

CITATION: *Young v Salmon* [2016] QCAT 508

PARTIES: Thomas Richard Young and June Ethel Young
(Applicant)
v
Stephanie Salmon
(Respondent)

APPLICATION NUMBER: NDR183-15

MATTER TYPE: Other civil dispute matters

HEARING DATE: 23 September 2016

HEARD AT: Rockhampton

DECISION OF: **Member Favell**

DELIVERED ON: 22 December 1016

DELIVERED AT: Brisbane

ORDERS MADE:

[1] **The respondent remove the remainder of the 10 mature palms within 1metre of the boundary numbered 1-10 in the report which is exhibit 3 including palms numbered 1, 2 and 5 by 4pm 31 January 2017.**

[2] **The respondent carry out cleaning so as to remove all overhanging fronds and fruiting material of any palm within 1metre of both the northern and eastern boundaries every six months at the time the palms begin to fruit.**

CATCHWORDS: TREE DISPUTE – VIEW – whether trees on the tree-keeper’s property obscures a view from the neighbours’ property – whether view existed when the property was purchased by the neighbour – whether severe obstruction of the view – where neighbour wants trees removed – where palm trees overhang neighbours property-where palm trees fruit and attract flying foxes and drop fruit in the neighbours property

Neighbourhood Disputes (Dividing Fences and

Trees) Act 2011 (Qld) ss 63, 66, 71, 72, 73, 74, 75

APPEARANCES:

APPLICANT: Thomas Richard Young and June Ethel Young

RESPONDENT: Stephanie Salmon

REASONS FOR DECISION

- [1] The parties are neighbours. Mrs Salmon has planted many trees on her property. The varieties of trees include cocos palms, alexander palms and umbrella trees. Some are close to the boundary fences and some over hang the fence.
- [2] Mr and Mrs Young have made an application for a tree dispute contending for an order that Mrs Salmon carry out work on trees to remove them or orders that the trees be removed at the expense of Mrs Salmon.
- [3] In their application Mr and Mrs Young say there are 22 trees that overhang the northern boundary and 15 trees that overhang the eastern boundary of their property. They claim the trees are a nuisance to them and some trees on the northern boundary are just 2.7 from their house. They claim some of the trees overhang their property by up to 4.5 metres. They claim there is a lack of sunlight to their house and say they need to use lights in their house during the day.
- [4] During cyclone Marcia 4 trees fell into the property owned by the applicants and damaged their house. They say that palms fronds and other debris fly onto their patio. The fruit of the palm trees attract fighting and screeching bats at night and seeds fall onto their garden shed with a bang.
- [5] They claim that In the past, root invasion from umbrella and chinese bell trees have caused interruption to their water supply.
- [6] Mr and Mrs Young say that they tried to sell their property in 2005 but were unable to sell because prospective buyers, although they liked the house did not like the trees next door.
- [7] They complain that the trees are too close to their house and threaten damage to the house as they grow taller. They are worried that the trees will continue to rub on their roof and could fall on their house during a cyclone.
- [8] They say the trees “affect negatively” their property valuation, their lifestyle, their happiness in their old age, their health and the sea views

they had before the respondent purchased the low set house to the east of their property.

- [9] They believe the enjoyment of their land has gone and that the trees should be removed completely at the respondents cost. During the hearing they told me they wanted all the trees on the northern boundary removed and the trees numbered 1, 2 and 5 in the tree assessment report¹.
- [10] During the hearing Mrs Salmon agreed that the trees numbered 1, 2 and 5 should be removed. She told me that she had already removed 22 palms. Mrs Young said that Mrs Salmon had removed 13 trees.
- [11] Exhibit 4 shows palm number 5. The tree assessor Mr James in exhibit 3 recommended the 10 mature Cocos palms numbered 1 to 10 within 1meter of the boundary be removed and the tall Alexander palms numbered 12 near the boundary be cleaned of the fruiting material every six months.
- [12] The photos of the trees in the Tree Assessment Report and exhibits show trees well advanced in growth with tall palms, overhanging fronds and growth. They also show fruiting material. In particular exhibit 16 shows the density of tree growth.
- [13] Exhibit 7 contains a collection of fact sheets from Biosecurity Queensland which make it clear that although a Cocos Palm is not a prohibited or restrictive invasive plant under the *Biosecurity Act 2014* everyone has a general biosecurity obligation to take reasonable and practical steps to minimise the risks associated with invasive plants. The Fact Sheets recommend removal of Cocos Palms but if that is not possible, management so that their fruits are removed before they ripen.
- [14] Exhibit 8 is a list of the trees Mr and Mrs Young want removed. They want 22 trees on the north boundary removed.
- [15] Exhibit 9 is a list of trees to the east Mr and Mrs Young want removed. They want trees numbered 1, 2, 14, and 5 in the Tree Report removed along with another cocos palm near the trees numbered 1 and 2. In the application they sought the removal of 15 trees on the eastern boundary.
- [16] They say they would like more trees removed to regain more sea view but say they understand there is no sea view entitlement.
- [17] Section 66 of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* allows the tribunal to make orders it considers appropriate in relation to a tree affecting the neighbours land to remedy, restrain or prevent substantial ongoing and unreasonable interference with the use and enjoyment of the neighbours land. That power applies to interference that is an obstruction of sunlight or a view only if the tree rises at least

¹ Exhibit 3.

2.5m above the ground and the obstruction is severe obstruction of sunlight to a window or roof of a dwelling on the neighbours land or severe obstruction of a view from a dwelling on the neighbours land that existed when the neighbour took possession of the land.

- [18] To make an order under section 66 the tribunal must be satisfied that the neighbour has made a reasonable effort to reach agreement with the tree keeper, has taken all reasonable steps to resolve the issue under any relevant local law, local government scheme or local government administrative process and that the neighbour has given copies of the application under section 63. To the extent the issue relates to the land being affected because branches from the tree over hang the land the tribunal must be satisfied the branches extend to a point over the neighbour's land that is at least 50cm from the common boundary and the neighbour cannot properly resolve the issue using the process under part 4.
- [19] Part 4 applies when a neighbour's land is affected by a tree because branches from the tree overhang the land and the neighbour wants the overhanging branches removed. In that situation where branches extend to a point on the neighbours land at least 50cm from the common boundary and only to the extent the branch is 2.5m or less above the ground the neighbour can give a written notice to the tree keeper asking the tree keeper to cut and remove the overhanging branch.
- [20] Division 4 states matters for the tribunal to consider in deciding an application for an order under section 66. The primary consideration is the safety of any person.²
- [21] A living tree should not be removed or destroyed unless the issue relating to the tree cannot otherwise be satisfactorily resolved.³
- [22] Section 73 requires the tribunal to consider a number of matters including the location of the tree in relation to the boundary and any premises, fence or other structure affected by the location of the tree, whether the carrying out of work on the tree would require any other consent or authorisation, whether the tree has any historical, cultural, social or scientific value, whether there is any contribution the tree makes to the local ecosystem and to biodiversity, and to the natural landscape and the scenic value of the land or locality. The tribunal must also consider any contribution the tree makes to public amenity, any contribution the tree makes to the amenity of the land on which it is situated including its contribution relating to privacy, landscaping, garden design or protection from sun, wind, noise, odour or smoke.
- [23] The tribunal must also consider any impact the tree has on soil stability, the water table or other natural features of the land or locality along with

² Section 71.

³ Section 72.

any risks associated with the tree in the event of a cyclone or other extreme weather event.

- [24] The tribunal must also consider the likely impact on the tree of pruning it and the type of tree including whether the species of tree is a pest or weed.
- [25] Section 74 provides for other matters the tribunal may consider if serious injury or damage is alleged. Those matters include anything other than the tree that has or may contribute to injury or damage and any steps taken by the tree-keeper or the neighbour to prevent or rectify the injury or damage or the likelihood of injury or damage.
- [26] Section 75 provides for matters the tribunal may consider if unreasonable interference is alleged. Those matters include the size of the neighbours land, whether the tree existed before the neighbour acquired the land and where the interference is an obstruction of sunlight or a view any contribution the tree makes to the protection or vegetation of a waterway or foreshore.
- [27] The parties are the registered owners of their land.
- [28] The applicants have tried to resolve the dispute by talking with the respondent. The applicants sought to mediate the dispute but the respondent refused to meet for mediation. The applicants advised the Livingstone Shire Council of the damage trees had caused to their property during a cyclone.
- [29] Some of the trees on the boundary do extend to a point over the land owned by the applicant more than 50cm and the branches are more than 2.5 meters above the ground.
- [30] Mr and Mrs Young say that four trees fell over to their house during Cyclone Marcia. Their gutters were overflowing because of litter from trees, which caused ceiling leaks. The dividing fence was damaged and there was at one stage a serious water supply leak caused by root invasion. They are concerned about the potential of the trees on the boundary to cause damage in a cyclone or other extreme weather event.
- [31] Mr and Mrs Young say that there is nothing on their land that may contribute to damage or the likelihood of damage.
- [32] The trees were planted in 1997/98.
- [33] Mr and Mrs Young say that they enjoyed extensive sea views from their highset brick home that was built for their retirement in 1990. The Salmons purchased a low set home directly to the east in front in May 1997. When they moved to their house the vehicle driveway of 5 metres wide did not have any trees.

- [34] Mr and Mrs Young say that they attempted to serve a written notice on the Salmons but the notice was returned by Australia Post stating that the respondent would not take delivery.
- [35] In a response to the application Mrs Salmon said that she considers it unreasonable to grant any order to remove the trees in her yard due to an ongoing dispute over roof and surface water from the Young's property. She says that all of the roof and surface water from the property owned by Mr and Mrs Young is directed directly onto her property and has caused erosion of the earth under her building around the stumps, paver disturbance in her courtyard and undermining of the house slab causing differential settling and cracking in the walls of her residence. That contention is supported by an engineers desktop report dated 22 December 2015. (Attachment B to the response)
- [36] She says that she has been advised by engineers that removal of the trees would magnify damage to her property during future heavy rain episodes. She contends that if any order is put in place requiring removal of the trees the applicants should be ordered to pay half of the cost of removal as they caused the problem by not controlling surface water. She says that she had to plant trees to control their water. I accept that there is a water flow over Mrs Salmon's property and that vegetation is a method of minimising erosion.
- [37] She says that when she bought the property in 1998 she was attracted to the location by a well established garden with Cyprus pines and trees and shrubs up to 20m high. She says that the flora provides beauty to the property and attracts an array of bird life to the area. She says it provides privacy and natural air conditioning.
- [38] Mrs Salmon disputes the contention that the Young's had sea views when they moved in 1997. She says that Mr Young slashed, ring barked and poisoned trees in her back yard. She supports those contention with photographs which are attachments C, D and F to the response. Attachment E to the response has a photograph said to be of the view of the sea after an area was poisoned.
- [39] She says that there is a thirty foot drop from the top to the bottom of her property and she does not want trees removed until the water problem is fixed.
- [40] Mrs Salmon disputes the number of palm trees and in her response said there were 6 large palms on the Northern side and 10 small Alexander palms and 11 large palms on the eastern side.
- [41] Mrs Salmon says that since moving to her residence she and her husband have been subjected to a barrage of malicious damage to their garden and the subject of frivolous and vexatious complaints. She says that plants have been poisoned are in a direct line from the balcony at 5 Stow street to the sea view. She says that most of the flora was growing when the house was built in 1990. There is evidence of the poisoning of

plants in attachment Q to the application. According to Ken Lyngkuist project manager for Betascapes there were 17 plants 8-10 years old and 46 plants 3-5 years old dead or dying from poisoning in August 2004. To replace the plants lost would cost between \$48,000 and \$50,000 plus GST. I accept that plants were poisoned so as to create a view line.

- [42] Attachments N and O are affidavits which swear to a conversation with Mrs Young when in answer to a statement "we wouldn't have to do this if you were not poisoning our trees and plants" she said "Tom had to do it because of the roots".
- [43] On 13 October 1998 solicitors acting for Mr and Mrs Salmon wrote to Mr and Mrs Young complaining about trespass by the Youngs and called on them to cease harassing and intimidating the Salmons.
- [44] On 4 May 1999 solicitors for the Salmons complained to the Youngs about them trespassing, harassing trades people employed by the Salmons, making disparaging remarks about the Salmons and generally being a nuisance.
- [45] By a letter dated 28 August 2001 from Lawyers acting for Mrs Salmon complain about baseless complaints, trespass and the water problems.
- [46] Mrs Salmon has provided evidence of complaints made to police about noise, complaints made to the Livingstone Shire Council alleging unlawful camping in a caravan on Mrs salmon's property and complaints made to Animal Welfare. None of the complaints were found to have substance. Mrs Salmon believes the complaints were made by the Youngs on the basis of observation and conversations with the Youngs.
- [47] Taking all of those matters into account I am limited in the manner in which I can approach the application. I do not have the jurisdiction to make orders about storm water drainage and runoff. However that aspect is a relevant consideration in determining whether trees should be removed.
- [48] I am not satisfied that Mr and Mrs Young had a sea view when they moved to their residence.
- [49] Mr James is a tree assessor who prepared a report in respect of the trees on Mrs Salmon's property. He has marked the trees on the northern and eastern boundaries with numbers. They are shown in image 2 on page 3 of his report exhibit 3.
- [50] He attended at the property on 9 April 2016.
- [51] The trees on the northern boundary are much closer to 5 Strow Street than those on the eastern boundary. He noted that trees numbered 3, 4, 6, 7, 8, 9, and 10 were removed on 10 April 2016. Throughout the report he notes other trees that have been removed in February or 10 April 2016. I

note the majority of the photographs tendered were taken in September 2016.

- [52] Exhibit 6 shows the extent of the growth on the northern boundary.
- [53] Mr James noted a seed/fruit drop and overhanging vegetation across the fence line on the northern boundary. He found that the applicants property was being affected by the trees. He identified two potentially significant issues namely falling palm fronds and a trip hazard caused by palm berries. He did not see a concern over root invasion. He identified flying foxes attracted to the palm berries and their excreta as a likely interference with the use and enjoyment of Mr and Mrs Young's land.
- [54] He did not think that sunlight was significantly obstructed to the windows or roof of the Young's house by the plants. He found that the trees did provide benefits to the tree keeper in that they provided shade, screening and a sense of security.
- [55] He recommended some tree removal and palm cleaning. He recommended the palm cleaning occur at six monthly intervals. He recommended the removal of the 10 mature palms (numbered 1-10) within 1 m of the boundary including the tree numbered 4. He also recommended the cleaning of the tall palms (numbered 12) near the boundary of fruiting material every six months.
- [56] He noted that Mrs Salmon offered to remove the cocos palms number 1 to 10.
- [57] I accept the contents of the report of Mr James and his recommendations.
- [58] Taking into account the matters set out above I find that it is appropriate to order the removal of the remainder of the 10 mature palms within 1metre of the boundary numbered 1-10 in the report which is exhibit 3 and order the cleaning so as to remove all overhanging fronds and fruiting material of any palm within 1metre of both the northern and eastern boundaries every six months at the time the palms begin to fruit.