

BETWEEN

ACB

APPLICANT

AND

ZYC

FIRST RESPONDENT

ZYB

SECOND RESPONDENT

Date of Order:

9 November 2010

Referee:

Referee C Smith

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that the Respondents pay the Applicant the sum of \$2,534.37 directly within 21 days of today's date. The counterclaim is dismissed due to failure of proof.

Facts

[1] The material facts are that the parties are neighbours. The Applicant, ACB, has brought a claim under the Fencing Act 1978 requesting that the boundary fence between her and the Respondents be replaced as the fence is 46 years old and rotten. The Respondents ZYC and ZYB believe the fence could be repaired and it is not necessary to replace it. They also raise concerns as to ownership of the fence and whether they are liable to contribute to replacing it.

Issues

[2] The issues are:

- (i) Is the fence a boundary fence under the Act?
- (ii) Is the existing fence adequate?
- (iii) Is the fence repairable?
- (iv) Are the Respondents liable to contribute to a replacement fence?

Law

[3] The law that applies is the Fencing Act 1978; s 9 in relation to adjoining occupiers to share costs of fencing, s 22 in relation to where the fence is to be built and s 24(a) in relation to whether an existing fence is an adequate fence.

Decision

[4] On the evidence presented it would appear that the 'fence' at the heart of this dispute adjoins both parties' property. I accept that when the fence was erected some 46 years ago, ZYC and ZYB were not the occupiers of their property and that the costs of the fence were met by the Applicant. However, under the Act the occupiers of adjoining land not divided by an adequate fence are liable to contribute in equal proportions to work on a fence.

[5] The issue of an 'adequate' fence has been raised by ZYC and ZYB. They believe the fence requires some repair work but other than that it is an adequate fence. I accept that over the years the Respondents have trimmed the vegetation and repaired fence panels that had come loose. However, it is evident in the reports obtained by ACB that due to the age of the fence and the amount of rot and deterioration of the wood, repairs would not be able to restore the fence to an adequate level. Under the Act, an adequate fence 'means that the fence as to its nature, condition and state of repair is reasonably satisfactory for the purpose it serves or is intended to serve'. Unfortunately this does not appear to be the case in these circumstances.

[6] I acknowledge and accept that ZYC is no longer in a position to be able to maintain and repair the fence due to his health. He agreed at the hearing that the fence was a disgrace and that it was an embarrassment when friends visited. Therefore, taking all of these issues into account I have determined that the fence is not repairable and the Respondents, although given the opportunity, have not provided any evidence to the contrary.

[7] It is clear from ZYC and ZYB's submissions that financial constraints are an important factor in this dispute arising between them and their neighbour ACB. However, s 9 of the Act states that adjoining occupiers are to share the costs of the fence.

[8] The middle of the fence shall be upon the boundary line, the posts shall be placed on the boundary line or as near to there as practicable. I accept that ZYC and ZYB believe that ACB has placed the fence on her property therefore the fence is not a boundary fence. However, I find in these circumstances that if the fence was placed in the 'middle' of the boundary it would require pulling up the Respondents' concrete driveway and this would not be acceptable. Therefore, the new fence is to be placed as near as practicably possible to the boundary.

[9] I accept that the quotes presented at the initial hearing are not calculated at the new GST rate and this has been taken into account, with the new total of the cheapest quote from EK Ltd being \$5,068.74. It is also accepted that a gate will be put into the fence and there is no extra charge for this apart from the locks for which ACB will be responsible. As the parties could not agree to allow the Applicant's daughter access through the gate from the Respondents' property, it will remain locked but will still be put in should ZYC and ZYB change their minds or new owners in the future consent to it.

[10] Therefore, taking all of the issues into consideration, the law that applies, and in weighing up the substantial merits and justice of the case, I find ZYC and ZYB are responsible for paying a half-share of the costs to replace the boundary fence. The sum of \$2,534.37 is an equal share of the cheapest quote.

[11] I have allowed this amount to be payable within 21 days of today's date. However, if the parties are able to come to another arrangement (taking into consideration some value in allowing ACB's daughter to have access through the Respondents' property when she comes to visit, and an agreement is reached on this) they are free to do so. If they do not, this order stands as an enforceable order of the Tribunal.

[12] As to the Respondents' counterclaim, I do not find the matter is frivolous or vexatious and the matter is dismissed due to failure of proof.