QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Prince & Anor v Clark & Anor* [2020] QCAT
PARTIES:	**RUSSELL JOHN PRINCE** **NOREEN ANN PRINCE** (applicants) **v** **DARRYL NICHOLAS CLARK** **MENGYUAN LIU** (respondents)
APPLICATION NO/S:	NDR 231-18
MATTER TYPE:	Other civil dispute matters
DELIVERED ON:	19 May 2020
HEARING DATE:	17 April 2020
HEARD AT:	Cairns
DECISION OF:	Member Taylor
ORDERS:	**The Application is dismissed.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – TREES, VEGETATION AND HABITAT PROTECTION – DISPUTES BETWEEN NEIGHBOURS – where trees obstruct a view from a dwelling – where no dwelling existed on the neighbour's land when the neighbour took possession of the land – where dwelling later constructed - where there is a concern as to bamboo rhizomes travelling into neighbour's land but no assertion of damage or possible damage – whether neighbour is entitled to an order that the tree-keeper remove the trees or maintain them at a particular height *Neighbourhood Disputes (Dividing Fences and Trees) Act* 2011 (Qld), s 45, s 46, s 62, s 66 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 47 *Kent v Johnson* (1973) 21 FLR 177 *Calvisi v Brisbane City Council* (2008) 1 PDQR 374 *Laing v Kokkinos (No 2)* [2013] QCATA 247 *Vecchio v Papavasiliou* [2015] QCAT 70 *Bull & Anor v Matthiesson & Anor* [2019] QCAT 316 *Bose v Weir* [2020] QCATA 7
APPEARANCES & REPRESENTATION:	

Applicants:	Self-represented, R Prince
Respondents:	Self-represented, D Clark

REASONS FOR DECISION

[1] Woree is a residential suburb of Cairns to the south of the central business district. Within it, from the foothills of the mountain ranges behind Cairns, one may enjoy expansive views of Trinity Inlet to the east, the city to the north and the Coral Sea beyond, and the mountain ranges to the south and west.

[2] In November 2011, the Applicants purchased a vacant allotment within that residential area. They did so for the purposes of constructing a house in which to live from where they could enjoy such views. The land they purchased shares a common boundary with the land upon which the Respondents then resided. The Respondents' land is said to be approximately eight metres below the Applicants' land on the southern side of the downhill slope. At the time of purchase the views were not restricted.

[3] On or about 2 May 2012 the Applicants commenced construction of their house. At about the same time, the Respondents planted bamboo along the western boundary of their land, said to be for the purposes of giving them shade from the western sun. That western boundary runs perpendicular and away from the common boundary shared with the Applicants. That bamboo is said to be now approximately 15 m in height. The Applicants' complaint is that it severely restricts their views to the south. They also express a concern that the rhizomes from that bamboo will eventually invade their land. They have made an application to this Tribunal seeking an order that the bamboo either be cut down to no more than 2.5 m tall above the ground, or that it be removed in its entirety.

[4] There is also a line of trees on the Respondents' land, the species of which were not defined in this proceeding, approximately 2.5 m inside the common boundary. The Applicants also complain that these obstruct their views. They seek an order that these trees be maintained at not more than 2.5 m in height above the ground.

[5] The premise of the Application is expressed as being to 'remedy, restrain or prevent severe obstruction of the view from our dwelling … that existed at the time the Respondent took possession of [the Respondents' land].'[1] The Respondents oppose the Application in its entirety.

[6] For the reasons that follow, the Applicants cannot succeed on their application. It must be dismissed.

The Enabling Act

[7] Jurisdiction to decide this dispute between the parties is conferred on this Tribunal within Chapter 3 of the *Neighbourhood Disputes (Dividing Fences and Trees) Act* 2011 (Qld) (the **ND Act**).

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[1] This is as it is expressed by the Applicants in their answers to Part F – Question 40 of the 'Application for a tree dispute' filed on 5 November 2018. This is a flawed premise which I address later in these reasons.

[8] As provided for in that Act, land may be affected by a tree in circumstances where branches from the tree overhang a neighbour's land, or the tree has caused, is causing, or is likely within the next 12 months to cause – serious injury to a person on the neighbour's land; or serious damage to the neighbour's land or any property on the neighbour's land; or substantial, ongoing and unreasonable interference with the neighbour's use and enjoyment of the land.[2]

[9] In circumstances where a neighbour who claims to be affected by a tree is unable to resolve the dispute with the tree-keeper,[3] that neighbour may apply to this Tribunal for relevant orders.[4] By this proceeding, the Applicants do so.

[10] As was succinctly expressed by Senior Member Brown in *Bull & Anor v Matthiesson & Anor,* phraseology which I respectfully adopt:

> The Tribunal can make orders it considers appropriate in relation to a tree affecting the neighbour's land to prevent serious injury to any person; or to remedy, restrain or prevent serious damage to the neighbour's land or any property on the neighbour's land or substantial, ongoing and unreasonable interference with the use and enjoyment of the neighbour's land. For interference that is an obstruction of a view, the tree must rise at least 2.5 metres above the ground and the obstruction must be a severe obstruction of a view, from a dwelling on the neighbour's land, that existed when the neighbour took possession of the land.[5]

[11] Within their complaints, the Applicants do not assert that branches from the trees, which for present purposes includes the bamboo, overhang their land. Nor do they assert that the trees have caused, are causing, or are likely to cause serious injury to any person on their land. Nor, save only for the assertion of a concern regarding travelling bamboo rhizomes, is there any assertion of serious damage to their land or property on their land. Finally, nor do they assert that the trees cause a substantial, ongoing and unreasonable interference with the use and enjoyment of their land as a result of a severe obstruction of sunlight to a window or the roof of their house.

[12] Once again save only for the assertion of a concern regarding travelling rhizomes, the Applicants' primary complaint, and the substance of this proceeding, is that they say the trees severely obstruct the view from their house.

[13] As is relevant to the issues raised in this proceeding, under the ND Act this Tribunal is empowered to make orders it considers appropriate in relation to a tree affecting the neighbour's land, in this case the Applicants' land, so as to remedy, restrain or prevent:

> (i) serious damage to the neighbour's land or property on the neighbour's land; or
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> (ii) substantial, ongoing and unreasonable interference with the use and enjoyment of the neighbour's land.[6]

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2 ND Act – s 46.
3 Ibid – s 48.
4 Ibid – s 59, s 62.
5 [2019] QCAT 316, [6].
6 ND Act – s 66(2)(b).

[14] However, as is directly relevant to the decision made herein, subsection (ii) as it is extracted in the preceding paragraph, applies to interference that is an obstruction of a view only if:

> (b) the obstruction is –
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> (ii) severe obstruction of a view, from a dwelling on the neighbour's land, that existed when the neighbour took possession of the land.[7]

The Applicants' Case

[15] It may be observed from the outset that there is, respectfully, a fundamental flaw in the Applicants' case.

[16] As is noted earlier in these reasons, the premise of their action in this Tribunal is to restrain or prevent an asserted severe obstruction of a view from their dwelling that is said to have existed at the time the Respondents took possession of their land. That is the flawed premise. The Applicants are the 'neighbour' for the purposes of the Act.[8] As such the relevant 'possession of land' is not when the Respondent took possession of their land, but when the Applicants took possession of their land.[9] Notwithstanding that flaw, the Applicants pressed their case.

[17] They did so in the hearing advancing their case reliant on a number of photographs attached to what is said to be their joint statement filed in this proceeding,[10] together with oral evidence of Mr Prince. They also sought to rely on a report from Mr Dowling, an arborist, whom on their instigation had inspected and reported on the bamboo.[11] Both Mr Prince and Mr Dowling were subject to cross-examination by Mr Clarke for the Respondents.

[18] As Mr Prince summed it up in his discussions with me after the close of evidence and submissions, at the time he and his wife purchased their land the view was not obstructed and he believed that they had a right that the view could never be obstructed.[12] He asserts that such a right is created by the ND Act.

[19] As to the issue of the concern about the travelling bamboo rhizomes, whilst there was some confusion in Mr Prince's evidence and his submissions on whether the Applicants wanted the bamboo cut down to a specified height or removed, in summing up the Applicants' case he maintained a concern about damage occurring in the future, referring me to a number of the photographs attached to his statement said to show the extent of growth of the bamboo.[13]

The Respondents' Case

[20] As noted earlier in these reasons, the Respondents challenged the Applicants' assertions and claims for relief in their entirety. They premised their response on the issue of safety to themselves and their daughter as occupants of their land, submitting that they were all at risk of skin cancer from the sun thus the reason for having planted

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7 ND Act – s 66(3)(b).
8 ND Act – s 49.
9 Ibid – s 66(3)(b)(ii).
10 Ex.1.
11 Ex. 2. Mr Dowling also gave oral evidence.
12 In making this submission, he sought to rely on a Queensland Government document which appears to have been obtained by him from the internet, a copy of which appeared as Document 1 to his statement being Ex. 1 in the hearing.
13 Ex. 1 – Photos 4, 6 to 9.

the bamboo so as to afford the sun-protection. As for the other trees on the boundary common with the Applicants, they say that such exist for their privacy. Their arguments were also premised on the asserted absence of a 'severe' obstruction of the views.

[21] The Respondents' evidence was confined to that given by Mr Clarke himself. Mr Clarke was subject to cross-examination by Mr Prince.

Discussion on the competing cases

[22] During the hearing, Mr Prince made a submission that bamboo is not a tree but grass. This is so notwithstanding that he commenced this proceeding premised on the bamboo being a tree. Should there be any ongoing question in the Applicants' minds about that issue, it is appropriate to dispose of that quickly here.

[23] The meaning of a tree is given in the ND Act to include 'any plant resembling a tree in form and size', an example of which is expressed as being 'bamboo'.[14] I am thus in no doubt that for the purposes of this Act, the bamboo in question may be considered a tree.

[24] It is also convenient to dispose now of the issue raised by the Applicants as to their asserted concern over travelling bamboo rhizomes. As I understand the Applicants' case on this point, their concern is over some likely damage to their land or property on their land within the next 12 months.[15]

[25] As Mr Clarke appropriately and correctly pointed out in his submissions, on the 'Application for a tree dispute' as filled out and filed in commencement of this proceeding, the Applicants answered question 13 therein, being 'Has the tree caused serious damage to your land, or property on your land?', by ticking the box marked 'No', not the one marked 'Yes' or that marked 'No, but it is likely within the next 12 months'. He therefore submitted that this is not an issue for consideration in this proceeding. In doing so he objected to Mr Prince's efforts to have Mr Dowling give evidence in chief on the issue, noting that it was not addressed in his report.

[26] As I read the Application as completed and made, the only reference to this issue is in answer to the question 23 therein, being 'Has the tree caused substantial, ongoing and unreasonable interference with your use and enjoyment of your land?', to which the Applicants ticked the box marked 'Yes'. They then gave details about the asserted obstruction of their view which I will discuss shortly, and also made this statement therein: 'We are further concerned that the bamboo rhizomes that spread underground will shoot into our property in the near future.' Thus, notwithstanding the answers to question 13 as noted, I allowed Mr Prince the opportunity to advance the issue in the hearing on the basis that the Respondents were squarely on notice of it by way of the answers to Question 23 in the Application.

[27] That being so, it was not an issue that was advanced with any substance. Mr Dowling's evidence on the point was entirely unhelpful. The focus of his report was on the effect of the bamboo on the land to the western side of the Respondent's land, that being the one sharing the boundary with the Respondents along which the bamboo is planted. That land is not the Applicants' land, nor is it the boundary common with it. Despite this flaw in his report, I pressed Mr Dowling on the issue following conclusion of the

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14 ND Act – s 45.

15 ND Act – s 46; see also s 74.

examination of him by Mr Prince and Mr Clarke. But he was unable to provide any definitive statement as to the extent by which, or the duration of time in which, the rhizomes would travel to the Applicants' land. As I understood his responses, he simply did not consider it when he inspected the bamboo and the surrounding land. The photos to which Mr Prince referred me were similarly unhelpful.

[28] In all respects, the Applicants' evidence was entirely devoid of anything to show me the extent to which the Applicants' land would be affected in the manner required under s 46(a)(ii) of the ND Act. This part of the Applicants' case has not been made out. Accordingly, I will not make any orders in their favour to deal with the bamboo in terms of their asserted concerns of travelling rhizomes.

[29] That then leaves the question of the asserted severe obstruction of the Applicants' view.

[30] Once again, the report and oral evidence from Mr Dowling was entirely unhelpful on this issue. Despite this Tribunal's express directions given on 15 July 2019 to the Applicants in terms of the requisite arborist report, being that it was to address inter-alia the matters referred to in s 73 and s 75 of the ND Act, part of which is to address the question of interference of a view, Mr Dowling's evidence on those issues was entirely silent. Moreover, as I questioned him, he confirmed that he did not consider these issues. As such I was left with only the evidence from Mr Prince and Mr Clarke.

[31] On the material before me I am in no doubt that the bamboo and the trees along the boundary common between the parties' lands are within the line of sight of the Applicants from their house, and so enter within their 'views'. Yet, for the reasons I shall shortly explain, I am unable to find that they are entitled to the relief sought.

[32] As noted, the Respondents sought to argue that the obstruction of the view was not severe. They also sought to argue other issues upon which I should decide against the Applicants, such as their own safety from sun damage and the need for a balance between landowners' respective entitlements.[16] However, for the reasons that follow, in my opinion I need not have, and so did not, consider these arguments further. This proceeding can be decided solely on the absence of the Applicants' entitlement at law to the view they say they are now being denied.

[33] Upon the close of evidence, but before the parties made their respective closing submissions, I referred each of them to, and provided them with copies of, a line of authority in this Tribunal and its Appeal division, namely *Vecchio v Papavasiliou* [2015] QCAT 70, *Bull & Anor v Matthiesson & Anor* [2019] QCAT 316, and *Bose v Weir* [2020] QCATA 7. I asked that they each consider these three decisions and address me on them within their closing submissions, adjourning the hearing for an extended lunchtime period so as to afford them time to do so and prepare for that address.

[34] It is convenient to extract from the reasons in those three decisions the relevant passages upon which my decision in this proceeding is premised, and which once again I respectfully adopt.

[35] As Senior Member Stilgoe OAM observed in *Vecchio v Papavasiliou*:

> There is no general right to a view in Queensland. The Neighbourhood Dispute Resolution (Dividing Fences and Trees) Act 2011 (Qld) creates a limited

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16 In making such submissions the Respondent referred me to s 71 and s 73(1)(g) of the ND Act.

> exception to that principle. Therefore, the right to a view must be construed according to the terms of the Act. Section 66(3)(b)(ii) creates a right to a view **from a dwelling** (my emphasis) that existed at the time the neighbour took possession of the land. If there was no dwelling at the time the neighbour took possession of the land, then there was no view that is protected by the Act.
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> Therefore, when Mr Vecchio took possession of the land, because there was no house, there was no view capable of protection. Mr Vecchio cannot now seek the tribunal's assistance to reclaim a view he never had.[17]

[36] As Senior Member Brown observed in *Bull & Anor v Matthiesson & Anor*:

> Section 66(3)(b)(ii) of the ND Act is only engaged if a neighbour (that is, the applicant) can establish, on the evidence, that trees cause a severe obstruction of a view from a dwelling on the neighbour's land that existed when the neighbour took possession of the land. If there is no dwelling on a parcel of land when a neighbour takes possession of the land, there can be no obstruction of a view from that dwelling for the purposes of s 66(3)(b)(ii) Act.[18]

[37] And finally, as Senior Member Aughterson expressed it in *Bose v Weir*:

> As noted in *Neverfail Pty Ltd as Trustee for the Harris Siksna Family Trust v Radford*, there is no right to a view at law. However, the Act creates a limited 'right' to a view. Section 66(2)(b)(ii) of the Act provides that the Tribunal may make an order it considers appropriate where a tree is causing 'substantial, ongoing and unreasonable interference with the use and enjoyment of a neighbour's land'. That sub-section is qualified by s 66(3)(b)(ii), which provides that where the interference is an obstruction of a view, a remedy arises only if the obstruction is: "severe obstruction of a view, from a dwelling on a neighbour's land, that existed when the neighbour took possession of the land." Given that the view must exist when the neighbour takes possession of the land, questions arises as to when 'possession' takes place and whether there must be a dwelling on the land, from which a view is available, at that time. [19]

[38] As will be observed, there are two aspects consistent in the reasoning therein.

[39] The first is that there is no general right at law to a view. Such has been the common law position since 1610 in England[20] and adopted in Australia.[21] On that point, whilst Mr Prince made an admirable effort to press the case for him and his wife asserting that the Act gives him the right to a view, as I understood the submission reliant on s 66 of the ND Act, it was without a lawful premise. As Alan Wilson J, the then President of this Tribunal, observed in 2013 in *Laing v Kokkinos (No 2)*:

> Section 66 of the Act provides that an applicant may seek an order of the Tribunal to remedy, restrain or prevent the severe obstruction of a view from a dwelling on the land if the obstacle occurs as a consequence of trees on adjoining land. That section does not create a right to a view, the remedy referred to is a statutory one which is discretionary, and will not be exercised if it is not appropriate in the circumstances.[22]

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17 *Vecchio v Papavasiliou* [2015] QCAT 70, [10] and [11].
18 *Bull & Anor v Matthiesson & Anor* [2019] QCAT 316, [10] citing *Vecchio v Papavasiliou*.
19 *Bose v Weir* [2020] QCATA 7, [3] and [4]. Footnotes omitted.
20 *William Aldred's Case* (1610) 77 ER 816, 821.
21 See *Kent v Johnson* (1973) 21 FLR 177, 212. See also *Calvisi v Brisbane City Council* (2008) 1 PDQR 374, 381-382.
22 [2013] QCAT 247, [32].

[40] The second is that the view in question must be from a dwelling on the land, but moreover that dwelling and the view must be in existence when the person, in the present circumstances the Applicants, took possession of the land.

[41] That relevant and essential fact does not exist here. In that regard I specifically referred Mr Prince to the reasons of Senior Member Aughterson in paragraphs [14] to [21] of *Bose v Weir* wherein a similar argument was expressly rejected, and I stood down for a short while to afford him the opportunity to read and consider that passage.

[42] Having read and considered it, Mr Prince was unable to articulate a response to this line of reasoning in any meaningful manner. At its highest, as I understood it, his submission was that he and his wife had a view when they purchased the land, they had that view when they started construction of the house such being the time when they 'took possession', and they still had that view when they completed construction and moved in to the house.

[43] An argument on similar grounds was expressly rejected by Senior Member Aughterson in *Bose v Weir*, and accordingly I also reject it, again respectfully adopting the reasoning of the learned Senior Member.[23]

[44] For these reasons, the Applicants must fail in their efforts to obtain relief in this Tribunal. In a similar manner as it was expressed relevant to Mr Vecchio, because there was no dwelling on their land when the Applicants took possession of the land, there was no view from a dwelling capable of protection, and the Applicants cannot now seek the Tribunal's assistance to reclaim a view from a dwelling that they never had.

[45] It thus follows that their Application is not only misconceived, it is without substance. Accordingly, as provided for under s 47 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), there shall be an order that the proceeding is dismissed.

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[23] *Bose v Weir* [2020] QCATA 7, [14]-[21].