – minor debt filed 12 November 2019 in MCDQ86-18 (Richlands).

3 By order dated 19 December 2018, leave was given to the applicant (Mr Shome) to file an amended application being a fencing dispute.

4 By order dated 13 February 2019, applications MCDQ86-18 and MCDQ87-18 are dismissed.

> The fence has not caused nor likely to cause any hardship to [the respondent]. Both [the respondent] and I clearly benefit from this equal joint ownership of the boundary fence as it provides added privacy by mitigating tensions, and aesthetic value to our respective properties.[5]

[6] The transcript of the hearing reveals that the learned Adjudicator made findings about the fencing dispute brought under the Act and whether the Tribunal has the power to make orders. Firstly, the learned Adjudicator found that relevant forms have not been served by Mr Shome on the respondent pursuant to the statutory regime regarding dividing fence disputes. Further, the learned Adjudicator was not satisfied that the fencing work was urgent pursuant to s 28 of the Act nor was he satisfied that having regard to the emails exchanged between the parties it was impracticable to fill out a form and serve it pursuant to s 31 of the Act.

[7] Because this is an appeal from a decision of the Tribunal in the minor civil disputes jurisdiction, leave to appeal is necessary. Leave to appeal will usually be granted according to general principles such as 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.[6]

[8] For reasons explained below, there is no error in the Tribunal's findings that it does not have jurisdiction to make orders about the dividing fence under the Act. The learned Adjudicator correctly identified that there is a requirement under s 31 of the Act to issue a notice to fence. The transcript reveals that Mr Shome did not dispute, when asked by the learned Adjudicator, that the necessary forms required by s 31 of the Act had not been provided to the respondent. The relevant extract from the transcript is as follows:

> Adjudicator: …under [the Act], and that's the enabling legislation that gives the tribunal power, there's a government gazetted form where notice to fence, it's called a notice to fence, it's titled. And it's usually issued to a neighbour or to an adjoining property owner seeking out 50 percent contribution. Was that done?
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> Mr Shome: In not my knowledge, because advice by my builder that all that was required was for me to – the permission of my neighbour for permission to erect a fence.[7]

[9] The learned Adjudicator considered whether the fencing work was required and urgent for the purposes of s 28 of the Act, it being impracticable to give a notice under s 31. The transcript reveals that Mr Shome was given an opportunity to present evidence and make submissions about this issue. Mr Shome told the Tribunal that he has constant problems with the people (his neighbours) playing ball, coming to his car and stepping on his flowerbeds.[8] Mr Shome said that the police have been called referring to the 'kid' hitting the ball against his windows but also said that since that time (meaning the incident when the police were called) there has only been one incident when the ball has entered his property.[9]

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5 Application for leave to appeal or appeal filed 25 February 2019.
6 *Pickering v McArthur* [2005] QCA 294, [3].
7 Transcript of proceedings, T1-3, L8-12.
8 Ibid T1-7, L5-12.
9 Ibid T1-10.

[10] It was open for the learned Adjudicator to make relevant findings about the urgency of the fencing work and whether it was impracticable for Mr Shome to fill out a notice and serve it pursuant to s 31 of the Act. The transcript reveals that Mr Shome told the Tribunal at the hearing below that, amomsgt other things, 'it's not urgent' referring to the fence and said that it (meaning the fence) is the best way to 'preserve the kind of peace that I'd like my neighbour and myself to have'. Mr Shome also referred to his neighbours as being 'quite nice people'.[10] There is no error in the Tribunal's finding that the fencing work was not urgent for the purposes of s 28 of the Act.

[11] There is a further issue to be considered in the disposition of the appeal. That is whether it was open for the learned Adjudicator to find that there was no legally binding agreement between the parties giving rise to a minor debt, as set out in Mr Shome's application for a minor debt. Relevantly, as provided under s 10 of the Act, Chapter 2 (dividing fences) does not affect a covenant or agreement, other than an agreement under this chapter, made between adjoining owners about a dividing fence. Put simply if there was a binding agreement between the parties to contribute towards the cost of the dividing fence, then the Tribunal may make an order about the payment of money by the respondent to Mr Shome as a minor debt claim. Here, the learned Adjudicator was not satisfied that there has been acceptance of an offer and dismissed Mr Shome's application for a minor debt.

[12] The transcript reveals that the learned Adjudicator considered the exchange of emails between the parties. The learned Adjudicator was not satisfied based on the evidence that there has been acceptance of an offer by the respondent, a necessary element for there to be a legally binding agreement.[11] The learned Adjudicator said:

> …A contract or an agreement, to be legally binding, giving rise to a minor debt- or a minor debt in this circumstance could only arise as a result, having regard to the facts, of there being a legally binding agreement entered into, that is, a contract. A contract requires offer and acceptance. Offer and acceptance can, of course, be written, spoken or even implied.[12]

[13] The learned Adjudicator went on to say that the correspondence relied upon by Mr Shome did not support his case. That is, as contended by Mr Shome, there was no objection by the respondent in relation to what was proposed in the exchange of emails and therefore an acceptance to pay the amount claimed for the fence. The learned Adjudicator was not satisfied based on the evidence that there has been acceptance of an offer. The learned Adjudicator said:

> …Acceptance cannot be by silence; it cannot be by acquiescence. Acceptance cannot be implied through a party's acquiescence or failure to object to a course of action. In any event, the evidence from the respondent, supported by email dated 22 October, was that there was no acquiescence to an offer that was made. Therefore, in the absence of the element of acceptance, the Tribunal is not satisfied that it can make a finding that there is a minor debt.[13]

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10 Transcript of proceedings, T1-10.
11 *Hampstead Meats Pty Ltd v Emerson & Yates Pty Ltd* [1967] SASR 109.
12 Transcript of proceeding, T1-12, L22-28.
13 Ibid T1-13, L21-27.

[14] It was open for the Tribunal to find that the respondent's silence or 'no objection' in relation to what was proposed by Mr Shome in his email was at best, as observed by the learned Adjudicator, a 'willingness to share costs'[14] but only if a fence is required, as expressed in the email to Mr Shome dated 9 October 2018.[15] The evidence did not support a finding of acceptance by the respondent to Mr Shome's offer simply because the respondent did not object to Mr Shome's proposal. Indeed the respondent's representative by email dated 22 October 2018 to Mr Shome, communicated an intention to not contribute towards the cost of a fence. In the email dated 22 October 2018, the respondent's representative states the following:

> …If you want us to contribute please DO NOT engage your contractor, this is not urgent.[16]

[15] Further, by email dated 5 November 2018, the respondent's representative again emailed Mr Shome stating:

> …With regards to the below please see attached email trail, the last email sent to you asks for your response as there were queries in this correspondence that we required answers to. You then took it upon yourself to proceed with your quote without our consent. You initially enquired about the fence on [9 October 2018] and our last communication to you was on [22 October 2018] – this is a period of 13 days which is not unreasonable for a non-emergency repair. We are not contributing to this fence…

[16] There is no error in the Tribunal's finding that there is no legally binding agreement between the parties. Having made that finding, the learned Adjudicator was not satisfied that he could make a finding about a minor debt claim.

[17] The learned Adjudicator proceeded to dismiss the applications filed in the minor civil disputes jurisdiction for a fencing dispute and for a minor debt for 'lack of jurisdiction'.[17] Although not expressly stated, the learned Adjudicator exercised the Tribunal's discretionary powers under s 47 of the QCAT Act. Relevantly, s 47 permits the Tribunal to dismiss a proceeding if it considers the proceeding is, frivolous, vexation or misconceived; or lacking in substance; or otherwise an abuse of process.

[18] Here, it was within the Tribunal's power to properly exercise the discretion under s 47 of the QCAT Act to dismiss the applications having made findings that there was firstly, no power to make an order under the Act and secondly, that there was no binding agreement between the parties. Mr Shome has failed to identify any error in the Tribunal's findings. Leave to appeal is refused.

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14 Ibid T1-12, L45.

15 *Felthouse v Bindley* (1862) 11 CBNS 869, see transcript of proceedings, T1-12, L33.

16 Email dated 22 October 2018, 'Email 8' filed in MCDQ86-18.

17 Transcript of proceedings, T1-13.