QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Canham & Anor v Saharan & Anor* [2020] QCATA 51
PARTIES:	**NEVILLE CANHAM AND LAUREN CANHAM** (Applicants) **v** **SAHIL SAHARAN AND RAKHI SINGH** (Respondents)
APPLICATION NO:	APL151-19
ORIGINATING APPLICATION NO:	MCD1632-18 Brisbane
MATTER TYPE:	Appeals
DELIVERED ON:	16 April 2020
HEARING DATE:	13 April 2020
HEARD AT:	Brisbane
DECISION OF:	Dr J R Forbes, Member
ORDERS:	**The application for leave to appeal is dismissed.**
CATCHWORDS:	APPEAL – APPLICATION FOR LEAVE TO APPEAL – neighbourhood fencing dispute – where application for leave defines ambit of proposed appeal – where relief sought on appeal includes several forms of relief not included in originating application – where application does not establish reasonable prospects of success if leave granted – where application for leave to appeal dismissed *Land Act 1994* (Qld) s 373A *Land Title Act 1994* (Qld) s 97A *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) s 33, s 35, s 94 *Queensland Civil and Administrative Tribunal Act 2009 (Qld)* s 61, s 64, s 122, s 123, s 143 *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 *Coulton v Holcombe* (1986) 162 CLR 1 *Fox v Percy* (2003) 214 CLR 118 *Glenwood Properties Pty Ltd v Delmoss Pty Ltd* [1986] 2 Qd R 388

	Grewal v Di Camillo [2014] VSC 640 *JM v QFG* [2000] 1 Qd R 373 *Minister for Immigration and Citizenship v SZMDS & Another* (2010) 240 CLR 611 *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 *Snell v Moynihan* [2011] QCATA 316 *Thompson and Anor v Jedanhay Pty Ltd* [2012[QCATA 246 *W (an infant), In Re* [1971] AC 682
APPEARANCES & REPRESENTATION:	The applicants were represented by Mr N Canham The respondents were represented by Mr S Saharin

REASONS FOR DECISION

[1] The Applicants (`Canhams') and the Respondents (`Saharans') are neighbours in the pleasant Brisbane suburb of Aspley.

[2] In November 2018 it was necessary to build a boundary fence between the parties' properties, or at least Sarharans thought so.

Issue is joined

[3] Absent an agreement to that effect, and after some acerbic exchanges, the Saharans commenced these proceedings, seeking appropriate orders under the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) (`DFA').[1]

[4] On 4 April 2019 the Tribunal ordered:

> (i) A new dividing fence is to be erected on the common boundary between the properties of the parties;
>
> (ii) The fence is to be constructed in accordance with the quotation by Amazing Fencing (Qld) Pty Ltd dated 19 March 2019 for a 2.1 m Colorbond fence;
>
> (iii) The fence construction is to be arranged by [Saharans];
>
> (iv) [Canhams] are to pay the [Saharans] the sum of $1,055 within 14 days of completion of the fence;
>
> (v) The [Canhams] counterclaim is dismissed.

[5] By June 2019 the fence was completed[2], but not to the Canhams' satisfaction, and notwithstanding Canham's emphatic declaration that, as planned, it could not be done.[3]

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1 DFA s 35 (Orders about carrying out fencing work). Jurisdiction is conferred on the Tribunal by s 33(1) of the DFA.

2 Email Saharan to QCAT 20 June 2019; Saharans' submissions filed 4 October 2019 page 5.

Proposed grounds of appeal

[6] By application filed on 14 June 2019 the Canhams seek leave[4] to appeal on these grounds, which define the ambit of the proposed appeal:

> A. No written reasons were provided with the decision. The process was a breach of natural justice because the evidence provided by [the Saharans] and Amazing Fence quotations did not address structural compliance and council setback. The information was no different from the information rejected by the Tribunal during the first hearing.
>
> B. The evidence provided by the [Canhams] did not receive proper weighting resulting in a decision that no reasonable court would have made.
>
> C. Responsibility for the construction of a suitable boundary fence was directed by the Tribunal to [the builder] Amazing Fencing and the [Saharans] without the inclusion of the [Canhams]. Access to Amazing Fencing was denied to the [Canhams] due to the authority provided by QCAT to the [Saharans] only.
>
> D. The Tribunal failed to pay attention to the contractual obligations in the building covenants signed by Mr Sahil Saharan and Ms Rakhi Singh on 10 August 2016. The [Canhams have] a copy.
>
> E. The co-owners of the properties were not included in the [Saharans'] claim filed on 18 November, these being Ms Rakhi Singh and Mrs Lauren Canham.

Orders sought

[7] The Canhams seek the following orders in lieu of those made by the Tribunal on 4 April 2019:

> (a) Access to BCA Certifiers Pty Ltd to assess whether structural compliance and final site inspection for the construction of the Colorbond fence now constructed and diverging over the over the boundary line and into [the Canhams'] property was completed. This fence was constructed whilst [Mr Canham] was at work and by trespassing into 4A Pimlico Lane. [The] relaxation concurrency application did not include dialogue or permission from [Neville Canham] or the co-owner of 4A Pimlico Lane, Mrs Lauren Canham.
>
> (b) Removal of the fence which does not meet conditions agreed to be [the Saharans] on 10 August 2016 or engineering design.
>
> (c) Construction of a fence compliant with covenant requirements and engineering design in collaboration with both the applicant and co-owners of both properties.
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> (d) A claim for damages incurred in loss of plants and associated items destroyed by Amazing Fencing in the process of erecting a fence without [the Canhams'] inclusion or permission. Amazing Fencing [are] only interested in commercial gain.

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3 Transcript of hearing 4 April 2019 (`T') page 13 lines 41 and 45.

4 As required by s 143(3) of the QCAT Act.

(e) An injunction preventing Sahil Saharan, Rakhi Singh or any delegated tradesmen who attempt to trespass or gain access to [the Canhams'] property without permission.

(f) Indemnity of [the Canhams] for any costs relating to structural failure, repair or removal of Colourbond fence erected without [Canhams'] consent.

[8] The contents of Part D of the application (relief sought) do not constitute a second or supplementary list of proposed grounds of appeal set out in Part C. Nor are written submissions, if any. Each request in Part D, and any subsequent submission, depends for its relevance and availability upon one or more of the allegations in Part C. The ambit of the appeal is defined in Part C.

[9] Canhams' counterclaim for $2,200, which the Tribunal dismissed, is not now in issue.

Appeal grounds considered

Ground 6A

[10] This is not a viable ground of appeal. The decision was made in Canham's presence on 4 April 2019, and according to his application for leave, he received a copy of the orders on 8 April 2019. He exercised his right to receive a copy of the transcript, including reasons.[5] They were delivered to him on 21 May 2019, and the application for leave was filed within time. The frequently misunderstood and misused mantra `natural justice' is simply beside the point here. This ground is misconceived and is rejected.

Ground 6B

[11] The weight of respective cases is a matter for the primary tribunal. When dealing with an application for leave to appeal the appeal tribunal is bound by the following principles: An application of this kind is not an opportunity to re-run the trial, or to `second guess' the decision already made. It is not an occasion to repeat or re-argue evidence that the primary adjudicator reasonably rejected, or to present material that could have been put before him, but was not.[6] Still less is it an opportunity to raise new causes of action, as attempted in Section D of this application. Finality in litigation, particularly in a forum devoted to speed, simplicity and economy, is `highly desirable'.[7] It is not an appellable error to prefer one version to the other, or to give less weight to one party's case than he thinks it deserves. Findings of fact and assessments of weight are not normally disturbed when they have some support in the evidence, even when another view is possible.[8]

> If there is evidence, or if there are available inferences that compete for a judge's acceptance, no error of law occurs simply because the judge prefers one version to another, or one set of inferences to another. *That is his function* ... Even if the evidence is

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5 QCAT Act s 122. If a request is made, a CD recording suffices: s 123(2).

6 *Snell v Moynihan* [2011] QCATA 316 at [10]; *Thompson and Anor v Jedanhay Pty Ltd* [2012[QCATA 246 at [28].

7 *Fox v Percy* (2003) 214 CLR 118 at [29].

8 *Minister for Immigration and Citizenship v SZMDS & Another* (2010) 240 CLR 611 at [131]; *In Re W (an infant)* [1971] AC 682 at 700 per Lord Hailsham; *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1025; *Glenwood Properties Pty Ltd v Delmoss Pty Ltd* [1986] 2 Qd R 388 at 389.

> strongly one way the appeal court may not intervene simply because it reaches a different conclusion, and this, even if it regards the conclusion of the trial judge as against the weight of the evidence.[9]

[12] A distinguished member of the Queensland Court of Appeal agrees:

> It appears to be that a factual conclusion cannot be treated as infected by legal error unless it is supported by no evidence whatever, or unless it is clear, beyond serious argument, that it is wrong. That this court merely agrees with a factual view of a tribunal does not show that a decision based on it is legally erroneous.[10]

[13] Two reasonable people -

> ... can quite reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable.[11]

[14] A case of this kind is governed, not by the `beyond reasonable doubt' formula, but by the civil standard of proof, the balance of probabilities, as seen by the primary judge. It cannot seriously be contended that there was no evidence to support the tribunal's decision. Saharan tendered four quotations by three different companies.[12] He described the dimensions of the proposed fence,[13] the material to be used, and the reason for selecting it.[14] He provided the tendering companies with drawings and photographs, copies of which he produced at the hearing,[15] together with a design document provided by Canham[16] and certificates of satisfaction from two certifiers[17] based on the quotation that was finally accepted.

[15] Ground 6B is not made out.

Ground 6C

[16] The tribunal's jurisdiction to resolve fencing disputes[18] necessarily implies a power to make such incidental or `machinery' orders calculated to facilitate efficient performance of a substantive order. The tribunal was no doubt aware that Canham held strong views in opposition to the order that it proposed to make. Further there was a history of animosity between the parties.[19] Plainly, it would have been worse than useless to have a situation in which the fence builder might, and probably would receive conflicting directions while executing the tribunal's orders. A modern Tower of Babel may have ensued. It was Saharan who initiated the proceedings and who dealt with the tradesmen involved. It was

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9 *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 at 151 per Kirby P (emphasis added); *Grewal v Di Camillo* [2014] VSC 640 at [12].

10 *JM v QFG* [2000] 1 Qd R 373 at 391 per Pincus JA.

11 *Re W (An Infant)* [1971] AC 682 at 700 per Lord Hailsham LC.

12 T page 4 line 9.

13 T page 4 lines 45-47; page 5 lines 33-37.

14 T page 5 lines 16-28.

15 T page 10 lines 35-39.

16 T page 10 line 45.

17 T page 11 lines 12-15.

18 DFA s 35.

19 T page 19 line 1; page 20 line 18; email Canham to Saharan 27 August 2017; submissions of Canham 14 January 2019 page 9.

undoubtedly within the tribunal's incidental power to order that `the fence construction is to be arranged' by Saharan. There is no substance in this proposed ground of appeal.

Ground 6D

[17] The DFA provides that the tribunal, in deciding a dividing fence dispute may (not must) consider any policy or law made by a local government for the area, or any relevant written agreement made between the adjoining owners.[20] The tribunal did consider Canham's reliance upon a covenant made in 2016, but in the circumstances held that it was not decisive.[21] To that ruling Canham responded `fair enough'[22], and the point was not taken further. Contrary to the thrust of Ground 6D the tribunal did not err in deciding to overlook the alleged covenant.

[18] It may be added, incidentally, that references to the *Land Act 1994* (Qld) and the *Land Titles Act 1994* (Qld) were unhelpful. The former relates to non-freehold land[23], and the latter to covenants taken by the State or local government.[24]

Ground 6E

[19] This ground is insubstantial. The original of co-owners' names from the originating process did not invalidate the proceedings. It was a mere procedural matter, which was remedied by a subsequent direction under section 61 of the Act.[25] All four names appear on the Canhams' application for leave, and on Directions made on 14 June, 5 July, 12 September and 19 October 2019.

Inappropriate orders sought

[20] In view of the reasons above it is strictly unnecessary to deal in detail with the orders sought in Part D of the application. Briefly, a fatal objection to several of the remedies sought – so far as a leave application is concerned - is that they do not arise out of the original proceedings. If warranted, they would require separate and fresh applications. For example: the claims for an injunction and damages, and demands for demolition and rebuilding. The implied complaint of trespass would have to be taken to another jurisdiction, if not covered by an access licence in the fencing Act.[26]

> It is fundamental to the due administration of justice that the substantial issues issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish.[27]

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20 DFA s 36(e) and (g).
21 T page 7 line 46.
22 T page 8 line 1.
23 *Land Act 1994* (Qld) s 373A(1).
24 *Land Title Act 1994* (Qld) s 97A(2).
25 QCAT Act s 61 (Relief from procedural requirements). The tribunal may act under *subsection (1)* on the application of a party or on its own initiative. See also s 64.
26 DFA s 94.
27 *Coulton v Holcombe* (1986) 162 CLR 1 at [9].

[21] For the reasons set out above, there is no reasonable prospect of a successful appeal upon the grounds stated in the present application. It must therefore be dismissed.

ORDER

The application for leave to appeal is dismissed.