QCAT

Queensland Civil and Administrative Tribunal

CITATION:	Mahoney v Corrin [2013] QCAT 318
PARTIES:	Helen Mahoney Peter Mahoney (Applicants) v Jennifer Corrin (Respondent)
APPLICATION NUMBER:	NDR036-12
MATTER TYPE:	Referral of question of law under s 117, *Queensland Civil and Administrative Tribunal Act* 2009 (Qld)
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	**Justice Alan Wilson, President**
DELIVERED ON:	9 July 2013
DELIVERED AT:	Brisbane
ORDERS MADE:	**Answer the question referred under s 117(1) of the *Queensland Civil and Administrative Tribunal Act* 2009 – namely, whether the Tribunal has jurisdiction to hear and decide an application in relation to a view that existed prior to 1 November 2011 (i.e. the commencement of the *Neighbourhood Disputes (Dividing Fences and Trees) Act* 2011) but did not exist after the commencement date – in the affirmative.**
CATCHWORDS:	STATUTES – ACTS OF PARLIAMENT – OPERATION AND EFFECT OF STATUTES – RETROSPECTIVE OPERATION – INTERPRETATION – where applicants purchased property with view of the city prior to the commencement of the *Neighbourhood Disputes (Dividing Fences and Trees) Act* 2011 – where trees in respondent's property allegedly now interfere with the applicant's view – where s 66 of the Act provides that QCAT may make orders to remedy, restrain or prevent substantial, ongoing and unreasonable

interferences with the use and enjoyment of land – where interference includes obstruction of a view – where common law presumption that legislation does not operate retrospectively – whether s 66 of the Act may apply to a view that existed before the commencement of the Act

Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld), s 46(a)(ii)(C), s 48, s 61, s 66(2)(b)(ii), s 66(3), s 72, s 73, s 75.
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 117.

Bell v Police [2012] SASC 188, cited
Coleman v Shell Co of Australia Ltd (1943) 45 SR (NSW) 27, cited.
La Macchia v Minister for Primary Industries (1986) 72 ALR 23, followed.
Maxwell v Murphy (1957) 96 CLR 261, applied
Re a Solicitor's Clerk [1957] 3 All ER 617, followed.
Robertson v City of Nunawading [1973] VR 819, applied.

APPEARANCES and REPRESENTATION (if any):

This matter was heard and determined on the papers pursuant to section 32 of the *Queensland Civil and Administrative Tribunal Act* 2009.

REASONS FOR DECISION

[1] The *Neighbourhood Disputes Resolution Act* 2011 ('NDA') commenced on 1 November 2011.[1] It introduced rules designed to help neighbours find better ways to resolve disputes about dividing fences, and trees. Since its commencement the Tribunal has received over 400 applications in its Neighbourhood Disputes jurisdiction.

[2] A question of law has arisen about the proper interpretation of the NDA in circumstances that are not unlikely to reoccur within the Tribunal. The question has been referred to the President of QCAT under s 117 of the *Queensland Civil and Administrative Tribunal Act* 2009 by the presiding Member of the Tribunal constituted to determine an application for a tree dispute.

[3] The learned Member was asked to hear and determine an application by Helen and Peter Mahoney concerning an alleged interference with a view

[1] The NDA was amended by the *Classification of Computer Games and Images and Other Legislation Amendment Act* 2013, renaming it the *Neighbourhood Disputes (Dividing Fences and Trees) Act* 2011.

of the city from their dwelling at 9 Soden Street, Greenslopes by trees in a neighbouring property, at 8 Rowsley Street.

[4] The Mahoneys purchased their property in the early 1980s. Mrs Mahoney contends they bought the block because of its view of the city.[2] Shortly after purchasing the land the Mahoneys built a house '*to take in the view from a number of rooms & verandahs*'[3]. When they took possession of the house, Mrs Mahoney contends, there were no trees in the neighbouring property at 8 Rowsley Street which interfered with their view of the city.[4]

[5] In 2001, Ms Corrin purchased 8 Rowsley Street. At that time the property had established landscape gardens which included a number of palm trees, said to form part of an '*urban forest*' in the backyard.[5] The garden in the backyard provides '*landscape amenity value and enjoyment with privacy and shade*' for Ms Corrin but now also, it is alleged, '*blocks out the entire central view of the city skyline from the dwelling at 9 Soden Street*'.[6]

[6] The NDA places responsibility on a '*tree-keeper*'[7] to ensure that their neighbour's land is not affected by a tree growing on the tree-keeper's land. Chapter 3 provides ways in which a person may deal with an issue about a tree affecting the person's land. In particular, Part 5 of that chapter specifies what orders the Tribunal may make to resolve issues about trees.

[7] Section 61 of the NDA provides that the Tribunal has jurisdiction to hear and decide any matter in relation to a tree in which it is alleged that, as at the date of the application, land is affected by the tree.

[8] Land is considered to be affected by a tree at a particular time if it caused or is causing (or is likely within the next 12 months to cause) substantial, ongoing and unreasonable interference with the neighbour's use and enjoyment of their land.[8] The Tribunal may make the orders it considers appropriate to remedy, restrain or prevent the interference.[9]

[9] For the purposes of the NDA, the term '*interference'* includes an obstruction of a view.

[10] It is not the purpose or intent of the NDA to provide an applicant with greater or better views than those which existed at the time of purchase. The Tribunal may only make orders if a tree rises at least 2.5 m above the

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2 Helen Mahoney, 'Statement of Evidence', Submission in *Mahoney v Corrin*, NDR036-12, 26 July 2012, [2].

3 Helen Mahoney, 'Application for a tree dispute – Neighbourhood Disputes Resolution Act 2011', NDR036-12, 23 February 2012, 9.

4 Helen Mahoney, above n 2, [6].

5 Anthony Cockram, 'Tree Assessment Report', Report for *Mahoney v Corrin*, NDR036-12, 22 May 2012, 2.

6 Ibid.

7 A 'tree-keeper' is limited to holders of the property interests specified in s 48 of the NDA and would include Ms Corrin.

8 NDA s 46(a)(ii)(C).

9 Ibid s 66(2)(b)(ii).

ground and the obstruction is a severe obstruction of a view[10] from a dwelling on the neighbour's land *that existed when the neighbour took possession of the land*[11] (emphasis added).

[11] When deciding an application for an order under s 66 of the NDA the Tribunal must consider the general matters listed in s 73, and the principle that the removal or destruction of living trees should be avoided, '*unless the issue… can not otherwise be satisfactorily resolved*.'[12] Alternatives to removal must, if appropriate, be considered: for instance, pruning.[13] Section 75 refers to some additional matters the Tribunal may consider if a neighbour alleges a tree has caused, or is causing, an unreasonable interference with the use and enjoyment of the neighbour's land.

[12] The question of law posed by the learned Member under s 117 of the QCAT Act is this: *Does the Tribunal have jurisdiction to hear and decide an application in relation to a view that existed prior to 1 November 2011 (i.e. the commencement of the Neighbourhood Disputes Act) but did not exist after the commencement date*?

[13] In short, the issue is whether s 66 of the NDA has any operation in respect of something which only existed – here, it is alleged, a view – before the Act became law.

[14] There is a common law presumption that, in the absence of some clear statement to the contrary, legislation will be assumed not to have retrospective operation. The presumption was summarised by Dixon CJ in *Maxwell v Murphy*[14]:

> The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to past events.[15]

[15] In *Maxwell v Murphy* the High Court heard an appeal involving a widow bringing proceedings under the *Compensation to Relatives Act* 1897-1946 (NSW) ('CRA') in respect of her husband, who had been killed in a motor vehicle accident on 19 March 1951. At the time of the accident, s 5 of the CRA provided that '*every such action shall be commenced within twelve months after the death of such deceased person'*. In 1953 the CRA was amended by omitting from s 5 '*twelve months*' and by inserting in lieu thereof the words '*six years*'. The widow's action was not commenced until 30 November 1954 (i.e. three and half years after her husband's death,

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10 The term '*severe obstruction*' is not defined in either the NDA or in the Explanatory Notes. However, in the second reading speech of the Neighbourhood Disputes Resolution Bill 2010 on 2 August 2011, the Minister observed at 2309: '*The severity threshold requires that the view must be nearly blocked out*'.

11 NDA s 66(3).

12 Ibid s 72.

13 Explanatory Notes, Neighbourhood Disputes Resolution Bill 2010 (Qld) 36.

14 (1957) 96 CLR 261.

15 Ibid 267.

but within the extended period of six years allowed by the amendment). The High Court held that the amendment did not operate to revive the widow's right to maintain an action, which ceased to exist after 19 March 1952.

[16] In the normal course a dispute is decided using the legislation which was current at the time of the events out of which the dispute arose. If the legislation used was passed before the relevant events, the legislation is called prospective. However, if the legislation used was passed subsequent to the relevant event, then that legislation is described as being retrospective.

[17] The potential mischief of retrospective legislation is clear from what is sometimes called up as the classic example of it: e.g. a person who, performing a lawful act one day, is then exposed to criminal sanctions attached to that act by some later change to the legislation.

[18] Recently, in *Bell v Police*[16] Kourakis CJ explained the objectionable nature of retrospective legislation:

> The injustice of retrospective legislation and its inconsistency with the general concept of the rule of law rests, fundamentally, in the denial of a person's capacity to make an informed choice about how to conduct his or her affairs in a way which will either fall within, or outside of, the scope of the legislation.[17]

[19] As observed in *Coleman v Shell Co of Australia Ltd*[18] by Jordan CJ: '*there has been some ambiguity in the use of the word "retrospective"*'.[19] It follows that some care is required as to what is meant by the term before concluding that the presumption has been engaged.

[20] First, a distinction can be made between legislation having a prior effect on past events and legislation basing future action on past events. These circumstances were contrasted by Jordan CJ in *Coleman* (emphasis added):

> [A]s regards any matter or transaction, if events have occurred prior to the passing of the Act which have brought into existence particular rights or liabilities in respect of that matter or transaction, it would be giving a retrospective operation to the Act to treat it as intended to alter those rights or liabilities, but *it would not be giving it a retrospective operation to treat it as governing the future operation of the matter or transaction as regards the creation of further particular rights or liabilities*.[20]

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16 [2012] SASC 188.
17 Ibid [30].
18 (1943) 45 SR (NSW) 27 at 30 ('*Coleman*').
19 Ibid 30.
20 Ibid 31.

[21] The same distinction was observed in a Victorian Full Court decision, *Robertson v City of Nunawading*[21] (emphasis added):

> [The] principle is not concerned with the case where the enactment under consideration merely *takes account of antecedent facts and circumstances as a basis for what it prescribes for the future, and it does no more*… [22]

[22] The ambiguity pointed out by Jordan CJ refers to confusion between legislation which alters rights and liabilities accrued by reason of antecedent facts and circumstances, and legislation which takes those antecedent circumstances as '*a basis for what it prescribes for the future*'.

[23] Pearce and Geddes, in their text on the interpretation of legislation, cite several cases which succinctly demonstrate the distinction.[23]

[24] In *Re a Solicitor's Clerk*[24] the disciplinary committee of the Law Society directed that no solicitor should, in connection with their practice, take or retain the appellant into or in their employment without the permission of the Law Society. The direction was made under the *Solicitors' Act* 1941, as amended by the *Solicitors' (Amendment) Act* 1956. The appellant had been convicted of larceny in 1953. At the time of the conviction, the *Solicitors' Act* 1941 allowed the committee to restrict the continued employment of clerks who had been convicted of a criminal offence in respect of money or property belonging to the solicitor with whom the clerk was employed or any client of that solicitor. The amending Act allowed the committee to make a direction with respect to a clerk who had been convicted of larceny, embezzlement or fraudulent conversion of any property irrespective of whether it belonged to their employer or one of the employer's clients.

[25] The appellant contended that the committee was giving retrospective effect to the amending Act by applying it to a conviction which took place before the amending Act commenced. Lord Goddard CJ (with whom Barry and Havers JJ agreed) held the amending Act was not retrospective:

> It enables an order to be made disqualifying a person from acting as a solicitor's clerk in the future and what happened in the past is the cause or the reason for the making of the order, but the order has no retrospective effect. It would be retrospective if the Act provided that anything done before the Act came into force or before the order was made should be void or voidable, or if a penalty were inflicted for having acted in this or any other capacity before the Act came into force or before the order was made. This Act simply enables a disqualification to be imposed for the future which in no way affected anything done by the appellant in the past.[25]

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21 [1973] VR 819.

22 Ibid 824 per Winneke CJ, Starke and Gowans JJ.

23 Pearce and Geddes, *Statutory Interpretation in Australia* (LexisNexis, 6th ed, 2006) 309-310.

24 [1957] 3 All ER 617.

25 Ibid 619.

[26] A similar finding was made in *La Macchia v Minister for Primary Industries*[26]. In that case a fisherman's licence was cancelled on the basis of his conviction of an earlier offence. At the time of the offence, it had not been a ground for cancellation. The cancellation was held to be valid, as the amendment only operated in the future. Following the reasoning in *Re a Solicitor's Clerk,* Toohey J (with whom Bowen CJ agreed) held: '*The order does not have retrospective effect simply because it relies upon conduct that occurred before the power existed*'.[27] Similarly, French J (as his Honour then was) said:

> The fact that the power to cancel a licence under sub-s 9A(3A) is conditioned upon a class of past events, does not mean that the inclusion in that class, of events which predated the law, renders its operation retrospective.[28]

[27] Section 66 of the NDA is, in my view, of a similar kind and, on its face, Parliament intended that the Tribunal would have jurisdiction to make an order to prevent a severe obstruction of a view which existed when the applicant took possession of the land, even if that occurred before the commencement of the Act.

[28] In her submissions, Ms Corrin asserts:

> … in the absence of express words, [section] 66(3)(b)(ii) cannot be read as introducing a right to a view which will prevail over the established common law right to use and enjoyment [sic] of the tree-keeper's land.[29]

[29] The submission is, with respect, incorrect. It treats the provision as one which introduces a new right retrospectively when, as the distinction observed in the cases discussed above shows, it simply invests the Tribunal with jurisdiction based upon facts and circumstances which were in operation before the NDA began. Further, as observed in *Robertson v City of Nunawading*:

> There cannot, in any relevant sense, or perhaps in any sense, be a 'right' to exemption or immunity from legislative action. The taking of legislative action in a field where previously there was none cannot be treated as an impairment of a right for the purposes of the principle [against retrospectivity]. [30]

[30] There is another compelling reason to construe s 66 in this way, at least in the present context concerning views: the use of the phrase '*… a view… that existed when the neighbour took possession of the land*' is, in the absence of any words in that part of the NDA suggesting that it only applies to parties who took possession *after* the Act came into effect, a strong indication that Parliament intended to allow a remedy to persons whose views existed in the past, pre-NDA, but had then been lost.

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26 (1986) 72 ALR 23.
27 Ibid 26.
28 Ibid 33.
29 Jennifer Corrin, 'Written submissions of law', Submission in *Mahoney v Corrin*, NDR036-12, 25 February 2013, 2.
30 [1973] VR 819 at 825.

[31] It follows that the Tribunal does have jurisdiction to hear and decide an application in relation to a view that existed prior to 1 November 2011 (i.e. the commencement of the NDA) but did not exist after the commencement of that Act.

[32] That said, there are questions of fact and other matters in this case to be decided under the NDA, and the proceeding is returned to the Tribunal for that purpose.