

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Dearness v Sheldon* [2024] QCAT 148

PARTIES: **ROBYN FAYE DEARNESS**
(applicant)

v

JANE SHELDON
(respondent)

APPLICATION NO/S: NDR116-20

MATTER TYPE: Other civil dispute matters

DELIVERED ON: 10 April 2024

HEARD AT: Brisbane

DECISION OF: Member Goodman

- ORDERS:
1. **The respondent is to pay \$500 to the applicant as a refund of half of the cost of the tree assessor's report by 4pm on 30 May 2024.**
 2. **The respondent is to prune and maintain the seven trees bordering the applicant's property as deemed appropriate pursuant to good arboriculture practice, provided that:**
 - (a) **The pruning addresses risks associated with the epicormic growth identified in the report of the independent tree assessor dated 12 July 2022.**
 - (b) **All works are to be carried out by a properly insured and suitably qualified arboricultural contractor with a minimum AQF level 3 qualification, who must adhere to the guidelines set out in the Australian Standard for Pruning of Amenity Trees (AS4373-2007).**
 - (c) **The work is to be undertaken at the cost of the respondent.**
 - (d) **The work is to be completed annually no later than 30 June each year.**
 - (e) **If the work is not completed by 30 June each year, the applicant may arrange to have the work performed as above.**
 - (f) **Should the applicant be required to arrange the work in default of it being done by the**

respondent, the person(s) undertaking the work is/are entitled to enter the respondent's land to carry out the work upon the applicant giving 14 days written notice of that intention to the respondent.

- (g) The costs incurred by the applicant engaging a contractor to do the work in default of the respondent are recoverable from the respondent as a debt without further notice being required to be given.
- (h) The respondent and any contractor engaged by the respondent to perform the work are entitled to enter the applicant's land for the purpose of assessing and performing work necessary to comply with this decision subject to seven days written notice being given to the applicant.
- (i) These orders remain in force and effect for a period of 10 years from the date hereof.

CATCHWORDS: ENVIRONMENT AND PLANNING – TREES – DISPUTES BETWEEN NEIGHBOURS – where branches overhang neighbour's property – where tree keeper directed to arrange for pruning

Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld), s 46, s 61, s 66, s 71, s 72, s 73, s 75

APPEARANCES & REPRESENTATION: 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

- [1] The applicant and respondent are neighbours. The respondent has seven trees on her property which are growing along the boundary between the two properties, within two metres of the dividing fence line.
- [2] The applicant lodged an application in this Tribunal on 3 August 2020 claiming that:
 - (a) Branches from the trees overhang her roof and gutter.
 - (b) In windy conditions, the branches could hit the Foxtel dish and tear it off the roof. Branches are very close to the dish and eventually will cut off the signal.
 - (c) The trees continually block out sun and light on the patio area.
 - (d) The trees continually drop leaves on her property and she and her husband "never stop" cleaning out their gutters.

- (e) She and her husband have trimmed back the trees in the past, but that is really a task for the tree owner.
- [3] The applicant sought orders that:
- (a) The respondent remove the trees or remove or prune the branches every 6 or 12 months.
 - (b) The respondent pay the costs of removal and/or pruning.
 - (c) The respondent pay the costs of this application and other costs incurred in these proceedings.
- [4] On 24 November 2020, the respondent lodged a response to the application stating:
- (a) Branches had been trimmed and no longer extended more than 50 cm over the common boundary.
 - (b) When she purchased her home in 2003, the applicant had a number of paperbark trees on her property which provided privacy, protection and shade to the respondent's house. When the applicant cut down those trees, the respondent allowed trees in her yard to grow to provide shade and privacy.
 - (c) It has been her practice to trim the trees in winter to allow sun through, and allow them to grow in summer to provide shade. She did not trim the trees in winter 2020 due to, amongst other things, the effect of COVID on her business.
 - (d) She was happy to trim the trees back once per year before the winter months.
 - (e) She should not have to pay costs of the applicant, as the applicant had not followed proper protocols in requesting trimming of the trees.
- [5] On 27 September 2022, the applicant lodged an application seeking costs from the respondent. She stated that:
- (a) The respondent should reimburse her costs of the application and other costs incurred for this case, including:
 - (i) QCAT application \$345.80
 - (ii) Property search \$40.50
 - (iii) Property search \$21.70
 - (iv) Process Server \$88.00
 - (v) Tree assessor \$1,000.
 - (b) The respondent could see what the trees were doing to her property and chose to do nothing until QCAT got involved. The respondent has now finally agreed to trim back her trees on a regular basis since the application was lodged in QCAT.
 - (c) It would not have cost her any money if the respondent was a responsible tree owner in the first place.

THE LEGISLATION

- [6] The relevant legislation is the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld). Under that Act, the Tribunal has broad powers to hear and decide matters when a tree is affecting a neighbour's land at the date of the application to the Tribunal.¹ The Tribunal may make appropriate orders:
- (a) to prevent serious injury to any person; or
 - (b) to remedy, restrain or prevent:
 - (i) serious damage to the neighbour's land or any property on the neighbour's land; or
 - (ii) substantial, ongoing, and unreasonable interference with the use and enjoyment of the neighbour's land.²
- [7] I am satisfied that the parties are neighbours, and their lands are adjoining, and that the trees are "trees" as defined in the legislation.
- [8] The Tribunal may make orders if the applicants' land is *affected by a tree*. There are limited circumstances in which their land may be affected by a tree – if:
- (a) branches from the tree overhang the land; or
 - (b) the tree has caused, is causing, or is likely within the next 12 months to cause:
 - (i) serious injury to a person on the land; or
 - (ii) serious damage to the land or any property on the land; or
 - (iii) substantial, ongoing, and unreasonable interference with their use and enjoyment of the land.³
- [9] I am satisfied that the applicant's land is affected by the trees as branches from the trees overhang the boundary from time to time.
- [10] It seems that the applicants are alleging that the trees are causing substantial, ongoing, and unreasonable interference with their use and enjoyment of the land. In determining whether there has been unreasonable interference, the Tribunal may consider:⁴
- (i) anything other than the tree that has contributed, or is contributing, to the interference; and
 - (ii) any steps taken by the parties to prevent or minimise the interference; and
 - (iii) the size of the applicants' land; and
 - (iv) whether the trees were planted before the applicant acquired the land.

¹ *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld), s 61 ('NDA').

² NDA, s 66(2).

³ NDA, s 46.

⁴ NDA, s 75.

- [11] The primary consideration for the Tribunal in deciding an application is safety.⁵ Other matters for the Tribunal's consideration relevant to these circumstances are contained in the legislation,⁶ and they have been addressed later in this decision.
- [12] A living tree should not be removed or destroyed unless the issue relating to the tree cannot otherwise be satisfactorily resolved.⁷

ARBORIST REPORT

- [13] On 15 June 2022, the Tribunal appointed an arborist to carry out an inspection and provide a report to the Tribunal.
- [14] On 11 July 2022, the arborist attended at the properties and subsequently prepared a report dated 12 July 2022. The report states:
- (a) The applicant has complained of risk of damage to property or persons from tree failure, excessive shading, and excessive leaf drop.
 - (b) Of the seven trees complained of, all except one are native species. The remaining tree is a Brazilian Cherry tree which is considered an environmental weed. There is, however, no requirement for the tree to be removed.
 - (c) Recent pruning meant that vegetation no longer extended over the applicant's land.
 - (d) Leaf drop was not excessive or inconsistent with the tree species.
 - (e) The trees do shade the applicant's sunroom, but that is not considered excessive.
 - (f) There was no evidence of root suckering on the applicant's land.
 - (g) The likelihood of damage occurring to the applicant's property as a result of the respondent's vegetation is low.
 - (h) The surrounding area is heavily vegetated with many mature trees.
 - (i) The trees provide shade and cooling to the respondent's property and provide a privacy screen between the residences. The respondent values the tree as a contributor to the green landscape.
 - (j) The applicant has not employed any mechanical means of preventing leaf build up in her gutters, such as a gutter guard.
 - (k) Pruning work should be undertaken by a qualified arborist. The work undertaken to date will result in epicormic growth which will need to be managed to address potential hazards.
 - (l) The respondent was agreeable to maintain the trees as recommended –
 - (i) Annual maintenance so that the vegetation is pruned away from the dividing boundary by 300mm.

⁵ NDA, s 71.

⁶ NDA, s 73.

⁷ NDA, s 72.

- (ii) Work is undertaken by a minimum AQF level 3 arborist with the appropriate assurances and comply with the standard AS 4373-2007 Pruning of Amenity Trees.

- [15] On 1 August 2022, the Tribunal prepared a proposed agreement and provided it to the parties to give effect to the Arborist's recommendations.
- [16] On 18 September 2022, the respondent proposed that the agreement be altered so that pruning was not required to be completed by an arborist, but they be able to trim five of their own trees.
- [17] On 5 July 2023, the respondent wrote to the Tribunal indicating that they were agreeable to paying \$500 towards the costs of the tree assessment report (the full \$1,000 cost having previously been met by the applicant) and continue to maintain the trees yearly by engaging a professional.

DECISION OF THE TRIBUNAL

- [18] I am satisfied that the applicant's land has been affected by the trees because branches were overhanging and will continue to do so without ongoing maintenance. While there are claims of a safety risk, there is no expert evidence to support that claim. There is insufficient evidence to support a finding that the trees have caused or are likely to cause serious injury to a person or serious damage to the land or property on the land.
- [19] The applicant appears to claim that the trees cause substantial, ongoing, and unreasonable interference with their use and enjoyment of their land, and they seek orders from the Tribunal to address that claimed interference.
- [20] I accept that there is some interference with the applicant's use and enjoyment of the land arising out of plant matter dropping onto their property. The presence of leaf litter and other small debris will generally not be sufficient to establish substantial, ongoing, and unreasonable interference with the applicant's use and enjoyment of the land. Maintenance of the applicant's property is their responsibility. It is accepted that the frequency of debris removal will vary in different seasons and over the long term. In the absence of any evidence to persuade me otherwise, I find that the leaf litter and other debris is not excessive. While the maintenance/cleaning is subjectively onerous, I am not satisfied that the interference is substantial or unreasonable.
- [21] Addressing the considerations contained in the legislation,⁸ I find that:
 - (a) the trees are located close to the boundary;
 - (b) there is no evidence that the trees are of any particular historical, cultural, social or scientific value;
 - (c) the trees are likely to shelter local wildlife;
 - (d) the trees contribute to the amenity of the respondent's land by providing shade and privacy, and provide benefits in terms of landscape/aesthetic benefits;
 - (e) the trees contribute to public amenity as they are in a residential neighbourhood where trees abound;

⁸ NDA, s 73.

- (f) there is no expert evidence regarding any impact the trees have on soil stability, the water table or other natural features of the land or locality;
- (g) there is no expert evidence to raise concerns regarding risks associated with the trees in the event of a cyclone or other extreme weather event, although the tree assessor reports that the works previously undertaken may have promoted epicormic growth which can be poorly attached and prone to failure; and
- (h) the trees are able to be safely pruned, provided the work is carried out by a suitably qualified professional.

[22] The respondent, as tree keeper, is responsible for the trees growing on her land which are affecting the applicant's land. On the evidence available, I find that the branches overhanging the applicant's property should be pruned in accordance with the recommendations of the independent tree assessor.

[23] In relation to the costs application, I accept that it is reasonable that the respondent pay one half of the costs of the arborist report. The recommendations of the arborist have been accepted by the parties, and the Tribunal. Further, it is accepted, as recommended in the report, that pruning should be carried out by a qualified arborist, and not by the respondent, as previously proposed. This outcome seems to be accepted by the parties.