

CITATION: *McHugh v Withers & Anor* [2017] QCAT

PARTIES: Randall McHugh
(Applicant)
v
Russell Withers
Rhonda Withers
(Respondents)

APPLICATION NUMBER: NDR035-16

MATTER TYPE: Neighbourhood Dispute

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: **Member Traves**

DELIVERED ON: 3 October 2017

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. Russell Withers and Rhonda Withers must arrange for the removal of the Grevillea Robusta (Silky Oak) situated on their land at 26 Thomas Street, Grange.**
- 2. Russell Withers and Rhonda Withers are responsible for the cost of the tree removal.**
- 3. The tree removal must be completed within 45 days of the date of this order.**
- 4. A person with a minimum of Australian Qualifications Framework (AQF) Level 3 Arborist who is appropriately insured must undertake the tree removal.**

CATCHWORDS: ENVIRONMENT AND PLANNING – TREES, VEGETATION AND HABITAT PROTECTION – DISPUTES BETWEEN NEIGHBOURS – whether land affected by a tree – where parties had agreed to be bound by the recommendation of a Tribunal appointed tree assessor – where assessor recommended tree be removed - where parties refused to sign an agreement incorporating the recommendation of the assessor - whether appropriate to make an order for removal of the tree pursuant to s 66

Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld), s 46, s 48, s 50, s 57, s 59, s 66, s 70, s 71, s 73, s 74

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

Introduction

- [1] On 20 February 2016 Randall McHugh made an application to QCAT for an order that his neighbour's tree be removed at the neighbour's cost. His neighbours, Russell and Rhonda Withers (the tree-keepers¹ under the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld)* (the NDA) live in Perth.
- [2] The tree in question is a mature silky oak (*G. robusta*), with the dimensions of DBH 710mm, height 23m and spread of 11m. It is 0.27m from the dividing fence and some of its branches overhang Mr McHugh's property.
- [3] Mr McHugh submits that the tree is unsafe, in particular, that there is a danger of branches, or the entire tree, falling and injuring people and or his property.² The tree has been an issue between the parties since at least 2008 when large branches fell into Mr McHugh's pool. Since that time there have been no reported instances of injury caused by falling branches.³ In 2009 Mr McHugh paid for several large overhanging branches to be lopped with the consent of Russell and Rhonda Withers. The tree was most recently pruned in May 2016 by an arborist engaged by the Withers.⁴
- [4] The Tribunal made Directions by Consent on 29 July 2016 that the Tribunal would appoint an independent tree assessor to assist in the determination of the dispute. The Directions provided:

The Tribunal directs by consent:

1. The parties agree that the Tribunal will appoint an independent tree assessor to inspect the silky oak, including the upper branch union in question.
2. The independent tree assessor will provide the Tribunal and the parties with a recommendation for either maintenance, or if necessary for safety, tree removal.

¹ NDA, s 48(a): the respondents are the registered owners of the lot on which the tree is situated.

² Statement of Evidence of Randall McHugh received 26 May 2016.

³ Ibid, 2.

⁴ Statement of Evidence by Rhonda and Russel Withers received 24 June 2016, 7.

3. The parties agree that the Tribunal will incorporate the independent tree assessor's recommendations into a consent order, and they will be bound by its terms.
 4. The parties agree to equally bear the costs of the tree assessor.
- [5] The Tribunal received the tree assessor's report (the report) on 30 January 2017. The report recommended the removal of the tree. The Tribunal drafted a proposed agreement based on the recommendation. The agreement was signed by Mr McHugh but not by Mr and Mrs Withers.
- [6] Accordingly, the Tribunal must determine the application.

The law relevant to tree disputes

- [7] QCAT has jurisdiction to decide any matter in relation to a tree if it is alleged, at the date of the application to QCAT, that land is affected by the tree.⁵ The neighbour, whose land is affected by the tree, may apply for an order under s 66 of the NDA.⁶
- [8] Neighbourhood disputes relating to trees are dealt with in Chapter 3 of the NDA.
- [9] Land is ***affected by a tree*** if it adjoins land on which the tree is situated and either:
- (a) its branches 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
 - (ii) serious damage to the land or any property on the land; or
 - (iii) substantial, ongoing and unreasonable interference with the neighbour's use and enjoyment of the land.⁷
- [10] Part 5, s 66 sets out the orders that QCAT may make.
- [11] However before Part 5 can apply:
- (a) land must be affected by a tree; and
 - (b) the neighbour must not be able to resolve the issue using Part 4.⁸

⁵ NDA, s 61.

⁶ NDA, s 62(1).

⁷ NDA, s 46.

⁸ NDA, s 59.

[12] An example provided in the legislation as to when Part 5 might apply is where:

Branches from a tree overhang the neighbour's land and the neighbour is seeking a remedy that is more than the cutting and removal of the branches.

[13] Section 66 provides, relevantly, that QCAT may make the orders it considers appropriate to prevent serious injury to any person or serious damage to the land or property of the neighbour. Such an order may require the tree keeper to carry out work⁹ on the tree which may involve removal of the tree.¹⁰ The Tribunal may also make an order requiring the tree-keeper or neighbour pay for the costs of doing the work.¹¹

[14] Before making an order under s 66 I must be satisfied that:

- (a) The neighbour has made a reasonable effort to reach agreement with the tree-keeper;¹²
- (b) The neighbour has taken all reasonable steps to resolve the dispute under any relevant local law, local government scheme or local government administrative process;¹³
- (c) The branches of the tree extend at least 50cm over Mr McHugh's land;¹⁴
- (d) The neighbour can not properly resolve the issue using the process in Part 4;¹⁵
- (e) The neighbour has given a copy of the application to Mr and Mrs Withers.¹⁶

[15] I am so satisfied.

[16] In making a decision as to what the appropriate order should be in relation to the relevant tree there are certain matters I must consider.¹⁷ There are also matters I may consider depending on how the neighbour alleges the tree affects the land.¹⁸

[17] The primary consideration is the safety of any person.¹⁹ This is followed by s 72, which provides that a tree should not be removed unless the issue can not otherwise be satisfactorily be resolved. In my view, the issue will not be

⁹ NDA, s 50 defines work on a tree to include destroying the tree.

¹⁰ NDA, s 66(5)(a).

¹¹ NDA, s 66(5)(e).

¹² NDA, s 65(a).

¹³ NDA, s 65(b).

¹⁴ NDA, s 65(c)(i).

¹⁵ NDA, s 65(c)(ii).

¹⁶ NDA, s 65(d), s 63(1)(a).

¹⁷ NDA, s 73. These matters are not to limit the matters the Tribunal may consider: NDA, s 70(2).

¹⁸ NDA, s 74 - s 75.

¹⁹ NDA, s 71.

“satisfactorily resolved” if, without the removal, there is a risk to the safety of any person.

- [18] The general matters I must consider are set out in s 73. They include:
- (a) The location of the tree in relation to the boundary of the land on which it is situated and any premises, fence or other structure affected by the location;
 - (b) Whether the tree has any historical, cultural, social or scientific value;
 - (c) Any contribution the tree makes to the local ecosystem, natural landscape and scenic value of the land or locality;
 - (d) Any contribution the tree makes to public amenity;
 - (e) Any contribution the tree makes to the amenity of the land on which the tree situated;
 - (f) The likely impact on the tree of pruning it; and
 - (g) Other matters.

- [19] In making an order to remove a tree I may also consider any steps taken to prevent the likelihood of injury or damage²⁰ or any other matter I consider relevant.²¹

Consideration

- [20] I am satisfied that the threshold requirements in s 59 have been satisfied. The evidence is that the upper canopy extends over the Mr McHugh’s land by approximately 4.0m.²² This is sufficient to satisfy the requirement that land be affected by the tree.²³ However, I also find that the tree is likely within the next 12 months to cause serious injury to a person on Mr McHugh’s land or serious damage to his land or property. Branches have fallen from the tree on previous occasions, the tree is over-mature to senescent and, due to past pruning, has areas of decay.²⁴ I am also satisfied that the dispute could not be resolved using Part 4.²⁵ This is because Part 4 provides a process for resolving disputes relating to branches which are 2.5m or less above the ground.²⁶ It has no relevance to branches over that height.

- [21] I turn then to Part 5. Pursuant to s 66(2) the Tribunal may, relevantly, make an order it considers appropriate in relation to the relevant tree to prevent

²⁰ NDA, 74(1)(b).

²¹ NDA, 74(2)(d).

²² Report by Independent Tree Assessor, Mr Michael Sowden dated 27 January 2017, 5 [2.2.13].

²³ NDA, s 46.

²⁴ Report by Independent Tree Assessor, Mr Michael Sowden dated 27 January 2017, 5.

²⁵ NDA, s 59(b).

²⁶ NDA, s 57(1)(b).

serious injury to any person or to prevent serious damage to the neighbour's land or any property on the neighbour's land. It was not argued that the tree caused any substantial, ongoing and unreasonable interference with the use and enjoyment of the neighbour's land.

- [22] In my view the appropriate order is that the tree should be removed to prevent serious injury to persons or serious damage to property. I have come to that conclusion having considered the following matters.
- [23] The tree is in very close proximity to the boundary fence, being located only 0.27m from the boundary. The tree is approximately 23m high with a 10m canopy. The height and size of the tree is such that the tree canopy overhangs the neighbour's backyard and pool by approximately 4.0m.²⁷ The structural root zone of the tree has been estimated to extend to an area of 3.04m radius around the trunk of the tree.²⁸ The tree protection zone, which measures the distance around the tree required for its continued health is estimated to be 8.64m.²⁹ The roots of the tree therefore would extend well into the neighbour's land, under their pool. Other infrastructure at risk of damage from the tree would be the dwellings on both properties and a child's cubbyhouse.
- [24] There is no tree protection order in place.³⁰ There is therefore no need to seek Council approval before removing the tree.
- [25] The tree has no historical, cultural, social or scientific value.
- [26] The tree's contribution to the local ecosystem and to biodiversity is limited by its location within an urban area rather than a forest or parkland area.³¹
- [27] The tree leans towards the neighbour's land. It has an asymmetrical canopy due to at least three major pruning events³² and has areas of swelling to the trunk and signs of decay at the places where branches have been lopped.
- [28] The tree does not contribute to privacy due to its height and structure. It provides some shade.
- [29] There is no evidence of any impact the tree might have on soil stability. I infer from the land being level that the impact, if any, would be minimal.
- [30] There are risks that the tree could cause injury or damage in the event of a cyclone or other extreme weather event. Branches have fallen onto the neighbour's land in the past. The tree leans towards the applicant's property and is exposed to the wind. It is between 60 to 70 years old and considered

²⁷ Report, 5, [2.2.13].

²⁸ Arborist Tree Assessment Report, 20 May 2016, 14.

²⁹ Ibid.

³⁰ Report, 6, [2.4.1].

³¹ Report, 7, [3.2].

³² Report, 5, [2.2.4].

to be “over-mature to senescent”.³³ It has a long history of limb failure. It also has visible decay within old pruning wounds on several limbs. The Tribunal-appointed tree assessor states:

...this *G. robusta* in my opinion has high potential for limbs to impact within the applicant’s property within the next 12 months.³⁴

...

Whilst this *G. robusta* appears as what can be considered as a typical example of its species in consideration of its maturity, location and the past pruning history this tree has reached the end of its useful safe lifespan within this heavily developed urban environment.

As it highly likely that limbs will fail from this *G. robusta* at an increasing rate due to the presence of internal decay pockets within the upper canopy and should failures occur they have the potential to impact within the highly developed and person trafficked area of the applicant’s property.³⁵

- [31] I also accept the evidence of the applicant’s tree assessor, that there are numerous epicormically derived branches throughout the canopy which are prone to fail in strong winds due to poor branch attachment.³⁶
- [32] The impact of pruning on the tree is also a relevant matter.³⁷ The Tribunal appointed tree assessor states:

Pruning within the guidelines of Australian Standard 4373-2009 “pruning of amenity trees” would in my opinion not beneficially reduce the risk that this *G. robusta* represents to property or people, as to remove the limbs with decay pockets present would require the removal of nearly the entire canopy.³⁸

- [33] The tree has already undergone at least three major pruning events. There is evidence of visible decay within the old pruning wounds on several limbs. The age of the tree means that the ability of the tree to resist decay in the future will likely decline. This supports the view, in my opinion, that pruning of this tree at this stage of its life and in view of its location is not a reasonable alternative to its removal. Given the height of the tree it is also becoming increasingly less practicable to prune.
- [34] The tree is not a pest or a weed.
- [35] I also note the following. Mr McHugh first complained of branches falling onto his property and into his pool in 2006. The tree has been an ongoing source of disagreement between the parties since then. Mr and Mrs Withers have undertaken pruning in the past, most recently in May 2016, with a view

³³ Report, 5, [2.2.2].

³⁴ Report, 5, [2.2.13].

³⁵ Report, 7, [4.2], [4.3].

³⁶ Arborist Tree Assessment Report , Arbor Access Australia, 20 May 2016, 32 [8.1.6].

³⁷ NDA, s 73(1)(j).

³⁸ Report, 7 [4.3].

to preventing injury or damage. An arborist report obtained by them concludes that the tree is healthy and poses a low risk to safety.³⁹ The tree was there when Mr McHugh constructed his pool. The parties agreed to be bound by the recommendation of an independent tree assessor appointed by the Tribunal and the recommendation provided by the assessor was that the tree be removed.

Conclusion

[36] Accordingly, I order as follows:

1. Russell Withers and Rhonda Withers must arrange for the complete removal of the *Grevillea Robusta* (Silky Oak) situated on their land at 26 Thomas Street, Grange.
2. Russell Withers and Rhonda Withers are responsible for the cost of the tree removal.
3. The tree removal must be completed within 45 days of the date of this order.
4. A person with a minimum of Australian Qualifications Framework (AQF) Level 3 Arborist who is appropriately insured must undertake the tree removal.

³⁹