

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Richardson v Williams* [2024] QCAT 322

PARTIES: **KELLY RICHARDSON**
(applicant)
v
CARMEN WILLIAMS
(respondent)

APPLICATION NO: NDR087-22

MATTER TYPE: Other civil dispute matters

DELIVERED ON: 30 July 2024

HEARING DATE: 16 July 2024

HEARD AT: Brisbane

DECISION OF: Member Scott-Mackenzie

ORDERS:

1. **The application by the applicant filed 18 June 2024 for an order admitting further evidence is dismissed.**
2. **The respondent reduce the height of the bamboo at the front of the respondent's land on or near the common boundary between the applicant's land and the respondent's land to 3 metres.**
3. **The respondent cut and remove any culms of the bamboo overhanging the applicant's land.**
4. **The work required by orders 2 and 3 be carried out:**
 - (a) **initially within 60 days of this order and thereafter not less than annually;**
 - (b) **by an Australian Qualified Framework level 4 arborist with relevant insurance cover; and**
 - (c) **at the respondent's cost.**
5. **The applicant provide the Australian Qualified Framework level 4 arborist engaged to carry out the work required by orders 2 and 3 with access to the applicant's land to carry out the work on not less than seven days' notice by email from the respondent to the applicant.**

CATCHWORDS: ENVIRONMENT AND PLANNING – TREES, VEGETATION AND HABITAT PROTECTION – DISPUTES BETWEEN NEIGHBOURS – where bamboo growing on the respondent's land on the common boundary – where culms of bamboo overhang the applicant's land and

upper culms hit her home in wind – where culms of bamboo have fallen on the applicant’s driveway in wind – whether the bamboo is a risk of serious injury to a person – whether the bamboo is causing substantial, ongoing and unreasonable interference with the use and enjoyment of the applicant’s land – whether the bamboo provides the respondent with privacy – where applicant applies for orders for removal of the bamboo, alternatively periodic pruning and reduction in height – the appropriate orders

Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld), s 41, s 45, s 46, s 49, s 52, s 61, s 66, s 72, s 73, s 75

APPEARANCES & REPRESENTATION:

Applicant: Self-represented

Respondent: Self-represented

REASONS FOR DECISION

Application

- [1] The applicant has made application to the Tribunal for a tree dispute under the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) (ND Act) (application).

Background

- [2] The applicant is the owner of land at 37 North View Street, Hope Island (applicant’s land). The respondent, the applicant’s neighbour, is the owner of land at 35 North View Street, Hope Island (respondent’s land).
- [3] The homes on the applicant’s land and respondent’s land face North View Street and back onto a canal.
- [4] At the time of the application, bamboo was growing on the respondent’s land on the common boundary at the front and rear of her land. The applicant, in the application, asserts the bamboo overhangs her land and, with gusts of wind, hits her home. She further asserts culms of bamboo falling on her driveway are likely to cause serious injury to a person on the driveway.
- [5] The order of the Tribunal sought by the applicant is for removal of the bamboo, alternatively it be pruned and maintained at a height of 2 metres.
- [6] The bamboo at the rear of the respondent’s land has been removed. There remains the bamboo at the front of her land.

Response

- [7] The respondent, in her response filed 31 May 2022 (response), asks that the bamboo be left alone. She denies the bamboo comes anywhere near the applicant’s home.

Statements of evidence

Applicant's statements of evidence

- [8] The applicant, in accordance with directions given by the Tribunal on 3 February 2023, filed in the Tribunal a statement of evidence. She asserts the respondent planted the bamboo after she moved into her home in 2019. It has grown to a height of 9 metres. Both the height and volume of the bamboo, the applicant further asserts, are causing unreasonable interference with the use of her driveway and land.
- [9] On 19 December 2020 the applicant and her husband arrived at the home in the early hours of the morning to find broken culms of bamboo on her garden and driveway. Wind velocity records record high winds on 13 and 14 December 2020.
- [10] The bamboo at the front and rear of her land, the applicant asserts, “... *is now and has been for some time at a height and volume that it hits the glass window at the rear of my property at times this has woken me up from my sleep ...*”
- [11] Photographs annexed to the statement show the applicant's home under construction, the bamboo and motor vehicles on the applicant's driveway.
- [12] The statement was admitted into evidence and marked as exhibit A2.
- [13] The applicant also filed a statement by her husband, Mr Gavin Richardson. He states the bamboo sways with wind making regular contact with his home.
- [14] The statement was admitted into evidence and marked as exhibit A4.

Respondent's statement of evidence

- [15] The respondent also filed in the Tribunal a statement of evidence. She asserts the bamboo at the front of her land was planted before the applicant moved into her home. The bamboo at the rear of her land was planted one year later.
- [16] She denies the bamboo hits the applicant's home.
- [17] Photographs of the bamboo are annexed to the statement.
- [18] The statement was admitted into evidence and marked as exhibit R2.
- [19] The respondent also filed a statement by her partner, Mr Jurgen Voigtlander. He was not available for cross-examination at the hearing of the proceeding.
- [20] In the circumstances, the statement was not admitted into evidence.

Applicant's statement of evidence in response

- [21] The applicant, on 15 March 2023, filed a statement of evidence in response to the respondent's statement. She asserts the respondent planted the bamboo after she moved into her home.
- [22] A rope tied around the bamboo and onto a pool gate, she further asserts, “... *did nothing to stop this bamboo from hitting/slamming into my glass window ...*” The bamboo, the applicant adds, was pruned by the respondent in December 2022.
- [23] Annexed to the statement is a landscape plan and letter from Forgan Smith Architects dated 8 February 2013 and further photographs of the bamboo, several of which show the bamboo hitting the applicant's home.
- [24] The statement was admitted into evidence and marked as exhibit A3.

Legislation

- [25] Trees are provided for in chapter 3 of the ND Act. A tree-keeper is responsible for the proper care and maintenance of the tree-keeper's tree. The chapter applies to trees on land recorded in the freehold land register.
- [26] **Tree** is widely defined. It means:
- (a) any woody perennial plant; or
 - (b) any plant resembling a tree in form and size; or
 - (c) a vine; or
 - (d) a plant prescribed under a regulation to be a tree for chapter 3 of the ND Act.¹
- [27] Bamboo is offered as an example of a plant resembling a tree in form and size.
- [28] Land is **affected by a tree** at a particular time if branches from the tree overhang the land **and** the tree has caused, is causing, or is likely within the next 12 months to cause:
- (a) serious injury to a person on the land; **or**
 - (b) serious damage to the land or any property on the land; **or**
 - (c) substantial, ongoing, and unreasonable interference with the neighbour's use and enjoyment of the land,
- and** the land adjoins the land on which the tree is situated.²
- [29] **Tree-keeper** is defined in section 48 of the Act. A person is a tree-keeper for a tree if the land on which the tree is situated is a lot recorded in the freehold land register under the *Land Title Act 1994* (Qld) and the person is the registered owner of the lot under the Act.
- [30] A registered owner of a lot recorded in the freehold land register and an occupier of the land is a neighbour in relation to a particulate tree or the tree-keeper for a particulate tree if land affected by the tree is a lot recorded in the freehold land register.³
- [31] The responsibilities of a tree-keeper are provided for in section 52 of the Act. The tree-keeper is responsible for:
- (a) cutting and removing any branches of the tree that overhang the neighbour's land⁴;
 - (b) ensuring that the tree does not cause:
 - (i) serious injury to a person; or
 - (ii) serious damage to a person's land or any property on a person's land; or

¹ ND Act, s 45(1).

² Ibid, s 46.

³ Ibid, s 49.

⁴ Ibid, s 52(1).

- (iii) substantial, ongoing, and unreasonable interference with a person's use and enjoyment of the person's land⁵.

[32] Section 61 of the ND Act gives the Tribunal jurisdiction to hear and decide any matter in relation to a tree in which it is alleged that, at the date of the application to the Tribunal, land is affected by the tree.

[33] The Tribunal must be satisfied of several matters before making an order under section 66 of the Act. Those matters are:

- (a) the neighbour has made a reasonable effort to reach agreement with the tree-keeper;
- (b) the neighbour has taken all reasonable steps to resolve the issue under any relevant local law, local government scheme or local government administrative process;
- (c) to the extent the issue relates to the land being affected because branches from the tree overhang the land:
 - (i) the branches extend to a point over the neighbour's land that is at least 50cm from the common boundary; and
 - (ii) the neighbour cannot properly resolve the issue using the process under part 4;
- (d) the neighbour has given the copies of the application under section 63, other than to the extent the requirement to do so has been waived.⁶

[34] Division 4 of part 4 of the Act states the matters for the Tribunal's consideration in deciding an application for an order under section 66. Those matters include safety⁷ and removal or destruction of a living tree is to be avoided.⁸ The general matters, spelt out in section 73, include, inter alia:

- (a) the location of the tree in relation to the boundary of the land on which the tree is situated and any premises, fence or other structure affected by the location of the tree;
- (b) ...
- (c) whether the tree has any historical, cultural, social, or scientific value;
- (d) any contribution the tree makes to the local ecosystem and to biodiversity;
- (e) any contribution the tree makes to the natural landscape and the scenic value of the land or locality;
- (f) any contribution the tree makes to public amenity;
- (g) 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;
- (h) and (i) ...

⁵ Ibid, s 52(2).

⁶ Ibid, s 65.

⁷ Ibid, s 71.

⁸ Ibid, s 72.

- (j) the likely impact on the tree of pruning it, including the impact on the tree of maintaining it at a particular height, width, or shape;
- (k) the type of tree, including whether the species of tree is a pest or weed (however described) or falls under a similar category under an act or a local law.

[35] The Tribunal may make the orders it considers appropriate in relation to a tree affecting the neighbour's land:

- (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.⁹

Interlocutory application

[36] The applicant, on 18 June 2024, made application to the Tribunal for an order admitting evidence not available at the time of the original application. At the hearing, both the parties were afforded an opportunity to tender further evidence.

[37] The application will be dismissed.

Oral evidence

Applicant

[38] The applicant stated in evidence the respondent's home was built prior to the applicant's home. The planting of the bamboo was not approved by the body corporate. They are unable to use their driveway because of the height of the bamboo. It hits their home, even in a slight wind.

[39] The bamboo hitting their home is depicted in the photographs tendered in evidence¹⁰ reproduced below:



⁹ Ibid, s 66(2).

¹⁰ Exhibit A1.

- [40] The bamboo hitting their home, the applicant stated, has caused cracking, depicted in the photographs tendered in evidence. One of the photographs, reproduced below, shows the cracking referred to by the applicant, marked with a red arrow.



Mr Richardson

- [41] Mr Richardson stated in evidence the bamboo hits the applicant's home. It has been pruned to reduce its volume.

Respondent

- [42] The respondent stated in evidence she has trimmed the bamboo. It is located four metres from the applicant's home. The body corporate has been given the plans for her home. The bamboo, she added, does not go near the applicant's home.

- [43] The applicant uses the driveway "*all the time*".

Closing

- [44] The bamboo, the applicant asserted in closing, was planted after she built her home. It has grown to six or seven metres in height. The order sought from the Tribunal is for removal of the bamboo, alternatively it be pruned and maintained.

- [45] The culms overhanging the applicants land should be pruned.

- [46] Any work ordered by the Tribunal should be at the respondent's cost.

- [47] The parties' homes are on the water. Whenever the wind blows, the upper culms of the bamboo hit the applicant's home.

- [48] In closing, the respondent asserted the upper culms of bamboo do not reach the applicant's balcony and cannot have caused any cracking.

Discussion

Issues

- [49] The issues to be decided by the Tribunal identified by the parties in both the written material filed in the Tribunal and in evidence and submissions may be summarised in the following terms:

- (a) does the bamboo on the respondent's land overhang the applicant's land;
- (b) is the bamboo causing serious damage to the applicant's land or any property on her land;
- (c) does the bamboo pose a risk of causing serious injury to a person on the applicant's land; and
- (d) is the bamboo causing substantial, ongoing, and unreasonable interference with the use and enjoyment of the applicant's land?

Does the bamboo on the respondent's land overhang the applicant's land?

- [50] The photographs tendered in evidence clearly show culms of bamboo overhanging the applicant's home. I accept they do so.

Is the bamboo causing serious damage to the applicant's land or any property on her land?

- [51] Cracking in the exterior walls of the applicant's home is visible in the photographs tendered in evidence. However, the extent and location of the cracking make it clear the cracking is not because of the bamboo hitting the home.
- [52] The photographs on page 4 of exhibit A1 shows cracking on the front of the applicant's home, to the right and below the balcony. The photograph on page 5 shows cracking to the left of the balcony. There is no evidence of the bamboo hitting the home in those areas, let alone with sufficient force to cause cracking.
- [53] I do not accept the bamboo caused the cracking.

Does the bamboo pose a risk of causing serious injury to a person on the applicant's land?

- [54] I accept culms of the bamboo fell on the applicant's driveway and garden in high wind on one occasion. However, the evidence falls short of establishing the bamboo poses a risk of causing serious injury to a person on the applicant's land. I do not accept it does so.

Is the bamboo causing substantial, ongoing, and unreasonable interference with the use and enjoyment of the applicant's land?

- [55] The parties' homes are located on the water. I accept the evidence of the applicant and Mr Richardson the wind frequently blows off the water causing the upper culms of the bamboo to hit the applicant's home. It does so in the vicinity of the applicant's bedroom.
- [56] I also accept the applicant's evidence the noise caused by the culms hitting her home disturbs her sleep. Consequently, I find, the culms hitting the applicant's home are causing substantial, ongoing, and unreasonable interference with her use and enjoyment of her land.

Appropriate orders

- [57] The Tribunal is required to consider the matters in sections 72, 73, and 75 of the ND Act in deciding what orders are appropriate.
- [58] The bamboo, the respondent states, was planted to provide privacy. It does not, either to her land or home. Even if I am wrong, the privacy will not be lost by removing any

culms overhanging the applicant's land and reducing the height of the bamboo to three metres. The reduction in height will avoid culms hitting the applicant's home and eliminate the risk of damage to the home.

- [59] The bamboo has been pruned in the past without affecting it. Further pruning, and reducing it in height, is unlikely to have any effect on the health of the bamboo. To the extent it provides privacy, it will continue to do so.
- [60] Taking into consideration the whole of the evidence and weighing the matters in sections 72, 73, and 75 of the ND Act, I am persuaded orders for reducing the bamboo in height and, thereafter, maintaining it at that height, and the cutting and removal culms overhanging the applicants' land, achieves an appropriate balance between the relevant interests of the parties.

Decision

- [61] The Tribunal orders as follows:
1. The application by the applicant filed 18 June 2024 for an order admitting further evidence is dismissed.
 2. The respondent reduce the height of the bamboo at the front of the respondent's land on or near the common boundary between the applicant's land and the respondent's land to 3 metres.
 3. The respondent cut and remove any culms of the bamboo overhanging the applicant's land.
 4. The work required by orders 2 and 3 be carried out:
 - (a) initially within 60 days of this order and thereafter not less than annually;
 - (b) by an Australian Qualified Framework level 4 arborist with relevant insurance cover; and
 - (c) at the respondent's cost.
 5. The applicant provide the Australian Qualified Framework level 4 arborist engaged to carry out the work required by orders 2 and 3 with access to the applicant's land to carry out the work on not less than ten days' notice by email from the respondent to the applicant.